

**TEXAS COMMISSION ON JUDICIAL  
CONDUCT PRESENTS:**

*YOUR TWEETS ARE SHOWING: JUDICIAL USE OF SOCIAL MEDIA*

**State Bar of Texas  
Justice of the Peace Courts Section  
April 22, 2016**



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**TECHNOLOGY**



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## CHALLENGES

- **Common Technology Challenges:**
  - Privacy Issues
  - Ethical use of email/text messaging/internet
  - Use of Internet/Technology in Campaigns
  - Responding to Abuses by Jurors/Lawyers/Others



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## TEXAS CODE OF JUDICIAL CONDUCT

- Do the canons adequately address how modern technology has transformed the way we communicate and interact in/out of the courtroom?
  - *Ex parte* issues
  - Independent investigations
  - Impartiality
  - Relationships (“friends” & “fans”)
  - Disclosure
  - Public Comments
  - Order and Decorum



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## APPLICABLE ETHICS RULES

### Judges must not:

- engage in improper *ex parte* communication
- convey the impression that another is in a special position to influence the judge
- lend the prestige of office or use the judicial title to advance the interests of the judge or another person



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## APPLICABLE ETHICS RULES

### Judges must not:

- make public comment about a pending or impending proceeding or that might substantially interfere with a fair hearing
- Disclose non-public information obtained in judicial capacity
- engage in improper political activity or publicly endorse or oppose a candidate for judicial office



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### Extrajudicial activities must not:

- cast doubt on judge's ability to act impartially
- demean the judicial office
- interfere with proper performance of judicial duties

### Judges must:

- avoid appearance of impropriety and maintain public confidence in the integrity and impartiality of the judiciary



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## SOCIAL MEDIA



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**According to a 2014 CCPIO\* Poll:**

- 37% of courts have a social media policy for courtroom (compared to 29% in 2013)
- Courts' use of Facebook increased 5%; Twitter increased 3.5%; YouTube increased 3.2%
- More than 60% of courts use Twitter to release decisions and for emergency management
- More than 50% use Facebook to post jobs
- More than 50% use Twitter to gather and monitor news

▪ Conference of Court Public Information Officers



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- (personal use): 35% of respondents reported using Facebook more than once per day ("Fanatic"); 31% said they never use Facebook
- 100 judges responded to questions about use of social media in political campaigns; of the 63 who indicated they were aware of the use of social media in their campaigns, 34% used Facebook; 11% used Twitter; 8% used YouTube; 7% used blogs



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- More than 42% of court officials believe social media is necessary for courts to connect with public (compared to 34% in 2013); 26% find it not necessary (compared to 42% in 2013)
- 41% of respondents indicated privacy concerns regarding use of social media in professional lives (compared to 30% in 2013); nearly 75% of court personnel reported they do not use any social media in their professional lives
- 44.5% of judges agreed that judges can use Facebook without ethics concerns (a decrease of more than 5% from 2013)



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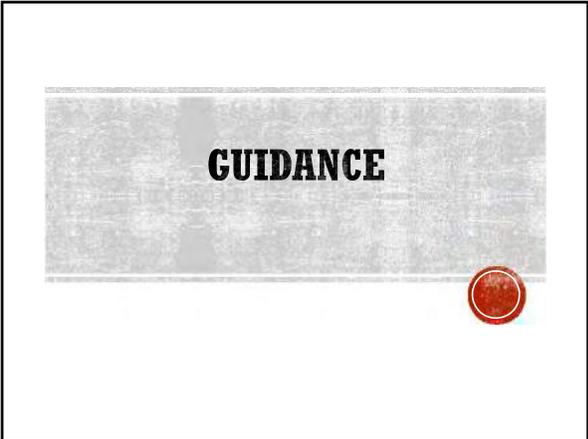
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**ABA OPINION NO. 462 (02/21/13)**

- Judges may use social networking sites, but must comply with relevant provisions of Code of Judicial Conduct and avoid conduct that would undermine independence, integrity, impartiality and/or create any appearance of impropriety.
- Depending on nature and extent of interaction with other contacts in legal profession with pending or impending matters before court, judges might be compelled to disclose such relationships.

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**ETHICS ADVISORY OPINIONS**

- *Arizona Advisory Opinion 2014-1*
- *California Judges' Association Advisory Opinion 66 (2010)*
- *Connecticut Informal Opinion 2013-6*
- *Florida Advisory Opinion 2009-20*
- *Florida Advisory Opinion 2010-6*
- *Florida Advisory Opinion 2010-28*
- *Florida Advisory Opinion 2012-12*

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**ETHICS ADVISORY OPINIONS**

- *Kentucky Advisory Opinion JE-119 (2010)*
- *Maryland Advisory Opinion Request 2012-7*
- *Massachusetts Advisory Opinion 2011-6*
- *Massachusetts Letter Opinion 2016-1*
- *Missouri Advisory Opinion 186 (2015)*
- *New Mexico Advisory Opinion (2016)*
- *New York Advisory Opinion 2008-176*
- *New York Advisory Opinion 2013-39*
- *New York Advisory Opinion 2014-5*



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**ETHICS ADVISORY OPINIONS**

- *New York Advisory Opinion 2013-126*
- *New York Advisory Opinion 2015-121*
- *North Carolina State Bar Formal Ethics Opinion 2014-8*
- *Ohio Advisory Opinion 2010-7*
- *Oklahoma Advisory Opinion 2011-3*
- *South Carolina Advisory Opinion 17-2009*
- *Tennessee Advisory Opinion 2012-1*
- *Utah Informal Advisory Opinion 2012-1*
- *U.S. Advisory Opinion 112 (2014)*



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**JUDICIAL  
DISQUALIFICATION  
INVOLVING SOCIAL MEDIA**



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***DOMVILLE V. STATE\****

Court held that a judge was disqualified from a criminal case because the judge was a Facebook friend of the prosecutor assigned to the case.

\*4th District Florida Court of Appeal (2013).



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***CHACE V. LOISEL\****

Court held that the *ex parte* “friend” request a judge sent on Facebook to the petitioner in a custody case would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.

\*5th District Florida Court of Appeal (2014)



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***STATE V. FORGUSON\****

Affirming trial court judgments in case where jury had convicted defendant of sale of 2 prescription drugs and trial judge’s consecutive 6-year sentences, Court held that trial judge could properly fulfill his role as 13th juror despite status as “Facebook friend” with state’s confidential informant who had been witness at trial.

\*Tennessee Court of Appeals (2014)



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***STATE V. FORGUSON (CONT.)***

Judge's Facebook friendship with witness, whom the judge "defriended" when the issue was raised and was one of 1,500 "friends," did not require disqualification.



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***STATE V. MADDEN\****

Affirming the trial court judgments in case where jury found defendant guilty of second degree murder and tampering with evidence and judge imposed 29-year sentence, the Court held that judge's Facebook friendship with one of the witnesses did not require his disqualification

\*Tennessee Court of Criminal Appeals (2014)



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***STATE V. MADDEN (CONT.)***

Witness was university basketball coach who had over 4,900 "friends" (most of whom he had never met).

Judge did not think Facebook page was public, believed defense counsel had hacked his account, and thought "friending" lawyers on Facebook would help him understand that lawyers coming before him have lives outside of court.



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***YOUKERS V. STATE\****

Affirming revocation of defendant's community supervision and imposition of 8-year prison sentence, Court rejected argument that trial judge lacked impartiality or neutrality based on Facebook friendship and communications with father of defendant's girlfriend, in addition to other arguments

\*Dallas Court of Appeals (2013)



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***YOUKERS V. STATE (CONT.)***

Judge handled *ex parte* communication properly by:

- Informing the victim's father that his message violated *ex parte* rules
- Disclosed the communication to the attorneys in the case
- Put a copy of the message in the case file
- Asked the judicial conduct commission if further action was needed



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***COMMONWEALTH V. PARKER (PA COMMON PLEAS COURT, 2012)***

Judge was recused and decision to suppress officers' testimony overruled in drunk driving case against State Representative after AG learned judge and defendant were Facebook friends.

