

JUDICIAL USE OF THE INTERNET

Ann E. Brenden, Iowa Administrative Law Judge
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JUDICIAL ETHICS IN AN INTERNET AGE

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A. OBJECTIVES OF PRESENTATION

Judges attending this seminar will be able to identify relevant considerations in determining whether their use of the internet/social media implicates of constitutional, evidentiary, or ethical considerations, and how to address concerns.

Judges will also be able to identify issues that arise out of the jury's use of the internet/social media/social networking during the presentation of evidence and during deliberations; and undertaken prophylactic measures to avoid problems.

Finally, judges will be able to identify ethical considerations relating to the use of the internet in judicial campaigns, so as to be able to tailor their behavior to avoid problems.

B. DEFINITIONS¹

1. **Social Media** refers to forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).²
2. **Social networking** refers to "building online communities of people who share interests or activities, or who are interested in exploring the interests and activities of others. These web-based applications allow users to create and edit personal or professional "profiles" that contain information and content that can be viewed by others in electronic networks that the users can create or join. There is a distinction between

¹ The definitions of "social networking", "blogs", and "wiki" are from *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees*, Committee on Codes of Conduct, Judicial Conference of the United States (April 2010); <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf>.

²*Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com>.

social networks that offer personal connections and professional networks that market a business or accomplish other business-related goals.”

- a. **Example: Facebook** is a social networking website that was originally designed for college students, but is now open to anyone 13 years of age or older.

Facebook provides an easy way for people, particularly friends, to keep in touch, and for individuals to have a presence on the web without needing to build a website. Since Facebook makes it easy to upload pictures and videos, nearly anyone can create and publish a customized profile with photos, videos and information about themselves. Friends can browse the profiles of other friends or any profiles with unrestricted access and write messages on a page known as a “wall” that constitutes a publicly visible threaded discussion. Facebook allows each user to set privacy settings. (*Other social networking websites: “LinkedIn”, “MySpace”*).

3. **Blogs.** A blog, a contraction of the term “weblog,” is a type of website maintained with regular entries of commentary, descriptions of events, or other material such as graphics or video.

“Blog” can also be used as a verb, meaning “to maintain or add content to a blog.” Many blogs provide commentary or news on a particular subject; others function as more personal online diaries. A typical blog combines text, images, and links to other blogs, web pages and other media related to its topic. The ability for readers to leave comments in an interactive format is an important part of many blogs. Entries are commonly displayed through “threaded discussions” in reverse chronological order.

4. **Micro-blogging (e.g., Twitter).** Twitter is a micro-blogging application that is more or less a combination of instant messaging and blogging. Twitter has quickly established itself as a popular tool for communicating news, market trends, questions and answers and links with numerous benefits for both business and personal use. Twitter enables its users to send and read messages known as tweets. Tweets are text-based posts of up to 140 characters displayed on the author’s profile page and delivered to the author’s subscribers, who are known as followers. Senders can restrict delivery to those in their circle of friends or, by default, allow open access.

5. **Wiki.** A wiki (Hawaiian for “fast”) refers to a website that allows the site users themselves, as opposed to a centralized site manager, to control the content by adding or correcting the text of the site. Most wikis serve a specific purpose, and off-topic material is promptly removed by the user community. Such is the case of the collaborative encyclopedia Wikipedia, http://en.wikipedia.org/wiki/Main_Page.

C. INDEPENDENT JUDICIAL RESEARCH ON INTERNET: ETHICS

1. **Ultimate question: is it proper for a judge to obtain facts relevant to a pending case by conducting independent research on the internet?**
2. **Preliminary question: What role does the nature of the media (internet) play in the analysis?**

Answer: Almost none.

- a. Real question: is independent judicial research proper, no matter what the source.
- b. What is different about internet sources:
 1. vastness of available information and
 2. extraordinary ease of access.
- c. What is also different about internet resources: possible problems.
 1. Outdated information
 2. Inaccurate information
 3. Broken links
 4. Fairness of research – one sided or incomplete
 5. Possibility of fraudulent information (open sources)
 6. Whether interested parties know/should know of your research.

3. Information you might seek on the internet, examples:

- a. Information from federal or state websites
- b. Location/distance/directions (MapQuest, Google Maps, Yahoo maps, Bing Maps);
- c. Info regarding party from his/her/its website

- d. Personal or professional information about a party, witness, juror (Google, Yahoo, Facebook, MySpace, personal or company websites, online Court Records, Property sites).

4. Does it make a difference what kind of information you are looking for?

Yes. It is (or may be) appropriate to seek certain types of information but not others.

Specifically, the Model Code of Judicial Conduct rule prohibits independent judicial research but allows judges to consider facts that may be properly judicially noticed.

5. Model Code of Judicial Conduct (2007)

CANON 2: Model Code of Judicial Conduct (February 2007):

A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently;

Rule 2.9(C): A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may *properly be judicially noticed*.

Comment to Rule 2.9[6]: The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

*States that have adopted this Canon/rule or some variation thereof:*³

Arizona	Arkansas	Colorado	Connecticut	Delaware	Hawaii
Indiana	Iowa	Kansas	Maryland	Minnesota	Montana

³ If your jurisdiction has not adopted the Model Code of Judicial Conduct, consider the following approach. Undoubtedly there will be parity in the overarching themes of independent, impartial, and competent judges, and the prohibition against appearance of propriety in the performance of their duties. A conservative approach in the face of silence on the proscription against independent judicial research is to undertake such research with a mind toward those ethical themes and in conjunction with adherence to constitutional standards of due process and strict adherence to the rules of evidence, particularly those governing judicial notice.

Nebraska	New Hampshire	Nevada	Ohio	Oklahoma	Utah
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e. Application of Rule 2.9(C) in this analysis: can rule 2.9(C) be interpreted to allow the judge to consider information *gathered* from the internet, as long as it may properly be judicially noticed?

“By including the reference to judicial notice, however, the Model Code opens a loophole. If the ethics rules are meant to incorporate the totality of federal and state evidence rules’ approach to what judges can ‘know’ on their own, the research prohibition is a narrow one. Judges may not independently investigate adjudicative facts – the facts that are at issue in the particular case – unless they are generally known or ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’ But they may independently ascertain and use information that meets the requirements for judicial notice, and they may investigate “legislative facts” – those that inform the court’s judgment when deciding questions of law or policy – to their hearts’ content, bound by no rules about sources, reliability, or notice to the parties.”

Elizabeth Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 *Review of Litigation* 131 (Fall 2008)

6. Possible key: Judicial Notice (Fed. R. Evid. 201)

a. If independent research is appropriate because it satisfies judicial notice requirements, know those parameters. What may be judicially noticed?

Fed. Rule Evid. 201: Judicial Notice of Adjudicative Facts (compare with ethical rule’s reference to “facts in a matter”)

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts, and does not preclude judicial notice of legislative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within

the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

b. Ask yourself: is the fact you seek adjudicative or legislative?

1. Adjudicative

Defined: (1) Adjudicative facts are simply the facts of the particular case (*Notes of Advisory Committee on Rules, Fed. R. Evid. 201*); (2) a controlling or operative fact rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties. (*Black's Law Dictionary 7th Ed. 1999*).