Court ruled failure to recuse due to Facebook friendship was abuse of discretion.

Judge had over 1,500 FB friends; defendant had more than 4,500

Defendant's attorney said there was no other personal connection beyond FB



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***FRESNO RV, INC., ET AL V. PAUL EVERT'S RV COUNTRY, INC., ET AL (CA SUPERIOR COURT, FRESNO, 2014)***

Judge disqualified following trial due to failure to disclose Facebook "friendship" with prevailing party's attorney.

Judge had disclosed actual, "real-life" friendship with the attorney during trial and parties did not object to him presiding over case.

Judge stated the Facebook friendship, one of only 36 he had on the site, was never "on the radar" because he so rarely used the site.

However, Judge had posted a comment complimenting a photo of the attorney's family during the pendency of the case



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***STATE V. WIESECKEL (GALVESTON COUNTY, TX, 2014)***

Judge recused after posting on Facebook about high-profile criminal case during trial in her court.

Judge instructed jurors not to posts on social media about the case until she gave them permission.

Judge's own posts appeared on Facebook the next day



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**PUBLIC DISCIPLINE**



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- Florida Supreme Court suspended judge for 30 days without pay for using social media to seek assistance of friends to help her husband, at the time a judicial candidate, correct perceived misstatements of his opponent (2015).
- Texas State Commission on Judicial Conduct publicly admonished a judge for posting comments about pending cases on her Facebook page (2015)(case dismissed on appeal)
- New Mexico Supreme Court ordered permanent retirement of judge who admitted endorsing candidates for public office on Facebook, and continued to endorse candidates on Facebook and post their campaign materials on Facebook after telling the Judicial Standards Commission he would no longer do so (2015).




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- Indiana Supreme Court permanently banned a former judge from serving in any judicial capacity for posting an injudicious comment on Facebook page of biological father of her twin children, in addition to other injudicious behavior outside courtroom, misusing her judicial authority, failing to record guilty plea and sentencing hearings, and failing to cooperate with the Judicial Qualifications Commission (2015).
- Arkansas Supreme Court removed judge from office (1) for, on a public on-line fan-site, posting comments regarding closed adoption of famous actress; making inappropriate statements about official duties, pending cases, and independent investigations; and making inappropriate gender, race, and sexually related statements; (2) spoliation of evidence; and (3) involvement in a hot check case in which he was the victim (2014).




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- Based on judge's resignation and agreement to be disqualified from future judicial service, Texas State Commission on Judicial Conduct agreed not to pursue disciplinary proceedings against a former judge based on a complaint alleging judge had engaged in inappropriate conduct with regard to messages sent to teenagers through his Facebook account (2013).
- Alabama Court of Judiciary publicly reprimanded and censured judge for making public comments about pending contempt proceedings against lawyer on Facebook and in e-mail to all state court judges (2013).
- Georgia Judicial Qualifications Commission suspended judge for 60 days without pay and reprimanded him for, in addition to other misconduct, engaging in private Facebook chat with woman who contacted him on behalf of her brother about a DUI matter, advising her how her brother should get matter to his court where he could handle it, and failing to recuse from case (2013).




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- Kentucky Judicial Conduct Commission publicly reprimanded judicial candidate for “liking” a Facebook posting that publicly endorsed a candidate for public office and made a contribution to a political candidate (2014).
- West Virginia Judicial Investigation Commission admonished former magistrate for exchanging sexually explicit Facebook messages with woman who appeared before him in court (2014).
- North Carolina Judicial Standards Commission publicly reprimanded judge for engaging in *ex parte* communications on Facebook with counsel for a party in matter being tried before him and being influenced by information he independently gathered by viewing a party’s web-site (2009).



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- Minnesota Board on Judicial Standards publicly reprimanded a senior judge for comments he publicly posted on his Facebook page about cases to which he was assigned as a senior judge (2015).
- Missouri Supreme Court publicly reprimanded a judge for, in addition to other misconduct, Facebook posts that abused the prestige of office and constituted personal participation in fund-raising activities and a Facebook post that was unfairly critical of the integrity of other judges in the circuit (2015).
- Texas Commission on Judicial Conduct publicly warned a judge for, in addition to other misconduct, a Facebook post that directed an offensive term to her political opponent (2015).



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**PRIVATE DISCIPLINE**



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- California Commission on Judicial Performance issued a private advisory to a judge for social media activities that created an appearance of impropriety and an appearance of partiality (2014).
- Kansas Commission on Judicial Qualifications privately ordered a judge who “liked” a comment on a candidate’s Facebook page to cease and desist from publicly endorsing a candidate for any office (2012).
- Kentucky Judicial Conduct Commission privately reprimanded a judge for “liking” the Facebook pages of lawyers and a judicial candidate and posting offensive comments about a lawyer on Facebook (2015).
- New Mexico Judicial Standards Commission privately cautioned a judge who, on a social media site, allegedly made public and ex parte comments about a case over which the judge was presiding, including comments about the jury’s verdict (2013).



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- Texas State Commission on Judicial Conduct privately reprimanded a judge for soliciting public participation in a non-profit’s fund-raising operations through Facebook postings and the corporation’s website and related conduct (2013).
- Texas State Commission on Judicial Conduct privately warned a judge for active involvement in a charitable fund-raiser that was apparent to the public from numerous entries on a Facebook page, in addition to related conduct (2012).
- Texas State Commission on Judicial Conduct privately warned a judge for exceeding his authority, failing to follow the law, and exhibiting poor demeanor when he issued a writ of attachment to summon a public defender to his chambers, threatened the attorney with contempt, and verbally rebuked the attorney for posting a comment on his Facebook page boasting about the outcome of a court proceeding (2014).



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## **CRIMINAL SANCTIONS**



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## **GALVESTON COUNTY COURT AT LAW JUDGE CHRISTOPHER DUPUY**

- Judge was sentenced to 45 days in jail for using his Facebook page to make personal attacks against the prosecutor in his criminal case
- Judge was ordered by trial court to cease using the Internet, or any social or electronic media, to communicate about his case
- Now former judge recently arrested for online harassment of former girlfriends



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## **BEST PRACTICES**



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## **Strategies for the Savvy Judge**

- Appreciate and utilize the benefits of technology; be an educated consumer
- Read and follow the Canons
- Be aware of inadvertent misdirection of emails; email programs “help” by suggesting the email address you’d like to send it to.
- Recognize that you have no control over subsequent forwarding (**and editing!**) of your message
- Use a confidentiality/privacy disclaimer, but don’t expect it to give your message “magical” protections.



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## Strategies for the Savvy Judge

- A warning for judges and courts with “official” Facebook pages:
  - be aware of “public forum doctrine” problems that arise when controlling, censoring, deleting posts from citizens based on view points you may not agree with or because the posts are critical, irritating, or lack civility.
  - Citizens have 1<sup>st</sup> amendment rights to post their view points on “public forums,” “designated public forums,” and to some extent on “limited public forums.”
  - Consider posting social media policy that places burden on poster to show that speech didn’t violate terms of use (contract) for Facebook (or other social media site); set privacy settings to prevent others from posting (government speech vs. public forum doctrine)



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## SET PRIVACY SETTINGS SO THAT OTHERS CAN'T POST PICS OR “TAG” YOU ON FACEBOOK



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- Even with privacy settings, pictures and comments posted online that you thought were private could become public & go viral in a nasty way...



- Pictures and comments posted on the internet by you or others may come back years later to haunt you
- Make sure your online profile reflects the professional image you wish to project to the public, the legal community, and the judiciary



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- Don't let social networking take over your life or control you
- **REMEMBER:** if you don't want to see your email, text, tweet, picture, video, or comments on the front page of the morning newspaper, DON'T HIT "SEND" (or "Post")



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## HELPFUL INFORMATION



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## ETHICS ADVICE

- **State Commission on Judicial Conduct**
  - Seana Willing, Executive Director
  - Toll Free: (877) 228-5750
  - Fax: (512) 463-0511
  - [seana.willing@scjc.texas.gov](mailto:seana.willing@scjc.texas.gov)
- **Committee on Judicial Ethics (State Bar of Texas)**
  - Honorable Evelyn Keyes, Chair
  - [judicialEthics@hotmail.com](mailto:judicialEthics@hotmail.com)



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**MORE HELPFUL INFORMATION**

- Website: [www.scjc.texas.gov](http://www.scjc.texas.gov)
- Annual Reports available on-line
- Public sanctions, private sanction summaries, Review Tribunal Opinions available on-line



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# TEXAS CODE OF JUDICIAL CONDUCT

## Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

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### **CANON 1**

#### **Upholding the Integrity and Independence of the Judiciary**

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An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

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### **CANON 2**

#### **Avoiding Impropriety and the Appearance of Impropriety In All of the Judge's Activities**

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A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

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**CANON 3**  
**Performing the Duties of**  
**Judicial Office Impartially and**  
**Diligently**

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**A. Judicial Duties in General.** The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

**B. Adjudicative Responsibilities.**

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

(2) A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad

litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

- (a) communications concerning uncontested administrative or uncontested procedural matters;
  - (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;
  - (c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;
  - (d) consulting with other judges or with court personnel;
  - (e) considering an *ex parte* communication expressly authorized by law.
- (9) A judge should dispose of all judicial matters promptly, efficiently and fairly.
- (10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.
- (11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

### **C. Administrative Responsibilities.**

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

#### **D. Disciplinary Responsibilities.**

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

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**CANON 4**  
**Conducting the Judge's Extra-**  
**Judicial Activities to Minimize**  
**the Risk of Conflict with**  
**Judicial Obligations**

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**A. Extra-Judicial Activities in General.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or

(2) interfere with the proper performance of judicial duties.

**B. Activities to Improve the Law.** A judge may:

- (1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,
- (2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

**C. Civic or Charitable Activities.** A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

- (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.
- (2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.
- (3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

**D. Financial Activities.**

- (1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.
- (2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business. A judge shall not be an officer, director or manager of a publicly owned business. For purposes of this Canon, a "publicly owned business" is a business having more than ten owners who are not related to the judge by consanguinity or affinity within the third degree of relationship.

(3) A judge should manage any investments and other economic interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other economic interests that might require frequent disqualification. A judge shall be informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to be informed about the personal economic interests of any family member residing in the judge's household.

(4) Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to the judge; books and other resource materials supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a gift from a friend for a special occasion such as a wedding, engagement, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or person whose interests have come or are likely to come before the judge;

(d) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

#### **E. Fiduciary Activities.**

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

**F. Service as Arbitrator or Mediator.** An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties.

**G. Practice of Law.** A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

**H. Extra-Judicial Appointments.** Except as otherwise provided by constitution and statute, a judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

**I. Compensation, Reimbursement and Reporting.**

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's family. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall file financial and other reports as required by law.

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**CANON 5**  
**Refraining From Inappropriate**  
**Political Activity**

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(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

(iii) make a statement that would violate Canon 3B(10).

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(3) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(4) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code §253.151, *et seq.* (the “Act”), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

#### ***COMMENT***

*A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.*

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### **CANON 6**

#### **Compliance with the Code of Judicial Conduct**

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#### **A. The following persons shall comply with all provisions of this Code:**

(1) An active, full-time justice or judge of one of the following courts:

(a) the Supreme Court,

(b) the Court of Criminal Appeals,

(c) courts of appeals,

(d) district courts,

(e) criminal district courts, and

(f) statutory county courts.

(2) A full-time commissioner, master, magistrate, or referee of a court listed in (1) above.

**B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:**

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D(2), 4D(3), or 4H;

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(4) with Canon 5(3).

**C. Justices of the Peace and Municipal Court Judges.**

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to *ex parte* communications; in lieu thereof a justice of the peace or municipal court judge shall comply with 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canons 5(3).

(2) A justice of the peace or a municipal court judge, except as authorized by law, shall not directly or indirectly initiate, permit, nor consider *ex parte* or other communications concerning the merits of a pending judicial proceeding. This subsection does not prohibit communications concerning:

(a) uncontested administrative matters,

(b) uncontested procedural matters,

(c) magistrate duties and functions,

- (d) determining where jurisdiction of an impending claim or dispute may lie,
- (e) determining whether a claim or dispute might more appropriately be resolved in some other judicial or non-judicial forum,
- (f) mitigating circumstances following a plea of nolo contendere or guilty for a fine-only offense, or
- (g) any other matters where *ex parte* communications are contemplated or authorized by law.

**D. A Part-time commissioner, master, magistrate, or referee of a court listed in 6A(1) above:**

- (1) shall comply with all provisions of this Code, except he or she is not required to comply with Canons 4D(2), 4E, 4F, 4G or 4H, and
- (2) should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves, or act as a lawyer in a proceeding in which he or she has served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto.

**E. A Judge Pro Tempore, while acting as such:**

- (1) shall comply with all provisions of this Code applicable to the court on which he or she is serving, except he or she is not required to comply with Canons 4D(2), 4D(3), 4E, 4F,4G or 4H, and
- (2) after serving as a judge pro tempore, should not act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto.

**F. A Senior Judge, or a former appellate or district judge, or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer:**

- (1) shall comply with all the provisions of this Code except he or she is not required to comply with Canon 4D(2),4E, 4F,4G, or 4H, but
- (2) should refrain from judicial service during the period of an extra-judicial appointment not permitted by Canon 4H.

**G. Candidates for Judicial Office.**

- (1) Any person seeking elective judicial office listed in Canon 6A(1) shall be subject to the same standards of Canon 5 that are required of members of the judiciary.

(2) Any judge who violates this Code shall be subject to sanctions by the State Commission on Judicial Conduct.

(3) Any lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas.

(4) The conduct of any other candidate for elective judicial office, not subject to paragraphs (2) and (3) of this section, who violates Canon 5 or other relevant provisions of the Code is subject to review by the Secretary of State, the Attorney General, or the local District Attorney for appropriate action.

#### **H. Attorneys.**

Any lawyer who contributes to the violation of Canons 3B(7), 3B(10), 4D(4), 5, or 6C(2), or other relevant provisions of this Code, is subject to disciplinary action by the State Bar of Texas.

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### **CANON 7**

#### **Effective Date of Compliance**

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A person to whom this Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

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### **CANON 8**

#### **Construction and Terminology of the Code**

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#### **A. Construction.**

The Code of Judicial Conduct is intended to establish basic standards for ethical conduct of judges. It consists of specific rules set forth in Sections under broad captions called Canons.

The Sections are rules of reason, which should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the State Commission on Judicial Conduct. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

## **B. Terminology.**

(1) "Shall" or "shall not" denotes binding obligations the violation of which can result in disciplinary action.

(2) "Should" or "should not" relates to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

(3) "May" denotes permissible discretion or, depending on the context, refers to action that is not covered by specific proscriptions.

(4) "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

(5) "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant, in an educational, religious, charitable, fraternal, or civic organization or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(6) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

(7) "Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(8) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(9) "Member of the judge's (or the candidate's) family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(10) "Family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides at the judge's household.