2. Legislative

Defined: (1) “[T]hose which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” (*Notes of Advisory Committee on Rules, Fed. R. Evid. 201*); (2): “a fact that explains a particular law’s rationality and that helps a court or agency determine the law’s content and application”. (*Black's Law Dictionary 7th Ed. 1999*); (3) generalized factual propositions that help the tribunal to determine the content of law and policy and to exercise discretion in determining what course to take. Legislative facts do not pertain to the specific parties ... See *State v. Henze*, 356 N.W.2d 538, 520 at n. 1 (Iowa 1984); *Brummer v. Iowa Dep’t of Corrections*, 661 N.W.2d 167, 173 (Iowa 2003) (“a party is not entitled to an evidentiary hearing ‘if the agency decision rests on legislative facts,’ or those ‘generalized factual propositions, often consisting of demographical data and statistics compiled from surveys and studies, which aid the decision-maker in determining questions of policy and discretion.’”)⁴

⁴ *Additional examples: United States v. Williams*, 442 F.3d 1259, 1261 (10th Cir. 2006) (“statutes are considered legislative facts” of which the authority of courts to take judicial notice is “unquestionable”); *U.S. v. Gavegnano*, 305 Fed. Appx 954 (4th Cir. 2009) (“the district court may take judicial notice of legislative facts, and such legislative facts include the interpretation of statutes”); *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, fn. 12 (1st Cir. 2004)

c. Case law: judicial notice of internet information.

Requirement: capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned.

American Board of Emergency Medicine Web site. Oken v. Williams, 23 So.3d 140, fn 2 (Fla. Ct. App. 2009), *quashed on other grounds*, 2011 WL 1674252 (Fla. 2011) (majority opinion defends against dissent's criticism of its reliance on internet resources to define "specialist" in medical malpractice action, noting that "[t]he use of generally-known knowledge ... which is capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned[] does not present the same concerns").⁵

Blood-Horse Stallion Register. Moore v. Landes, 2006 WL 2919064 fn. 2 (Ky. App. 2006) (action regarding sale of horse by owner who did not properly disclose animal's prior invasive joint surgery; court held that the internet register fell within the category of indisputable facts derived from sources the accuracy of which could not reasonably be questioned.)

Center of Disease Control and Prevention. Gent v. CUNA Mut. Ins. Society, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (ERISA) (circuit court took judicial notice of general facts on website of Center for Disease Control and Prevention concerning Lyme Disease because facts were "not subject to reasonable dispute.")

County Recorder website. Penstan Supply Div. of Hajoca Corp v. Traditions of America L.P., 2010 WL 687512 (Pa.Com.Pl. 2010) (court

("Legislative facts,' by contrast, include facts 'which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.' For example, in *Muller v. Oregon*, 208 U.S. 412, 419-21 & n. 1, 28 S.Ct. 324, 52 L.Ed. 551 (1908), the Supreme Court took judicial notice of extensive sociological research that supported shorter working hours for women in evaluating the rationality of statutes mandating such hours."); *Qually v. Clo-Tex Intern, Inc.*, 212 F.3d 1123 (8th Cir. 2000) ("[l]egislative facts do not relate specifically to the activities or characteristics of the litigants. A court generally relies upon legislative facts when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties.")

⁵ Citing Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 Rev. Litig. 131 (Fall 2008).

determines that the County Government Recorder of Deeds website qualifies as a source for judicial notice as one whose accuracy cannot reasonably be questioned.)

MapQuest, Google maps, and other online mapping tools. People v. Clark, 406 Ill.App. 3d 622, 940 N.E.2d 755 (Ill. App. Dist. 2, 2010) (information acquired from mainstream internet sites such as MapQuest and Google Maps is reliable enough to support a request for judicial notice; also *Warwick v. University of the Pacific*, 2010 WL 2680817 (N.D. Cal. 7/6/2010); *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007)).

Michigan Dep't of Corrections Offender Tracking Information System. People v. Djonaj, 2010 WL 3063673 (App. 2010) (majority dismisses challenges to upward departure from sentencing guidelines as moot, after apparently consulting online Offender Tracking Information System (OTIS); dissent rebukes that reliance because (1) parties did not request that Court take judicial notice of website and (2) given its disclaimer regarding accuracy, the website "is not a source whose accuracy cannot reasonable be questioned"; *see also People v. Joseph Henry Duncil*, 2008 WL 681161 (Mich. App. 2008) (OTIS website not deemed to qualify as a source whose accuracy cannot reasonably be questioned; court declines to take judicial notice of the website information).

National Institute of Health and National Library of Medicine website. Louisville-Jefferson County Metro Government v. Martin, 2009 WL 1636270 (Ky. App. 2009) (circuit court took judicial notice of a definition from website maintained by NIH and NLM after parties provided differing definitions of condition; mere fact that information was obtained from internet does not make it suspect; "[c]ourts across this country take judicial notice of medical terminology on a daily basis in order to save litigants the added expense of having a physician or other medical expert testify to a readily determined disease or malady.")

New York Secretary of State web site. Munaron v. Munaron, 21 Misc. 3d 295, 862 N.Y.S.2d 796 (N.Y. 2008) (taking judicial notice of status of corporate personnel as set forth on the official website of the New York secretary of state).

Online State Court sites. L&Q Realty Corp v. Assessor, 71 A.D.3d 1025, 896 N.Y.S.2d 886 (NYAD Dept 2 2010); *Woodhull Medical & Mental Hosp. of New York City Health & Hosp*, 2011 1107202 (2011) (taking judicial notice of the New York Unified Court System E-Courts public Web site); *see also Marks v. Criminal Injuries Compensation Bd.*, 196 Md. App. 37, 7 A.3d 665 (Md. App. 2010) (“it is widely accepted that judicial notice of court records extends to records that are accessed through the Internet”)

State agencies and FAA. Cali v. East Coast Aviation Services., Ltd., 178 F.Supp.2d 276, 287, n. 6 (E.D.N.Y.,2001) (taking judicial notice of documents from Pennsylvania state agencies and Federal Aviation Administration).

Statistics collected and maintained by federal government: notice can be taken, but foundation from which accuracy and reliability must be established. Polley v. Allen, 132 S.W.2d 223, 226 (Ky. App. 2004) (While trial court could take judicial notice of public records from reliable sources on the internet, mere assertion that statistics came from governmental body, without identification of uniform resource locator (URL) of website from which stats originated, made it impossible to determine if the source was “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”)

Stock prices. Grimes v. Navigant Consulting, Inc., 185 F.Supp.2d 906, 913 (N.D.Ill. 2002) (taking judicial notice of stock prices posted on a website).

U.S. Health and Human Services web site. Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 20-21, 871 N.Y.S.2d 680, 685 (N.Y. 2009) (taking judicial notice of medical diagnosis and procedure codes of US Health and Human Services as set forth on that agency's official website).

U.S. v. Bari, 599 F.3d 176 (3rd Cir. 2010) (district court confirmed his “intuition” rather than merely taking judicial notice of the fact that “not all rain hats are alike” by searching the internet, which was not found to constitute reversible error: “[a]s the cost of confirming

one's intuition decreases, we would expect to see more judges doing just that. More generally, with so much information at our fingertips (almost literally), we all likely confirm hunches with a brief visit to our favorite search engine that in the not-so-distant past would have gone unconfirmed. We will not consider it reversible error when a judge, during the course of a revocation hearing where only a relaxed form of Rule 201 applies, states that he confirmed his intuition on a "matter[] of common knowledge."