(11) "Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(12) "Third degree of relationship."The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

(13) "Retired Judge" means a person who receives from the Texas Judicial Retirement System, Plan One or Plan Two, an annuity based on service that was credited to the system.(Secs. 831.001 and 836.001,V.T.C.A. Government Code [Ch. 179, Sec. 1, 71st Legislature (1989)])

(14) "Senior Judge" means a retired appellate or district judge who has consented to be subject to assignment pursuant to Section 75.001, Government Code. [Ch. 359, 69th Legislature, Reg. Session (1985)]

(15) "Statutory County Court Judge" means the judge of a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, statutory probate courts, county criminal courts, county criminal courts of appeals, and county civil courts at law. (Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 1601(18), 71st Legislature (1989)])

(16) "County Judge" means the judge of the county court created in each county by Article V, Section 15, of the Texas Constitution.(Sec. 21.009, V.T.C.A. Government Code [Ch. 2, Sec. 1601(18), 71st Legislature (1989)])

(17) "Part-time" means service on a continuing or periodic basis, but with permission by law to devote time to some other profession or occupation and for which the compensation for that reason is less than that for full-time service.

(18) "Judge Pro Tempore" means a person who is appointed to act temporarily as a judge.

# AMERICAN BAR ASSOCIATION

## Formal Opinion 462 Judge's Use of Electronic Social Networking Media

February 21, 2013

*A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.*<sup>1</sup>

In this opinion, the Committee discusses a judge's participation in electronic social networking. The Committee will use the term "electronic social media" ("ESM") to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons.<sup>2</sup>

### Judges and Electronic Social Media

In recent years, new and relatively easy-to-use technology and software have been introduced that allow users to share information about themselves and to post information on others' social networking sites. Such technology, which has become an everyday part of worldwide culture, is frequently updated, and different forms undoubtedly will emerge.

Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch. This opinion examines to what extent a judge's participation in ESM raises concerns under the Model Code of Judicial Conduct.

Upon assuming the bench, judges accept a duty to "respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."<sup>3</sup> Although judges are full-fledged members of their communities, nevertheless, they "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens...."<sup>4</sup> All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner "that promotes public confidence in the independence, integrity, and impartiality of the judiciary," and must "avoid impropriety and the appearance of impropriety."<sup>5</sup> This requires that the judge be sensitive to the appearance of relationships with others.

The Model Code requires judges to "maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives."<sup>6</sup> Thus judges must be very thoughtful in their interactions with others, particularly when using ESM. Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to

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<sup>1</sup> This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2012. The laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> This opinion does not address other activities such as blogging, participation on discussion boards or listserves, and interactive gaming.

<sup>3</sup> Model Code, Preamble [1].

<sup>4</sup> Model Code Rule 1.2 cmt. 2.

<sup>5</sup> 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](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html).

<sup>6</sup> Model Code, Preamble [2].

compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.<sup>7</sup>

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.<sup>8</sup>

A judge who participates in ESM should be mindful of relevant provisions of the Model Code. For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed. The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.

There also may be disclosure or disqualification concerns regarding judges participating on ESM sites used by lawyers and others who may appear before the judge.<sup>9</sup> These concerns have been addressed in judicial ethics advisory opinions in a number of states. The drafting committees have expressed a wide range of views as to whether a judge may “friend” lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.<sup>10</sup> A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.<sup>11</sup> In this regard, context is significant.<sup>12</sup> Simple

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<sup>7</sup> See Model Code Rule 1.2 cmt. 3. Cf. New York Jud. Eth. Adv. Op. 08-176 (2009) (judge who uses ESM should exercise appropriate degree of discretion in how to use the social network and should stay abreast of features and new developments that may impact judicial duties). Regarding new ESM website developments, it should be noted that if judges do not log onto their ESM sites on a somewhat regular basis, they are at risk of not knowing the latest update in privacy settings or terms of service that affect how their personal information is shared. They can eliminate this risk by deactivating their accounts.

<sup>8</sup> Jeffrey Rosen, “The Web Means the End of Forgetting”, N.Y. TIMES MAGAZINE (July 21, 2010) *accessible at* <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all>.

<sup>9</sup> See, e.g., 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).

<sup>10</sup> See discussion in Geyh, Alfani, Lubet and Shaman, JUDICIAL CONDUCT AND ETHICS (5<sup>th</sup> Edition, forthcoming), Section 10.05E.

<sup>11</sup> California Judges Assn. Judicial Ethics Comm. Op. 66 (need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent). See also New York Jud. Eth. Adv. Op. 08-176 (judge must consider whether any online connections, alone or in combination with other facts, rise to level of close social relationship requiring disclosure and/or recusal); Ohio Opinion 2010-7 (same).

<sup>12</sup> Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-06 (2010) (judge who is member of voluntary bar association not required to drop lawyers who are also members of that organization from organization’s ESM site; members use the site to communicate among themselves about organization and other non-legal matters). See also Raymond McKoski,

designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person.<sup>13</sup>

Because 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. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.<sup>14</sup> The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally.<sup>15</sup> A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification.<sup>16</sup> For example, a judge may decide to disclose that the judge and a party, a party's lawyer or a witness have an ESM connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge's ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.

### Judges' Use of Electronic Social Media in Election Campaigns

Canon 4 of the Model Code permits a judge or judicial candidate to, with certain enumerated exceptions, engage in political or campaign activity. Comment [1] to Rule 4.1 states that, although the Rule imposes "narrowly tailored restrictions" on judges' political activities, "to the greatest extent possible," judges and judicial candidates must "be free and appear to be free from political influence and political pressure."

Rule 4.1(A)(8) prohibits a judge from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4. The Code does not address or restrict a judge's or campaign committee's method of communication. In jurisdictions where judges are elected, ESM has become a campaign tool to raise campaign funds and to provide information about the candidate.<sup>17</sup> Websites and ESM promoting the candidacy of a judge or judicial candidate may be

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"Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from 'Big Judge Davis'," 99 KY. L.J. 259, 291 (2010-11) (nineteenth century judge universally recognized as impartial despite off-bench alliances, especially with Abraham Lincoln); Schwartz, *supra* note 9 ("Judges do not drop out of society when they become judges.... The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.") (quoting New York University Prof. Stephen Gillers).

<sup>13</sup> See Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (designation as an ESM follower does not, in and of itself, indicate the degree or intensity of judge's relationship with the person).

<sup>14</sup> See, e.g., New York Judicial Ethics Advisory Opinion 08-176, *supra* n. 8. See also Ashby Jones, "Why You Shouldn't Take It Hard If a Judge Rejects Your Friend Request," WALL ST. J. LAW BLOG (Dec. 9, 2009) ("'friending' may be more than say an exchange of business cards but it is well short of any true friendship"); Jennifer Ellis, "Should Judges Recuse Themselves Because of a Facebook Friendship?" (Nov. 2011) (state attorney general requested that judge reverse decision to suppress evidence and recuse himself because he and defendant were ESM, but not actual, friends), available at <http://www.jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/>.

<sup>15</sup> See Jeremy M. Miller, "Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)," 33 PEPPERDINE L. REV. 575, 578 (2012) ("Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge").

<sup>16</sup> Rule 2.11 cmt. 5.

<sup>17</sup> In a recent survey, for judges who stood for political election, 60.3% used social media sites. 2012 CCPIO New Media and Courts Survey: A Report of the New Media Committee of the Conference of Court Public Information Officers (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/>.

established and maintained by campaign committees to obtain public statements of support for the judge's campaign so long as these sites are not started or maintained by the judge or judicial candidate personally.<sup>18</sup>

Sitting judges and judicial candidates are expressly prohibited from “publicly endorsing or opposing a candidate for any public office.”<sup>19</sup> Some ESM sites allow users to indicate approval by applying “like” labels to shared messages, photos, and other content. Judges should be aware that clicking such buttons on others' political campaign ESM sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office.<sup>20</sup> On the other hand, it is unlikely to raise an ethics issue for a judge if someone “likes” or becomes a “fan” of the judge through the judge's ESM political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.

Judges may privately express their views on judicial or other candidates for political office, but must take appropriate steps to ensure that their views do not become public.<sup>21</sup> This may require managing privacy settings on ESM sites by restricting the circle of those having access to the judge's ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

## Conclusion

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.

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<sup>18</sup> Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-28 (July 23, 2010).

<sup>19</sup> Model Code Rule 4.1(A)(3).

<sup>20</sup> See “Kansas judge causes stir with Facebook ‘like,’” The Associated Press, July 29, 2012, *available at* [http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas\\_judge\\_causes\\_stir\\_with\\_facebook\\_like\\_.html](http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook_like_.html).

<sup>21</sup> 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.”).

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## AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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**CENTER FOR PROFESSIONAL RESPONSIBILITY:** Dennis A. Rendleman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

**Opinion issued September 30, 2015.**



**DOCKET NO. 15-0001**

**SPECIAL COURT OF REVIEW OF TEXAS**

**IN RE HONORABLE MICHELLE SLAUGHTER,  
PRESIDING JUDGE OF THE 405TH JUDICIAL DISTRICT COURT,  
GALVESTON COUNTY, TEXAS**

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**OPINION**

This Special Court of Review<sup>1</sup> is assigned to conduct a trial de novo of the State Commission on Judicial Conduct’s Public Admonition and Order of Additional Education issued against Respondent, the Honorable Michelle Slaughter, Judge of the 405th Judicial District Court in Galveston, Galveston County, Texas, selected “by lot” and appointed by the Chief Justice of the Texas Supreme Court. *See* Tex. Gov’t Code Ann. § 33.034 (West Supp. 2014) (providing the procedure for

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<sup>1</sup> The Special Court of Review panel consists of Justice Charles A. Kreger of the Ninth Court of Appeals in Beaumont, designated presiding justice; Justice Gina Benavides of the Thirteenth Court of Appeals in Corpus Christi and Edinburg; and Justice John Bailey of the Eleventh Court of Appeals in Eastland.

appealing the Commission's sanctions). We note at the outset that the function of the Commission "is not to punish; instead, its purpose is to maintain the honor and dignity of the judiciary and to uphold the administration of justice for the benefit of the citizens of Texas." *In re Lowery*, 999 S.W.2d 639, 648 (Tex. Rev. Trib. 1998, pet. denied).

Article V of the Texas Constitution states that any judge may be disciplined for:

willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his [or her] duties or casts public discredit upon the judiciary or administration of justice.

Tex. Const. art. V, § 1-a(6)(A). The Texas Constitution further provides that after receipt of a written complaint and an investigation, the Commission may, among other things, issue a private or public admonition, warning, reprimand, or requirement that the judge obtain additional training or education. Tex. Const. art. V, § 1-a(6)(A), (8). Upon receipt of notification of any type of sanction, the judge may request a special court of review be appointed by the chief justice of the supreme court to review the action of the Commission. Tex. Gov't Code Ann. § 33.034(b); Tex. Rules Rem'l/Ret. Judg. R. 9(a) (West 2015). The Commission then files a charging document with the allegations of judicial misconduct against the judge.

Tex. Gov't Code Ann. § 33.034(d). The special court of review holds a trial de novo and renders its decision by written opinion. *Id.* § 33.034(e), (h). As this review is governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of a civil action, the Commission has the burden to prove the charges against a respondent by a preponderance of the evidence. *See id.* § 33.034(f); *In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006); *In re Canales*, 113 S.W.3d 56, 66 (Tex. Rev. Trib. 2003, pet. denied); *In re Davis*, 82 S.W.3d 140,142 (Tex. Spec. Ct. Rev. 2002).

In its Charging Document, the Commission charged the Respondent with misconduct for posting certain comments on her Facebook page about an ongoing trial in her court, as well as other matters unrelated to the trial that had occurred in her courtroom. In Charge I, the Commission alleged that:

Judge Slaughter's decision to use her "Judge Michelle Slaughter" Facebook page as the medium through which to comment publicly and enthusiastically about pending criminal cases was inconsistent with the proper performance of her duties as a judge. By engaging in this conduct, Judge Slaughter used the trappings of judicial office to boost her message and, thereby, cast reasonable doubt upon her impartiality and gave rise to a legitimate concern that she would not be fair or impartial in these or other cases.

Pursuant to this allegation, the Commission alleged that the Respondent willfully violated Canon 3B(10) of the Texas Code of Judicial Conduct, and that her willful

or persistent conduct was clearly inconsistent with the proper performance of her duties in violation of Article V, Section 1-a(6)(A) of the Texas Constitution.

In Charge II, the Commission alleged that “Judge Slaughter’s extrajudicial Facebook activities cast reasonable doubt upon her impartiality and interfered with the proper performance of her duties as a judge in that, as a direct result of her conduct, Judge Slaughter was ordered to be removed from presiding over a criminal case....” Her removal ultimately led to a subsequent judge granting a mistrial in the case. Under this charge, the Commission alleged that Respondent’s conduct constituted willful violations of Canon 4A of the Texas Code of Judicial Conduct, and willful or persistent conduct that is clearly inconsistent with the proper performance of her duties in violation of the standards set forth in Article V, Section 1-a(6)(A) of the Texas Constitution.

Finally, in Charge III, the Commission alleged that by engaging in the extrajudicial Facebook activity and by “disregarding her own admonition to jurors about the use of social media during the trial, Judge Slaughter failed to uphold her duty to promote and maintain public confidence in the integrity, impartiality, and independence of the judiciary.” The Commission alleged the Respondent’s conduct “became the focus of criticism due to the attendant media attention” and “cast public

discredit upon the judiciary or administration of justice“ in violation of the standards set forth in Article V, Section 1-a(6)(A) of the Texas Constitution.

The Respondent, in both her written responses to the Commission’s allegations and her testimony at trial, asserted that her social media postings did not violate the Texas Code of Judicial Conduct of the Texas constitution. In the alternative, she asserted that if her conduct was found to be in violation of the Texas Code of Judicial Conduct, then the Code abridges her freedom of speech guaranteed by the First Amendment to the United States Constitution.

We conclude the Commission has failed to meet its burden of proving the Respondent violated the Canons of Judicial Conduct or Article V, Section 1-a(6)(A) of the Texas Constitution, we dismiss the Commission’s public admonition, and find the Respondent not guilty of all charges.<sup>2</sup>

## I. FACTS

The Respondent maintained a public Facebook page which displayed: (1) a photograph of the Respondent wearing her judicial robe; (2) featured a photograph of the Galveston County Courthouse; and (3) described the Respondent as a “public figure” and as “Judge of the 405th Judicial District Court.” After her election to the

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<sup>2</sup> Because we conclude the Respondent did not violate the Canons of Judicial Conduct or the Texas Constitution, we do not address the constitutional question. *See Hecht*, 213 S.W.3d at 551–52.

bench, the Respondent was very active in posting comments about matters that were occurring in her court and in utilizing her Facebook page as a means to educate the public about her court.

On April 28, 2014, a high profile, criminal jury trial was scheduled to begin in the Respondent's court. The case involved a man charged with unlawful restraint of a child for allegedly keeping a nine-year-old boy in a six-foot by eight-foot wooden enclosure inside the family home. The case became known in the media as "the Boy in the Box" case.