Internet resources not found to be appropriate for judicial notice:

Consumer Electronic Association's website. Powers v. Halpin, 2007 WL 1196527 (Ky. App. 2007) (CEA website deemed to be a source whose accuracy could reasonably be questioned; trial court erred in taken judicial notice of it; citing to lack of foundation as to identity of CEA and date of the information).

MapQuest. Com. v. Brown, 839 A.2d 433, 435-436 (Pa. Super. 2003) (holding that trial court abused its discretion in taking judicial notice of a MapQuest distance determination to invoke mandatory sentencing provision; "[c]learly, an internet site such as MapQuest™, which purports to establish distances between two locations, is not so reliable that its 'accuracy cannot reasonably be questioned. [] An internet site determining distances does not have the same inherent accuracy as do professionally accepted medical dictionaries, or encyclopedias, or other matters of common knowledge within the community.")

Microsoft web site. People v. Schilke, 2005 WL 1027039 (Mich. App. 2005) (defendant claimed that a known defect on Microsoft server was responsible for missing information, in prosecution for unauthorized access to a computer; Court declined to take judicial notice of information on Microsoft web site documenting the issue; trial court ruled it could not accept such information as being accurate without expert testimony; appellate court agrees that alleged problem was not capable of accurate and ready determination and that the web site did not constitute a "source[] whose accuracy cannot be reasonably questioned."

New York State Department of Insurance. NYC Medical and Neurodiagnostics, P.C. v. Republic Western Ins. Co., 8 Misc. 3d 33, 38, 798 N.Y.S.2d 309, 313 (App. Term 2004) (no showing that the official website of the New York State Department of Insurance was the source of undisputed accuracy.)

Northwest Immigrant Rights Projected website. In re Marriage of Meredith, 148 Wash. App. 887, 903, 201 P.3d 1056, 1064 (2009) (declining to take judicial notice of website information that presiding judge had made financial contribution to immigration rights organization, in dissolution proceeding involving immigrant party).

Unidentified Medical Website. Robertson v. City of Seattle, 2004 WL 1774814 (Wash. App. Div.1 2004) (court refuses to take judicial notice of “complex medical information from a website whose reliability and accuracy cannot be determined”, in a disability reasonable accommodation case.)

Unspecified results of Google search. In re Conservatorship and Guardianship of CPR, 209 P.3d 879, 882 (Wyo. 2009) (abuse of discretion to take judicial notice of printout of proper schedule of immunizations for children, in an action for guardianship of children, from unverified internet source not authenticated by medical expert, as not a source “whose accuracy cannot reasonably be questioned”).

Wikipedia results. Although cited in almost 700 judicial opinions since 2005 and relied on by some courts without much analysis or comment, this online encyclopedia is an “open source” project to which pseudonymous or anonymous volunteers; indeed, anyone with internet connections, can write, edit, revise, or vandalize almost any article.⁶ (*Performance Pricing, Inc. v. Google Inc.*, 2009 WL 2497102 (D. Tex. 2009) (“The content on this website is provided by volunteers from around the world—anyone with internet access can provide or modify content. [citation omitted] Thus, not only is the information unreliable, [citation omitted] but

⁶ David J. Dansky, *The Google Knows Many things: Judicial Notice in the Internet Era*, 39 *Nov. Colo. Law* 19 (November, 2010).

it can potentially change on a day-to-day basis.”); *D.M. v. Department of Children and Family Services*, 979 So.2d 1007, 1010 (Fla App. 2008) (“the trial court also located articles in Wikipedia, the British Medical Journal, and other medical or scientific treatises regarding a psychological issue in the case. It is clear that the trial court regarded this as being permissible background research and not information assembled to form the basis of a decision in the case. These articles were cited in the judgment. We agree with the parents that it was error for the court to conduct this independent research.”)

See also Badasa v. Mukasey, 540 F.3d 909, 910-11 (8th Cir. 2008) (“Wikipedia describes itself as ‘the free encyclopedia that anyone can edit,’ urges readers to ‘[f]ind something that can be improved, whether content, grammar or formatting, and make it better,’ and assures them that ‘[y]ou can’t break Wikipedia,’ because ‘[a]nything can be fixed or improved later.’ Wikipedia: Introduction, (last visited August 7, 2008). Wikipedia’s own ‘overview’ explains that ‘many articles start out by giving one – perhaps not particularly evenhanded – view of the subject, and it is after a long process of discussion, debate, and argument that they gradually take on a consensus form.’ Wikipedia: Researching with Wikipedia, (last visited August 7, 2008). Other articles, the site acknowledges, ‘may become caught up in a heavily unbalanced viewpoint and can take some time – months perhaps – to regain a better-balanced consensus.’ *Id.* As a consequence, Wikipedia observes, the website’s ‘radical openness means that any given article may be, at any given moment, in a bad state: for example, it could be in the middle of a large edit or it could have been recently vandalized.’ *Id.* The BIA presumably was concerned that Wikipedia is not a sufficiently reliable source on which to rest the determination that an alien alleging a risk of future persecution is not entitled to asylum. *See also Campbell v. Sec’y of Health and Human Servs.*, 69 Fed. Cl. 775, 781 (Fed. Cl. 2006) (observing that a review of the Wikipedia website ‘reveals a pervasive and, for our purposes, disturbing set of disclaimers’); R. Jason Richards, *Courting Wikipedia*, 44 *Trial* 62 (Apr. 2008) (“Since when did a Web site that any Internet surfer can edit become an authoritative source by which law students could write passing papers, experts could

provide credible testimony, lawyers could craft legal arguments, and judges could issue precedents?").

Summary of application of Rule 201(b): as a general rule, courts are more willing to take judicial notice of facts from websites hosted by public authorities (federal and state governments, entities, agencies, subdivisions).⁷

Next up are non-governmental websites that have the characteristics described in R. Evid. 803(17) – market quotations, tabulations, lists, and other data compilations relied on by the public, and the learned treatise exception described in Rule 803(18).⁸

Less reliable: information obtained from internet sources that are “open sourced”, meaning that anyone can change them, such as Wikipedia.

Probably the least likely source of internet information for judicial notice is that on a websites created or maintained by a party to the case. *Koenig v. USA Hockey, Inc.*, 2010 WL 4783042 (S.D. Ohio, 2010) (“This Court concludes that federal courts should be very reluctant to take judicial notice of information or documents that appear exclusively on websites which have been created and are maintained by one of the parties to a case unless that party is a governmental body and the website is maintained not to further the business interests of the party but to provide a source of public information. The potential for fabrication or for inaccurate information is simply too great to be reconciled with the language in Rule 201 to the effect that judicial notice may be taken only if the information comes from “sources whose accuracy cannot reasonably be questioned.” As the Advisory Committee notes to Rule 201 state, “[a] ‘high degree of indisputability’ is an essential prerequisite for a court to take judicial notice of a particular fact.” See *Holland v. United States*, 2008 WL 2769367, 3 (W.D.Tenn. July 11, 2008)).

⁷ *Id.*

⁸ *Id.*

i. Reminder: the remainder of the Judicial Notice rule must be satisfied, to comply with the ethical rule allowing consideration of such information.

REMAINDER OF FED. R. EVID. 201:

c) When discretionary. A court may take judicial notice, whether requested or not, and may require a party to supply necessary information.

(d) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins., 798 N.Y.S.2d 309, 313 (NY Supp.App. 2004) (“In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality. Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance....”)

Justice v. King, 60 A.D.3d 1452, 876 N.Y.S.2d 301 (NYAD 2009) (citing *NYC Medical and Neurodiagnostic, above*: “Although not raised by the parties on appeal, we express our concern that, in deciding the issue before it, the court sua sponte relied on a source and its contents that were not submitted by either party. Specifically, the court accessed SGM's website and relied heavily on information found therein.”)

(e) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(f) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

D. INDEPENDENT JUDICIAL RESEARCH ON INTERNET: REMAINING CONSIDERATIONS

1. Constitutional considerations

a. Due process

Kiniti-Wairimu v. Holder, 312 Fed. Appx. 907, 2009 WL 430439 (9th Cir. 2009) (9th Circuit Court finds Kenyan citizen was denied due process in his pursuit of an application for withholding of removal and protection under the Convention Against Torture when the Immigration Judge conducted independent research of Kiniti's family circumstances on the internet and then relied on reports of which he was not aware, to make an adverse credibility determination).

2. Additional Rules of Evidence

Rule 605: Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins., 798 N.Y.S.2d 309, 313 (NY Supp.App. 2004) ("In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality.")

Rule 802: Hearsay Rule

Hearsay is not admissible except as provided by these rules.

Internet newspaper articles. State v. Kinder, 2010 WL 4157297 (Ohio App. 2010) (newspaper articles, analogous to internet news articles, “are generally inadmissible as evidence of the facts stated within the article because they are hearsay not within any exception.”)

MapQuest -- qualified. Jianniney v. State, 962 A.2d 229 (Del. Sup., 2008) (“Numerous courts, in this and other jurisdictions, have taken judicial notice of facts derived from internet mapping tools when deciding questions concerning child custody, proper venue in a civil action, proof of venue in a criminal action, discovery disputes and compensation for travel expenses.” However, MapQuest printouts admitted for the truth of the website’s driving time estimates, without more, did not qualify for exception to the hearsay rule.)

Rule 901: Authentication and Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Siegel-Robert, Inc. v. Johnson, 2009 WL 3486625 (Tenn Ct. App., 2009) (authentication of pages from taxpayer/claimant’s website determined sufficient by virtue of taxpayer’s corporate logo at the top of each page, and the internet address linking to taxpayer’s website at the bottom of each page).

James V. Masella III, *Leading Lawyers on Complying with New Rules, Leveraging the Latest Technology, and Preparing Key Evidence*, (Aspatore, 2011 WL 1574296) (April 2011) (noting different standards applied by different courts to the authentication of website evidence).

Be aware of tools that can help you look up registration data for (such as <http://www.whois.net/>) internet sites.

3. Discussion Scenarios – Internet Research by Judges

Consider, with respect to each:

- Constitutional concerns?
- Rules of Evidence?
- Ethical considerations?

1. Evidence is in, parties have rested, case is under consideration.

- The parties disagree on what the term “quickie” meant, in the context of a sexual harassment case. One party defined it as a brief sexual tryst. The other defined it as an expensive wheelchair. What are the implications (constitutional, evidentiary, ethical) of your independent internet research on the so-called “quickie” brand of wheelchair?⁹
- The drug prosecutor claimed that the defendant’s use of the term “18th Street” was a demand for \$1,800. You decide to conduct an internet search to determine whether the city has an 18th Street. What are the implications of you obtaining that information?

E. JUDICIAL USE OF SOCIAL MEDIA: ETHICS

1. Introduction

- A recent national survey (results released 8/26/2010) found that 40% of judges reported using social media sites like Facebook and LinkedIn.¹⁰
- Nearly half of the judges (47.8%) disagreed or strongly disagreed with the statement “Judges can use social media profile sites, such as Facebook, in their *professional* lives without compromising professional conduct codes of ethics.” (emphasis added). Only about 34.3% responded the same way to the statement “Judges can use social media profiles sites, such as Facebook, in their *personal* lives without compromising professional conduct codes of ethics.” (emphasis added).

⁹ *People v. Mar*, 28 Cal. 4th 1201, 1204, 52 P.3d 95, 97 (Cal. 2002).

¹⁰ Survey available online at: <http://www.ccpio.org/newmediareport.htm>.

- c. While a few states have issued advisory legal ethics opinions about judges' participation in social networking activities, almost no ethical violations have been found in connection with such activities.

2. State Advisory Opinions re Judicial Use of Social Networking

a. Florida: Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

Question 1: Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.

Answer: Yes

Discussion: This question, as well as Question 3, relates to the posting of materials by the judge or the campaign committee and relate only to the method of publication. The Code of Judicial Conduct does not address or restrict a judge's or campaign committee's method of communication but rather addresses its substance.

Question 2: Whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend."

Answer: No.

Discussion: "[l]isting lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge ... means [that the] lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the

judge. The [Florida Judicial Ethics Advisory Committee] concludes that such identification before the judge does convey this impression and therefore is not permitted.”

Note: This is a minority opinion among the advisory opinions filed on the subject by several states. (See Kentucky, New York, and Ohio opinions that follow.)

Question 3: Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge’s candidacy, may post material on the committee’s page on a social networking site, if the publication of the material does not otherwise violate the Code of Judicial Conduct.

Answer: Yes.

Discussion: (see Question 1).

Question 4: Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge’s candidacy, may establish a social networking page which has an option for persons, including lawyers who may appear before the judge, to list themselves as “fans” or supporters of the judge’s candidacy, so long as the judge or committee does not control who is permitted to list himself or herself as a supporter.

Answer: Yes.

Discussion: “To the extent a social networking site permits a lawyer who may practice before a judge to designate himself or herself as a fan or supporter of the judge, this practice is not prohibited ... so long as the judge or committee controlling the site cannot accept or reject the lawyer’s listing of himself or herself on the site. Because the judge or the campaign cannot accept or reject the listing of the fan on the campaign’s social networking site, the listing of a lawyer’s name does not convey the impression that the lawyer is in a special position to influence the judge.”

b. Kentucky: Ky Ethics Comm. Of the Kentucky Judiciary, Op. JE-119 (2010).

- c. Question: May a Kentucky judge or justice, consistent with the code of judicial conduct, participate in an internet-based social networking site, such as Facebook, LinkedIn, MySpace, or Twitter, and be “friends” with various persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials?

Answer: Yes.

Discussion: “While the nomenclature of a social networking site may designate certain participants as ‘friends’, the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge. . . . While social networking sites may create a more public means of indicating a connection, the Committee’s view is that the designation of a ‘friend’ on a social networking site does not, in and of itself, indicate the degree or intensity of a judge’s relationship with the person who is the ‘friend’. The Committee conceives such terms as ‘friend,’ ‘fan’ and ‘follower’ to be terms of art used by the site, not the ordinary sense of those words. “

d. South Carolina: S.C. Advisory Committee Opinion 17-2009 (2009)¹¹.

Question: A magistrate judge has inquired as to the propriety of being a member of Facebook, a social networking site. The Magistrate is friends with several law enforcement officers and employees of the Magistrate’s office. The Magistrate is concerned about the possibility of an appearance of impropriety since the list of Facebook subscribers is vast.