A couple of days before the trial was set to begin, the Respondent posted the following on her Facebook page,

We have a big criminal trial starting Monday! Jury selection Monday and opening statements Tues. morning.

The following day, in response to the above-described post, a person posted the following comment on the Respondent's Facebook page,

One of my favorite Clint Eastwood movies is 'Hang 'Em High,' jus sayin your honor...

After the jury was seated in the case, the Respondent provided the jurors with oral instructions regarding their conduct during the trial. Specifically, the Respondent admonished the jury regarding their use of social media, including

Facebook, and their prohibition of accessing any news stories related to the trial. The

Respondent expressly told the jurors the following:

During the trial of the case, as I mentioned before, you cannot talk to anyone. So make sure that you don't talk to anyone. Again, this is by any means of communication. So no texting, e-mailing, talking person to person or on the phone or Facebook. Any of that is absolutely forbidden.

In addition, the Respondent provided written instructions to the jury that included the following admonition:

Do not make any investigation about the facts of this case.... All evidence must be presented in open court so that each side may question the witnesses and make proper objection. This avoids a trial based upon secret evidence. These rules apply to jurors the same as they apply to the parties and to me (the Respondent).

On April 28, 2014, the defendant in the criminal case elected to have the Respondent determine his punishment in the event of his conviction. The following day, the Respondent posted the following separate comments on her Facebook page:

Opening statements this morning at 9:30 am in the trial called by the press "the boy in a box" case.

After we finished Day 1 of the case called the "Boy in the Box" case, trustees from the jail came in and assembled the actual 6'x8' "box" inside the courtroom!

This is the case currently in the 405th!

In the third post listed above, the Respondent included a link to a *Reuters* article entitled “Texas father on trial for putting son in box as punishment.”

On the third day of trial, defense counsel in the criminal case filed a motion to recuse the Respondent and a motion for mistrial based on the Respondent’s Facebook activities. A visiting judge assigned to hear the motion to recuse granted the motion and removed the Respondent from the case. The case was transferred to another court and that judge granted the defendant’s motion for mistrial, causing the case to be retried. In the subsequent trial, the defendant was acquitted of the charges.

After the initial complaint was filed, the Commission examined all of the Respondent’s Facebook postings and found other postings it believed improper. On February 5, 2014, the Respondent posted the following comment on her Facebook page regarding another matter pending in her court:

We have a jury deliberating on punishment for two counts of possession of child pornography. It is probably one of the most difficult types of cases for jurors (and the judge and anyone else) to sit through because of the evidence they have to see. Bless the jury for their service and especially bless the poor child victims.

At the time of the post, the jury had heard the evidence on punishment and was deliberating in the case.

On May 13, 2014, the Respondent posted the following Facebook comment regarding another case:

We finished up sentencing today with a very challenging defendant.

The Special Court of Review held a trial de novo on July 20 and 21, 2015. At the hearing, to prove its case the Commission called a complaining witness by deposition, called the defense attorney who initially complained of the Respondent's postings and filed the motion to recuse, and called the Respondent.

## II. DISCUSSION

### A. Applicable Law

The Texas Constitution provides that a judge may be disciplined for a willful violation of the Code of Judicial Conduct or for willful or persistent conduct that is clearly inconsistent with the proper performance of his or her duties or that casts public discredit upon the judiciary or administration of justice. Tex. Const. art. V, § 1-a(6)(A). For purposes of Article V, Section 1-a, “willful [sic] or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties” includes willful violation of a provision of the Code of Judicial Conduct. Tex. Gov't Code Ann. § 33.001(b)(2).

“Willful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence.” *In re Sharp*, No. 12-0003, 2013 WL 979361, at \*2 (Tex. Spec. Ct. Rev. Mar. 13, 2013); *Davis*, 82 S.W.3d at 148; *In re Bell*, 894 S.W.2d 119, 126 (Tex.

Spec. Ct. Rev. 1995). A judge need not have specifically intended to violate the Code of Judicial Conduct; a willful violation occurs if the judge intended to engage in the conduct for which he or she is disciplined. *Davis*, 82 S.W.3d at 148; *see In re Barr*, 13 S.W.3d 525, 539 (Tex. Rev. Trib. 1998).

## **B. Social Media and Judicial Conduct**

“Social media is having a transformative effect on society as it revolutionizes the way we share information and ourselves.” John G. Browning, *Symposium: Social Media and the Law: Keynote Address*, 68 U. MIAMI L. REV. 353, 359 (2014). In *Youkers v. State*, the Dallas Court of Appeals considered an allegation that a trial judge’s designation as a “friend” of a victim’s father on Facebook constituted a basis for recusal. *Youkers v. State*, 400 S.W.3d 200, 205 (Tex. App.—Dallas 2013, pet. ref’d). In reaching its decision, the court found that no rule, canon of ethics, or judicial ethics opinion in Texas prohibits Texas judges from using social media outlets like Facebook. *Id.* “The general premise that judges are not prohibited from using social media is consistent with the current standards suggested by the American Bar Association, as well as recent articles addressing the topic.” *Id.*, *see*, e.g., ABA Comm. on Ethics & Prof’l. Responsibility, Formal Op. 462 (2013); Susan Criss, *The Use of Social Media by Judges*, 60 *The Advoc.* 18 (2012); Gena Slaughter & John G. Browning, *Social Networking Dos and Don’ts for Lawyers and Judges*,

73 Tex. B.J. 192 (2010). However, the Dallas Court of Appeals warned that while the use of social media websites “‘can benefit judges in both their personal and professional lives,’ the use presents concerns unique to the role of the judiciary in our justice system” because “an independent and honorable judiciary is indispensable to justice in our society[,]” and, “[t]hus, judges must be mindful of their responsibilities under applicable judicial codes of conduct.” *Youkers*, 400 S.W.3d at 205 (internal citations omitted). “While the technology involved may be newer, at their core, social networking sites are simply platforms for communication and social interaction. Judges have had to contend with the ethical risks, such as the appearance of impropriety posed by other forms of social interaction for decades, if not centuries.” John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487, 490 (2014). “Existing rules of judicial conduct are more than sufficient to provide guidance when it comes to judges’ use of social media, once one recognizes that communications and interaction via social media are no different in their implications than more traditional forms of communication.” *Id.* Thus, our analysis of the allegations of misconduct alleged against the Respondent should not change simply because the communication occurred online rather than offline. *See Youkers*, 400 S.W.3d at 206. Our analysis, therefore, should

focus on the substance of the comments rather than the vehicle by which they were disseminated.

## **C. Analysis**

### **1. Charge I**

At least two attorneys involved in the pending criminal case complained to the Commission about the Respondent's comments on Facebook, which were about the pending trial. They complained that the Respondent's actions violated the provision of Canon 2 of the Code of Judicial Conduct requiring that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Tex. Code Jud. Conduct, Canon 2(A), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. B (West 2013). The evidence supports that the Respondent was motivated by the admonition of the Preamble to the Code of Judicial Conduct for judges to "strive to enhance and maintain confidence in our legal system," as she sought to educate the public of the events occurring in her court. *See* Tex. Code Jud. Conduct, Preamble. However, as noted by John Browning, a recognized expert in the field of legal ethics and the use of social media in the legal system, any extrajudicial comment by a judge about a pending case can pose a problem.

The Commission alleges in Charge I that the Respondent’s postings violated Canon 3(B)(10) of the Texas Code of Judicial Conduct. This Canon states, in pertinent part:

A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge’s court in a manner which suggests to a reasonable person the judge’s probable decision on any particular case.

....