Conclusion: A judge may be a member of Facebook and be friends with law enforcement officers and employees of the

¹¹ <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

Magistrate as long as they do not discuss anything related to the judge's position as magistrate.

Opinion: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary... However, the commentary to Canon 4 states that complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Allowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge. Thus, a judge may be a member of a social networking site such as Facebook.

e. New York: N.Y.Judicial Ethics Advisory Opinion 08-176 (1/29/09).¹²

Digest: "Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the rules."

Discussion: There is nothing inherently inappropriate about a judge joining and using a social network. The judge must adhere to the rules of conduct, and in participating on a social network must (1) recognize the public nature of anything he/she posts and tailor such postings accordingly; (2) be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court; and (3) not answer questions about or seek to discuss a person's case, or answer legal advice. "The Committee urges all judges using social networks to, as a

¹² <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>.

baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology.”

f. Ohio: Ohio Bd. of Comm’s on Grievances and Discipline, Op. 2010-7 (2010).¹³

Question: May a judge be a “friend” on a social networking site with a lawyer who appears as counsel in a case before the judge?

Answer: “A judge may be a ‘friend’ on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge’s participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct.”

(Ethical considerations mentioned in this opinion are set out throughout this discussion.)

3. Ethical Violation found re Judicial Use of Social Networking

Public Reprimand of B. Carlton Terry, Jr., N.C. Judicial Standards Comm’n Inquiry No. 08-234, a judge was reprimanded for his use of Facebook, as follows:

From September 9, 2008 through September 12, 2008, Judge Terry presided over a child custody and support hearing.

On September 9, 2008, the judge and the attorney for the defendant talked about Facebook in chambers. This discussion was in the presence of the Plaintiff’s lawyer, but she stated that she did not know what Facebook was and that she did not have time for it.

Judge Terry and the defendant’s attorneys designated each other as “friends” on their Facebook accounts.

On September 9, 2008, Judge Terry Googled the plaintiff about her photography business, stating that he wanted to see examples of her

¹³ http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/op_10-007.doc

work. He viewed samples of photographs she had taken and also found numerous poems that he enjoyed.

In another in-chambers hearing on September 10, 2008, the lawyers and Judge Terry reviewed prior testimony suggesting that one of the parties had been having an affair. The judge stated he believed the allegations against the defendant but that it did not make any difference. The defendant's attorney (the judge's new Facebook friend, stated "I will have to see if I can prove a negative").

During the evening of September 10, 2008, Judge Terry checked the defendant's attorney's Facebook account. The attorney had posted "how do I prove a negative".

Judge Terry posted on his Facebook account that he had "two good parents to choose from" and "Terry feels that he will be back in court", referring to the case not being settled.

The defendant's attorney then posted on his Facebook page "I have a wise Judge".

The next day, September 11, 2008, Judge Terry told the plaintiff's attorney about the September 10, 2008 exchanges on Facebook between the defendant's attorney and himself.

On September 11, 2008, Judge Terry wrote on his Facebook page that he was in his last day of trial. The defendant's attorney wrote "I hope I'm in my last day of trial", to which Judge Terry responded with the post "you are in your last day of trial".

On September 12, 2008, prior to announcing his findings in the case, the judge recited a poem, to which he had made minor changes, that he found on the plaintiff's web site.

Judge Terry disclosed to the parties that he had viewed the plaintiff's web site and quoted a poem he found thereon only after the hearing had concluded and he had orally entered his order.

The North Carolina Judicial Standards Commission found that (1) Judge Terry had ex parte communications with counsel for a party in a matter

being tried before him and (2) he was influenced by information he independently gather by viewing a party's web site while the hearing was ongoing, without offering or entering the contents of the web site:

"Judge Terry's actions ... evidence a disregard of the principles of conduct embodied in the North Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the Court (Canon 3A(4)). Judge Terry's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

4. Application: state advisory opinions (above) to Model Code of Judicial Conduct.

CANON 1: A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

RULE 1.1 Compliance with the Law. A judge shall comply with the law, including the Code of Judicial Conduct.

RULE 1.2 Promoting Confidence in the Judiciary. A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Ohio Ethics Opinion. "A judge must act at all times 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. It should go without saying that upholding the law is a key component of maintaining the dignity of the office, displaying anything to the contrary on a social networking

site is imprudent and improper.”¹⁴

Kentucky Ethics Opinion. “[T]he Committee is compelled to note that, as with any public media, social networking sites are fraught with peril for judges, and [] this opinion should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public.... Thus, pictures and commentary posted on sites which might be of questionable taste, but otherwise acceptable for members of the general public, may be inappropriate for judges.”

RULE 1.3 Avoiding Abuse of the Prestige of Judicial Office. A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

New York ethics opinion: “The judge should also be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge’s court through a social network. In some ways, this is no different from adding the person’s contact information into the judge’s Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge’s friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a “close social relationship” requiring disclosure and/or recusal...”

Ohio Ethics Opinion. “A judge must not foster social networking interactions with individuals or organizations if such communications will erode confidence in the independence of judicial decision making. [A] judge must not convey the impression that any person or organization is in a position to influence the judge; and must not permit others to convey that impression. For example, frequent and specific social networking communications with advocacy groups interested in matters before

¹⁴ *Id.*

the court may convey such impression of external influence.”¹⁵

CANON 2: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

RULE 2.1 Giving Precedence to the Duties of Judicial Office. The duties of judicial office, as prescribed by law, shall take precedence over all of a judge’s personal and extrajudicial activities.

RULE 2.2 Impartiality and Fairness. A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

RULE 2.3 Bias, Prejudice, and Harassment. * * *

RULE 2.4 External Influences on Judicial Conduct.

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

Split on question of “friending” lawyers who appear before you:
Florida advisory opinion vs. Kentucky/New York/Ohio (see p. 20-25).

RULES 2.5 – 2.8 * * *

RULE 2.9 Ex Parte Communications.

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

¹⁵ *Id.*

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

Kentucky Ethics Opinion: "Judges are generally prohibited from engaging in any ex parte communications with attorneys and their clients... A North Carolina judge was publicly reprimanded for conducting independent research on a party appearing before him and for engaging in ex parte communications, through Facebook, with the other party's attorney. *Public Reprimand of B. Carlton Terry, Jr.,*

N.C. Judicial Standards Comm'n Inquiry No. 08-234."

(B) If a judge inadvertently receives an unauthorized *ex parte* communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

RULE 2.10 Judicial Statements on Pending and Impending Cases.

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

Ohio Ethics Opinion. "A judge should not make comments on a social networking site about any matters pending before the judge—not to a party, not to a counsel for a party, not to anyone. As required by Jud. Cond. Rule 2.9(A), a judge must avoid initiating, receiving, permitting, or considering *ex parte* communications. Even though Jud. Cond. Rule 2.9(A)(1) allows "[w]hen circumstances require it, an *ex parte* communication for scheduling, administrative, or emergency purposes, that does not address substantive matters or issues on the merits . . . provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication," it would be prudent to avoid any such job related communications on a social networking site as it increases the chance of improper *ex parte* exchanges. If a judge receives an *ex*

parte communication, the judge should reveal it on the record to the parties and their attorneys.”¹⁶

Kentucky Ethics Opinion. “While a proceeding is pending or impending in any court, judges are prohibited from making “any public comment that might reasonably be expected to affect its outcome or impair its fairness.... Judges, therefore, must be careful that any comments they may make on a social networking site do not violate these prohibitions. While social networking sites may have an aura of private, one-on-one conversation, they are much more public than off-line conversations, and statements once made in that medium may never go away.”

RULE 2.11 Disqualification.

(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

- (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
- (b) acting as a lawyer in the proceeding;
- (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
- (d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, domestic partner, parent, or child, or any other member of the judge’s family residing in the judge’s

¹⁶ *Id.*

household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [\$(insert amount)] for an individual or [\$(insert amount)] for an entity] [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether

to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

CANON 3: A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

RULE 3.1 Extrajudicial Activities in General.

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;
- (D) engage in conduct that would appear to a reasonable person to be coercive; or
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

RULE 3.6 Affiliation with Discriminatory Organizations.

- (A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

5. Discussion Scenarios – Judge participation in social media:

Consider, with respect to each:

- Constitutional concerns?
 - Rules of Evidence?
 - Ethical considerations?
1. Judge establishes Facebook page, authorizes attorneys appearing before him/her as "Friends". Majority of existing opinions accept if no violation of Code of Judicial Conduct occurs in those activities.
 - a. Permutation: Judge establishes Facebook page, authorizes law enforcement officers and employees of the judge's office as "Friends"
 - b. Permutation: Judge establishes Facebook page, authorizes attorneys appearing before him/her as "friend", refers to pending case in posting to his/her page.
 - c. Permutation: Judge establishes Facebook page, authorizes attorneys appearing before him/her as "friend", checks attorney's Facebook page in response to claim that continuance is needed because of a death in the attorney's family.
 2. Judge looks at witness's online criminal record during pendency of trial.
 - a. Permutation: Judge looks at party's Facebook page during trial.
 3. Judge reads blogs regarding the facts of a case pending before him during pretrial motion stage, personally recognizes and congratulates a particular blog author after a court proceeding for the fairness blogger has shown in his writings on case.

F. JURORS' USE OF THE INTERNET

1. The Problem-Fair and Impartial Trial?

"The theory of our [legal] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)(cited in "A Fair Trial: Jurors Use of Electronic Devices & the Internet," A Best Practices Paper prepared by the American Bar Association Judicial Division National Conference of State Trial Judges, 2010).

2. Cat's Out of the Bag... Now what?

a. Declare a "Google Mistrial"?

- i. Steps to take: (*U.S. v. Wheaton*, 517 F.3d 350 (6th Cir. 2008- Juror's computer used to listen to recording from evidence and look at mapping software):

- A. Alert counsel immediately;
- B. Inquire with Juror about extraneous information;
- C. Inquire with entire jury if extraneous information impacted deliberations;
- D. Mistrial or further Instructions?

ii. Juror Misconduct ≠ Prejudice

b. If Mistrial called-Double Jeopardy impact?

i. Manifest necessity

- A. *People v. Lett*, 466 Mich. 206, 644 N.W.2d 743 (Mich. 2002)-Hung jury
- B. Not if caused by Defendant
- C. Juror Misconduct?

3. Extraneous Information

a. Not a Recent Problem

Juries have always had access to:

- i. Newspapers/radios,
- ii. friends, and
- iii. the ability to view the scene.

b. But now Jurors are researching information **DURING** jury selection, presentation of evidence and deliberations.

Since 1990 at least 90 verdicts challenged by juror misconduct using the internet. More than half in the last 2 years. New trials or verdicts overturned in 28 cases.¹⁷

- i. Jurors' used the internet to "Google" terms "first degree murder Arizona" and "premeditation." Court reversed finding that the state did not prove beyond a reasonable doubt that the jurors' misconduct did not taint the convictions. *State v. Aguilar*, 224 Ariz. 299, 230 P. 3d 358 (2010).
- ii. Jurors looked up truck driver's driving record during deliberations. No new trial necessary because did not cause probable injury (juror said in her investigation did not see the improper information, it did not affect her decision, and she did not pass the information along to other jurors). *Sharpless v. Sim*, 209 S.W.3d 825 (Tex. App. Dallas 2006).
- iii. Rebuttable presumption of prejudice exists in criminal trials when jurors exposed to extraneous information. *U.S. v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009).
- iv. Other Examples of Jurors Using Internet to Research:
 - i. \$4.3 million employment discrimination verdict overturned when discovered that jury had researched employer's annual earnings. *Sheffield v. Goodyear Tire & Rubber Co.*, 151 Wash. App. 1052, 2009 WL 2586619 (Div. I 2009).

¹⁷ "As Jurors go online, U.S. trials go off track." By Brian Grow, Reuters. December 8, 2010.

- ii. One juror’s researching attorneys involved in case found to be insufficient misconduct to set aside verdict. *Rodriguez v. FedEx Freight East, Inc.*, 2008 WL 4155677 (E.D. Mich. 2008).
- iii. New trial awarded in negligent seatbelt design suit when juror researched seatbelt manufacturer’s home page and it did not reveal any lawsuits. *Russo v. Takata Corp.*, 774 N.W.2d 441 (S.D. 2009).

c. Jurors Disseminating Information about the trial during the trial

i. Tweeting

- 1. State Senator found guilty of mail and wire fraud in scheme to defraud the state. He used his senate paid staff to do personal (cleaning his mansion once a week) and political (organizing political fundraisers) work.

Juror was watching TV and saw a story about his postings on Facebook and Twitter. He immediately deleted them all. After an *in camera* hearing the judge did not remove Juror.

Found to be innocuous and therefore not prejudicial. *U.S. v. Fumo*, 639 F.Supp. 2d 544, (E.D. Pa.2009).

- 2. Weatherman Al Roker, after reporting for grand jury duty, commenced “tweeting” and posting photographs relating to the process.¹⁸
- 3. A potential juror in Los Angels Superior Court tweets during jury selection:

“Guilty! He’s guilty! I can tell!”¹⁹

¹⁸ http://www.iphonejd.com/iphone_id/2009/06/al-roker-iphone-jury-duty-experience.html.
¹⁹ “As Jurors Go Online, U.S. Trials go off track.” By Brian Grow, Reuters, December 8, 2010.

ii. Blogging

1. Juror on criminal case blogged during trial the following entries:
 - Serving on this case just goes to show how opinionated I am. Perhaps I'm more of a leader than I'm willing to give my self credit for. But, I dare anyone to cross me on the verdict.
 - [W]ell . . . I can't talk about the case dammit, and that's highly frustrating.
 - (After verdict returned) Well, it figures. Had a horrible time not being able to talk about the case. But now after finally having deliberations, it's like bleh, I don't want to talk about this shit anymore . . . Basically, I feel like I was the only [person] playing devil's advocate and presuming this guy was innocent.