This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Tex. Code Jud. Conduct, Canon 3(B)(10). We note at the outset that Canon 3(B)(10) does not constitute a complete prohibition against a judge ever commenting about a pending proceeding.<sup>3</sup> Instead, the Canon only prohibits a comment “which suggests to a reasonable person the judge’s probable decision on any particular case.” In this regard, Canon 4(A) of the Texas Code of Judicial Conduct states that, “A judge shall conduct all of the judge’s extrajudicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; or (2) interfere

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<sup>3</sup>Canon 3(B)(10) also applies to “impending” proceedings “which may come before the judge’s court.” Since this case only involves a “pending” proceeding, we only will omit further reference to “impending” proceedings.

with the proper performance of judicial duties.” Tex. Code Jud. Conduct, Canon 4(A).<sup>4</sup>

The first comment by the Respondent stated, in part, “We have a big criminal trial starting Monday!” The Commission criticized the Respondent’s use of the adjective “big” and the exclamation point, indicating that she was attempting to sensationalize the matter before her court for self-aggrandizement. Defense counsel in the underlying criminal trial testified that the comment raised concerns that because the Respondent felt the case was a “big” case, she might be unduly influenced by public opinion and thus, the comment cast doubt upon her impartiality. However, defense counsel testified that while he may not have agreed with all of the Respondent’s rulings in the case, he never observed any action or ruling that he felt was biased for or against either party. The only other witness critical of the Respondent’s statement was the attorney ad litem for the child in the same underlying criminal trial, who actively sought prosecution of the criminal defendant stepparent. She testified that the Respondent’s comment could have been interpreted by some as indicating that the Respondent was biased and favored the prosecution.

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<sup>4</sup>As noted previously, the Commission alleges in Charge II that the Respondent/s postings violated Canon 4(A).

In her defense, the Respondent presented testimony from Renee Knake, a law professor from Michigan State University College of Law and a published author in the field of legal ethics and judicial ethics; John Browning, a lawyer and published authority regarding the legal and judicial ethics surrounding the use of social media; the Honorable Lonnie Cox, Judge of the 56th Judicial District Court of Galveston County, Texas; and the Honorable Amy Clark Meachum, Judge of the 201st District Court of Travis County, Texas.

As indicated above, after the trial of the underlying criminal case had begun, the Respondent posted two additional comments about the case on her Facebook page wherein she referred to the case as “the boy in a box case.”

Counsel for the criminal defendant testified that it was part of his defensive strategy to avoid calling the structure a “box” in front of the jury to avoid any prejudice from that connotation. Defense counsel complained that he felt the comment regarding the “box” violated Canon 3, suggesting to a reasonable person the Respondent’s probable decision on her ruling on any objection to having the “box” presented before the jury. In a pretrial hearing, defense counsel argued a motion *in limine* to limit the use of the term “box” to describe the wooden enclosure at trial, arguing that the term was prejudicial to the defendant and misstated the evidence. The Respondent denied defense counsel’s motion, stating, “[c]alling it a

wooden enclosure – certainly the press has referred to it as ‘The Boy in the Box’ case, that sort of thing. So I don’t think that there’s going to be prejudice. The jury can make up their own minds as to what they believe that is.” The record shows that both the prosecutor and defense counsel sometimes referred to the structure in voir dire and opening statements as the “box” even before the Respondent posted her comments on Facebook.

Before the second comment referencing the box was posted by the Respondent, a videotape of the structure had been admitted into evidence and was viewed by the jury. Further, counsel for all parties met with the Respondent in open court and outside the presence of the jury to discuss the agreed-upon procedure for constructing the structure in the courtroom. In response to a question posed by the Respondent, defense counsel affirmatively stated on the record that he had no objection to proceeding in the agreed-upon manner of constructing the “box” in the courtroom. The record shows that the only objection lodged by defense counsel to the “box” during the first trial was that it was cumulative, which was overruled.

As indicated above, the Commission also considered comments the Respondent made regarding two other cases pending in her court. In the first case, she posted a comment that indicated that a jury was deliberating on punishment for two counts of possession of child pornography. The comment expressed the

Respondent's opinion that that type of case was probably one of the most difficult "for jurors (and the judge and anyone else) to sit through because of the evidence they have to see." The comment concluded by thanking the jurors for their service but was worded as "[b]less the jury for their service and especially bless the poor child victims." With regard to yet another case, she posted a comment describing the defendant in the case as being "very challenging[.]"

The Commission relied solely on the Respondent's testimony to support its position regarding these two additional comments. In her testimony, the Respondent explained that her comments were meant to express her appreciation to the jurors for their service in a particularly difficult case and to describe her day with a particularly challenging defendant who spat upon the judge and used profanity in the courtroom. The Respondent testified that she made a campaign promise to be transparent and to keep the public informed of the cases being tried in her court. She testified that she made the Facebook comments in order to keep that promise to her constituents. Reelection in the future may also have motivated the Respondent in part, but that goal is not necessarily inconsistent with the proper performance of her duties as a judge. The Respondent presented expert witness testimony that her Facebook comments did not violate the Canons of the Code of Judicial Conduct, did not amount to willful or persistent conduct clearly inconsistent with the proper

performance of the judge's duties, and did not cast public discredit upon the judiciary or administration of justice.

In *Sharp* and *Davis*, two cases where the judges' conduct was found to be willful or persistent, the judges' actions were shown to have been an intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment. *See Sharp*, 2013 WL 979361, at \*3–5, \*7; *Davis*, 82 S.W.3d at 148. Here, the testimony from the Respondent was that she read and considered the Canons before making her comments on social media. However, we find troublesome that these comments go beyond mere factual statements of events occurring in the courtroom and add the judge's subjective interpretation of these events at or near the time of their occurrence. Regardless, we find such comments, at most, showed what amounted to an error in judgment by posting facts from a pending case in her court.

After considering all of the evidence presented in the trial de novo with regard to Charge I, the Special Court of Review finds that the credible evidence overwhelmingly preponderates in favor of a finding that Respondent did not violate Canons 3(B)(10) and 4(A) of the Code of Judicial Conduct or Article V, Section 1-a(6)(A) of the Texas Constitution. The Commission did not present evidence that the Respondent's 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. Further, there was no evidence or legally insufficient evidence that the Respondent's comments rose to the level of willful or persistent conduct clearly inconsistent with the proper performance of the Respondent's duties as a judge. The Commission presented no evidence that the Respondent's actions amounted to an intentional or grossly indifferent misuse of her office.

While we have held that such communications did not rise to the level of communicating to others how the judge might have ruled in the case, the timing of the posts is troublesome for the judiciary. A judge should never reveal his or her thought processes in making any judgment. Even calling attention to certain facts or evidence found significant enough for the judge to comment on in a pending matter before any decision has been rendered may tend to give the public the impression that they are seeing into the deliberation process of the judge.

Additionally, extrajudicial comments made by a judge about a pending proceeding will likely invite scrutiny, as it did in this case. While the Respondent's comments were ultimately proven to not be suggestive of her probable decision on any particular case, the process for reaching this conclusion required the expenditure of a great deal of time, energy, and expense. And as this case illustrates, comments made by judges about pending proceedings create the very real possibility of a

recusal (or even a mistrial) and may detract from the public trust and confidence in the administration of justice.

## **2. Charge II**

The Commission additionally argues that implicitly, the Respondent's extrajudicial Facebook activities resulted in her recusal, as her postings were made the sole basis for the motion seeking her recusal. The Commission asserts that that fact alone is sufficient evidence that the Respondent violated the Canons of the Code of Judicial Conduct as the Respondent's extrajudicial Facebook comments interfered with the proper performance of her judicial duties as proscribed by Canon 4(A).