No misconduct found. *State v. Goehring*, 2007 Ohio 5886, 2007 WL 3227386.

iii. Facebook posts

1. Juror Number One (foreperson) posted on his Facebook page that he was "still" on jury duty. Later he posted that he was "bored" during the presentation of cell phone record evidence. Juror Number Five became "friends" with Juror Number one on Facebook. After guilty verdict Juror Number Five contacted Defense Counsel and stated that Juror Number One had posted "comments about the evidence during trial" on his Facebook page. Fighting dispute over whether Facebook could be required to produce postings pursuant to a subpoena. *Juror Number One v. State of California*, 2011 WL 567356 (E.D. Cal. 2011).

iv. OT -Texting Info to sequestered witness

4. How to Deal with Smart Phones in the hands of Not So Smart Jurors?

- a. Ban phones? U.S. District Court for the Western District of Louisiana bans cell phones from the courthouse.
- b. Require Phones be turned off? New Jersey state courts allow cell phones but require they be turned off.
- c. Confiscate phones?
- d. Other approaches used?

5. A Proactive Approach To Juror Misconduct

- a. Federal Proposed Model Jury Instruction Attached
- b. Develop Best Practices
 - i. Before Jury Selection Process
 - ii. During Jury Selection Process
 - iii. Preliminary Instructions
 - iv. Final Instructions
 - v. Collect devices
 - vi. Sequestration

6. Punish the misbehaving juror?

- a. Fine

Detroit Judge removed a Juror and ordered the Juror to pay a \$250 fine and write a 5 page essay after posing on Facebook that it was "gonna be fun to tell the defendant they're Guilty."

- b. Jail

Example from England

- c. Suggestions

G. JUDICIAL USE OF THE INTERNET IN CONTESTED CAMPAIGNS

1. Facebook

- a. Personal Settings
- b. Friends or No Friends?

2. Website

- a. Fundraising Issues
 1. Public Reprimand of B. Carlton Terry, Jr., District Court Judge, Judicial District 22.
- b. Can supporters list themselves as “fans” on website

3. Digital Advertising

- a. E-mails

Can a judicial candidate send out a message soliciting donations?

Candidate reprimanded for sending out an email soliciting donations written in the first person and concluded with the judge’s first name in the typed signature line. *In re Krouse*, Stipulation, Agreement, and Order of Reprimand (Washington Commission on Judicial Conduct May 5, 2005).

- b. Phone Text Messages

“If you are truly my friend then you would cut a check to the campaign! If you do not then its time I checked you. Either you are with me or against me!” *Inquiry Concerning Davis*, Order (Kansas Commission on Judicial Qualifications, July 18, 2008).

4. Judicial Activities and Free Speech

- a. U.S. Supreme Court struck down provisions of the Minnesota Canons of Judicial Conduct prohibiting candidates from announcing their views on disputed legal or political issues. The Court held that, “[w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.” Left unanswered was whether a similar pledge or promise of particular results in particular cases is constitutional. *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528 (2002).
- b. The prohibition on candidates making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court has survived First Amendment challenges before and after the *White* decision:
- c. Judges Challenging State Restrictions on Speech:
 - i. Two Indiana judges joined with Indiana Right to Life, Inc. challenged Indiana Code of Judicial Conduct’s commits, recusal, partisan-activities, and solicitation clauses. *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010)(cert. denied May 2, 2011).
 - ii. Challenge on free speech grounds to Minnesota Code of Judicial Conduct’s clauses prohibiting endorsement, personal solicitation, and solicitation for a political organization or candidate. Eighth Circuit reversed summary judgment ruling finding all challenged clauses failed strict scrutiny test. *Wersal v. Sexton*, 613 F.3d 84 (8th Cir. 2010).
 - iii. Wisconsin judicial canons prohibiting judges or judicial candidates from being members of political party, from publicly endorsing or speaking on behalf of a political party’s candidates or platforms, and from personally soliciting or accepting campaign contributions were struck down. On appeal Seventh Circuit upheld public endorsement and personal solicitation bans but struck down the party affiliation ban. *Siefert v. Alexander*, 619 F.3d 776 (7th Cir. 2010).

d. ABA Model Code of Judicial Conduct revised in 2003 concerning restrictions on campaign speech:

- A judicial candidate shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.
- A judicial candidate shall not make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.
- A judicial candidate shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the performance of the adjudicative duties of the office.
- A judicial candidate shall not knowingly misrepresent the identity, qualifications, present position, or other facts concerning the candidate or an opponent.
- A judicial candidate shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary.

Commentary advises, “a candidate should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her person views.”²⁰

e. Campaign Speech Held to Violate the Code:

- Promises to stop plea bargains (Letter from *Arkansas Judicial Discipline & Disability Commission to Judge Francis Donovan* November 16, 1990))
- Pledges to “stop suspending sentences” and to “stop putting criminals on probation” (*In the Matter of Haan*, 676 N.E.2d 740 (Indiana 1997).
- Promises not to “experiment with ‘alternative sentencing’” (*In the Matter of Polito*, Determination

²⁰ http://www.ajs.org/ethics/eth_ABA_commission.asp

(New York Commission on Judicial Conduct
December 23, 1998))

- Promises to be “a tough judge that supports the death penalty and isn’t afraid to use it” (*In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 4221 (Commission of Five Judges Appointed by the Ohio Supreme Court 1999))
- States that he has a “special placed called jail” for “thieves, burglars, stick-up artists, spouse beaters and repeat drunk drivers,” and uses the campaign slogan, “Do the Crime – Do the Time” (*In the Matter of Maislin, Determination* (New York State Commission on Judicial Conduct August 7, 1998))
- States that the candidate would be tough on drunk drivers (*In re Kaiser*, 759 P.2d 392 (Washington 1988))
- Misrepresents that her opponent, the incumbent, had not revoked a defendant’s bond at an emergency bond hearing (*Inquiry Concerning Kinsey*, 842 So.2d 77 (Florida 2003), cert. denied, 72 USLW 3007 (October 6, 2003))
- States intended sentences for DUI offenders (*In re: Complaint Campaign States Made by Candidate During TV Interview*, Public Decision 00-3 (Nevada Standing Committee on Judicial Ethics and Election Practices August 29, 2000).²¹

5. Money Changes Everything

- a. Massey Coal’s CEO created a non-profit corporation through which he directed \$3 million into the 2004 West Virginia Supreme Court race for ads that supported one candidate. That candidate wone and became the Chief Justice. Caperton, CEO of Harmon Mining, requested the Chief Justice recuse himself due to Massey’s expenditures. Chief Justice declined. U.S. Supreme Court held that the level of campaign funding was so “extreme” that it posed a threat to the due process rights of Caperton/Harman Mining and

²¹ “Effective Judicial Campaign Conduct Committees: A How-To Handbook.” National Ad Hoc Advisory Committee on Judicial Campaign Conduct, pp. 45-47. Published by the National Center for State Courts, 2004.

directed the Chief Justice to recuse himself. *Caperton v. Massey*, 129 S.Ct. 2252 (2009).

- b. Supreme Court held unconstitutional the limitations placed on corporate campaign spending. *Citizens United v. FEC*, 558 U.S. _____, 130 S.Ct. 876 (2010).

State Supreme Court Fundraising by Biennium

1989-1990	\$5.9 million
1991-1992	\$9.5 million
1993-1994	\$20.7 million
1995-1996	\$21.3 million
1997-1998	\$27.3 million
1999-2000	\$45.99 million
2001-2002	\$29.7 million
2003-2004	\$46.1 million
2005-2006	\$33.2 million
2007-2008	\$45.6 million ²²

6. Judicial Campaign Ethics Handbook, 2010 Edition, New York State Advisory Committee on Judicial Ethics.

- a. Judicial candidates should not include electronic links on their websites to the websites of partisan political parties, organizations or other campaigns.
- b. The candidate may include a link on their campaign website to newspaper articles about themselves, providing that nothing in the article is misleading and provided the article maintains the dignity of the judicial office.