Recusal motions—even in the criminal context—are governed by Rule 18(a) and Rule 18(b) of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 18(a), (b). When a motion to recuse is filed, the trial judge is not a party to the motion and therefore, is not represented in the hearing and is not allowed an opportunity to appear and defend against the motion. *See* Tex. R. Civ. P. 18(a). The visiting administrative judge who heard and considered the motion to recuse in the criminal case did not testify in the trial de novo before the Special Court of Review, and there is no evidence of the factors or grounds he relied upon to recuse the Respondent from the underlying criminal trial. Ethical violations alone are not necessarily grounds for recusal. *See Gaal v. State*, 332 S.W.3d 448, 454–55 (Tex. Crim. App.

2011); *Rosas v. State*, 76 S.W.3d 771, 775 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

Extrajudicial statements by a trial judge have been the subject of motions to recuse in other cases. In *Simpson v. State*, the Houston Court of Appeals held that violations of the Code of Judicial Conduct will not support recusal without further evidence of bias. No. 01-12-00380-CR, 2014 WL 2767126 \*10 (Tex. App.—Houston [1st Dist.] June 17, 2014, pet. Ref'd) (mem. op., not designated for publication). In that case, the court acknowledged that judges have their own personal opinions, but unless the movant can establish judicial bias, it is presumed that a judge will base her judgment upon the facts as they are developed at the trial. *Id.*

Sometimes the judge may need to recuse herself, or be recused, even though she has no actual bias and would do her very best to weigh the scales of justice equally between contending parties. *See, e.g., Keene Corp. v. Rogers*, 863 S.W.2d 168, 180 (Tex. App.—Texarkana 1993, no writ). It is recognized that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. *Id.* The judiciary must strive to not only give all parties a fair trial, but also maintain a high level of public trust and confidence. *See Indem. Ins. Co. v. McGee*, 356 S.W.2d 666, 668 (Tex. 1962). We

are not charged with reviewing the administrative judge's decision to recuse the Respondent, but only whether the Respondent's actions violated the Code of Judicial Conduct. Each involves implementation of separate and distinct standards of review.

Without further evidence, the panel finds the Commission has not met its burden to prove by a preponderance of the evidence any violation of Canon 4(A) arising solely from the Respondent's recusal. Accordingly, we find the Respondent not guilty of any violation of Canon 4(A) for being recused from a case pending in her court.

### **3. Charge III**

In Charge III, the Commission criticizes the Respondent for disregarding her own admonition to the jury about the use of social media during a trial. As such, the Commission charged that the Respondent failed to uphold her duty to promote and maintain public confidence in the integrity, impartiality, and independence of the judiciary, in violation of Article V, Section 1-a(6)(A) of the Texas Constitution, by posting a link on social media to an online news article about the pending trial, which may have contained extraneous facts.

In the underlying criminal trial, the Respondent provided the jury with two admonitions concerning the use of social media. The Respondent provided the jury with a written admonition concerning their *receipt* of information during the trial.

She admonished the jury that they were to guard themselves from receiving any evidence except that which was introduced in the trial of the cause. This admonition prohibited the jurors from reading any newspapers, watching the local news, or engaging in social media where they may come in contact with outside influences. The Respondent concluded this written admonition about the receipt of extraneous information about the case with the following statement: “These rules apply to jurors the same as they apply to the parties and to me.”

The Respondent additionally provided the jury with an oral admonition concerning their *disclosure* of information about the case during the trial. Specifically, she admonished the jury as follows:

During the trial of the case, as I mentioned before, you cannot talk to anyone. So make sure that you don't talk to anyone. Again, this is by any means of communication. So no texting, e-mailing, talking person to person or on the phone or Facebook. Any of that is absolutely forbidden.

This oral admonition concerning the disclosure of information about the case by the jury was not accompanied by a statement to the effect that the same rules applied to the parties or the judge. In an apparent disregard of her own admonitions to the jurors concerning their receipt of information, the Respondent posted a link to a *Reuters* article describing the trial.

The Court of Criminal Appeals has held that a trial judge's refusal to poll the jury mid-trial to determine whether the jurors had been influenced by a newspaper article was proper when the trial judge repeatedly admonished the jury not to read any newspaper articles concerning the case. *See Powell v. State*, 898 S.W.2d 821, 828 (Tex. Crim. App. 1994). In *Powell*, the appellant argued that the trial court's refusal to poll the jury was error. *Id.* The Court of Criminal Appeals held that the trial judge's refusal to poll the jury was correct after the trial judge reiterated its admonishments not to read any newspapers. *Id.*

In *Powell*, the trial judge was necessarily exposed to the substance of the newspaper article because the defendant brought the article to the judge's attention in order to request the judge to poll the jury to see if any improper influence had been brought to bear on the jury members. *Id.* Judges, as gatekeepers of the evidence that is admitted before the jury, are routinely exposed to inadmissible evidence. As the Texas Court of Criminal Appeals pointed out in *Layton v. State*, the rules of evidence place the "trial judge in the role of a 'gatekeeper,' whose responsibility it is to weed out inadmissible evidence...." 280 S.W.3d 235, 241 (Tex. Crim. App. 2009). The rules recognize that certain evidence "has the ability to mislead a jury that is not properly equipped to judge the probative force of the evidence[.]" and thus, it is the role of the judge to determine whether the evidence offered is relevant

and reliable for a jury to consider. *Id.* Implicit in that acknowledged role is that judges are properly equipped to judge the probative force of any evidence and separate that from any decision that must be rendered in cases that come before them.

Here, there was no evidence to suggest that the Respondent used extraneous evidence in any improper manner to the prejudice of either party before her. In this regard, there is no evidence that the *Reuters* article contained any extraneous information that was not already made known to the Respondent in her capacity as the judge presiding over the defendant's trial. Further, the Respondent took the extra step of polling the jury during the trial and every member of the jury panel answered affirmatively that he or she had not seen or been exposed to anyone's social media posts regarding the trial. No evidence presented by the Commission rises to the level of willful or persistent conduct as required by the Texas Constitution.

We hold the preponderance of the evidence shows no constitutional violation by the Respondent by her posting a link to the *Reuters* article on social media during the pendency of the trial in her court. Accordingly, we find the Respondent not guilty of violating Article V, Section 1-a(6)(A) of the Texas Constitution for posting a public comment referring to media reports of a trial pending in her court after having admonished the jury to refrain from viewing any media coverage of the trial while they were serving on the jury panel.

Finally, as noted previously, the “Factual Allegations” of the Commission’s Charging Document cites the “Hang ‘Em High” comment that a person posted on the Respondent’s Facebook page. This comment is not specifically referenced in any of the three Charges presented by the Commission.

The evidence elicited at the trial de novo revealed that the comment was unsolicited by the Respondent and was removed by the Respondent as soon as it was brought to her attention. Our review of the Canons does not indicate any express requirement for judges to patrol their social media websites to either delete or disavow any comments made by others. We are reluctant to impose a requirement of this type in the absence of an express requirement in the Canons. Furthermore, we find that a reasonable person would not believe that a comment of this type made by a third party would cause a judge to become biased or partial for or against one party or that a judge-host of the page is condoning the sentiments of any such unsolicited comment from the mere fact that it is posted on the judge’s wall. However, judges should be cautious and exercise discretion to avoid posting factual statements regarding pending proceedings that may invite disparaging comments about the parties, the judiciary, or the administration of justice.

We conclude the Commission has failed to meet its burden of proving by a preponderance of the evidence that the Respondent, Judge Slaughter, violated the

Canons of Judicial Conduct or Article V, Section 1-a(6)(A) of the Texas Constitution when an unsolicited comment was posted on her social media website.

Accordingly, we find the Respondent not guilty of all charges and we dismiss the Commission's public admonition. *See* Tex. Rules Rem'l/Ret. Judg. R. 9(d).

**CHARGES DISMISSED.**

**PER CURIAM**