²² “The New Politics of Judicial Elections 2000-2009, Decade of Change.” Brennan Center for Justice. Published August 2010.

ATTACHMENTS

OPINION STUDIES

<http://www.michbar.org/opinions/ethics/mcjc.cfm>

The Michigan Code of Judicial Conduct [MCJC] became effective October 1, 1974; the opinions listed address conduct occurring after that date. Amendments to the Michigan Code of Judicial Conduct addressing bias in the courts became effective October 1, 1993. For rules and opinions addressing conduct occurring prior to October 1, 1974, see the former Michigan Canons of Judicial Ethics. This table lists those ethics opinions that cite the respective provision of the Michigan Code of Judicial Conduct.

<http://www.michbar.org/opinions/ethics/ethicsindex2.cfm#23>

OPINIONS INTERPRETING THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

“Friends”, back when that meant something different JI-44 (November 1, 1991)

SYLLABUS: A judge's "personal acquaintance" with an advocate or a party, without more information indicating the nature of the acquaintance which gives rise to a presumption of bias, is insufficient grounds for a judge's automatic recusal. Where a judge is concerned about the appearance of bias because of a personal acquaintance with a party or advocate, the judge should advise the parties and their lawyers of the judge's concerns and recuse unless asked to proceed.

No ex parte communications directly or indirectly JI-134 (November 20, 2006)

SYLLABUS: A judge has a duty not to initiate or permit ex parte communications with the judge directly or through court personnel. In seeking not to permit ex parte communications through court personnel, a judge should instruct his or her personnel regarding the requirements of MCJC 3A(4) and the need to avoid improper ex parte communications.

“I just happened to come upon a discussion of issues *just like those before me*”
JI-84 (March 7, 1994)

SYLLABUS: A judge who attends a program or seminar at which the faculty argues issues which are nearly identical to those in a case pending before the judge is not required to advise the parties and their counsel in the pending case that the judge attended the seminar.

“Don’t ex parte me with talk of possible recusal!”
JI-83 (February 25, 1994)

SYLLABUS: A lawyer may not contact a judge about the possible recusal of the judge outside the presence of opposing counsel.

“You ought to be in pictures”
CI 816 (August 9, 1982)

SYLLABUS: It is not unethical for a judge to appear in a driver education videotape filmed in the judge's courtroom and intended for use in driver educational courses by law enforcement officers, provided there is no suggestion in the setting or the dialogue that would cast doubt upon the judge's capacity to decide impartially any issue that may come before the judge.

**Model Jury Instruction Recommended To Deter Juror Use Of Electronic
Communication Technologies During Trial Published on Federal Evidence
Review (<http://federalevidence.com>)**

Before Trial:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom. Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

RULE 4.1

Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

- (1) act as a leader in, or hold an office in, a political organization;
- (2) make speeches on behalf of a political organization;
- (3) publicly endorse or oppose a candidate for any public office;
- (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
- (5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
- (6) publicly identify himself or herself as a candidate of a political organization;
- (7) seek, accept, or use endorsements from a political organization;
- (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;
- (9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;
- (10) use court staff, facilities, or other court resources in a campaign for judicial office;
- (11) knowingly, or with reckless disregard for the truth, make any false or misleading statement;
- (12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
- (13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

RULE 4.2

Political and Campaign Activities of Judicial Candidates in Public Elections

(A) A judicial candidate in a partisan, nonpartisan, or retention public election shall:

- (1) act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary;**
- (2) comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations of this jurisdiction;**
- (3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination; and**
- (4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1.**

(B) A candidate for elective judicial office may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general or retention election:

- (1) establish a campaign committee pursuant to the provisions of Rule 4.4;**
- (2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;**
- (3) publicly endorse or oppose candidates for the same judicial office for which he or she is running;**
- (4) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;**
- (5) seek, accept, or use endorsements from any person or organization other than a partisan political organization; and**
- (6) contribute to a political organization or candidate for public office, but not more than \$[insert amount] to any one organization or candidate.**

(C) A judicial candidate in a partisan public election may, unless prohibited by law, and not earlier than [insert amount of time] before the first applicable primary election, caucus, or general election:

- (1) identify himself or herself as a candidate of a political organization; and**
- (2) seek, accept, and use endorsements of a political organization.**

RULE 4.3

Activities of Candidates for Appointive Judicial Office

A candidate for appointment to judicial office may:

- (A) communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency; and
- (B) seek endorsements for the appointment from any person or organization other than a partisan political organization.

RULE 4.4

Campaign Committees

(A) A judicial candidate subject to public election may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.

(B) A judicial candidate subject to public election shall direct his or her campaign committee:

- (1) to solicit and accept only such campaign contributions as are reasonable, in any event not to exceed, in the aggregate, \$[insert amount] from any individual or \$[insert amount] from any entity or organization;
- (2) not to solicit or accept contributions for a candidate's current campaign more than [insert amount of time] before the applicable primary election, caucus, or general or retention election, nor more than [insert number] days after the last election in which the candidate participated; and
- (3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions, and to file with [name of appropriate regulatory authority] a report stating the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding \$[insert amount]. The report must be filed within [insert number] days following an election, or within such other period as is provided by law.

RULE 4.5

Activities of Judges Who Become Candidates for Nonjudicial Office

(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law to continue to hold judicial office.

(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

CODE OF FAIR CAMPAIGN PRACTICES

There are basic principles of decency, honesty, and fair play that every candidate and political committee in this state has a moral obligation to observe and uphold, in order that, after vigorously contested but fairly conducted campaigns, our citizens may exercise their constitutional rights to a free and untrammelled choice and the will of the people may be fully and clearly expressed on the issues.

THEREFORE:

- (1) I will conduct the campaign openly and publicly and limit attacks on my opponent to legitimate challenges to my opponent's record and stated positions on issues.
- (2) I will not use or permit the use of character defamation, whispering campaigns, libel, slander, or scurrilous attacks on any candidate or the candidate's personal or family life.
- (3) I will not use or permit any appeal to negative prejudice based on race, sex, religion, or national origin.
- (4) I will not use campaign material of any sort that misrepresents, distorts, or otherwise falsifies the facts, nor will I use malicious or unfounded accusations that aim at creating or exploiting doubts, without justification, as to the personal integrity or patriotism of my opponent.
- (5) I will not undertake or condone any dishonest or unethical practice that tends to corrupt or undermine our system of free elections or that hampers or prevents the full and free expression of the will of the voters, including any activity aimed at intimidating voters or discouraging them from voting.
- (6) I will defend and uphold the right of every qualified voter to full and equal participation in the electoral process, and will not engage in any activity aimed at intimidating voters or discouraging them from voting.
- (7) I will immediately and publicly repudiate methods and tactics that may come from others that I have pledged not to use or condone. I shall take firm action against any subordinate who violates any provision of this code or the laws governing elections.

I, the undersigned, candidate for election to public office in the State of Texas or campaign treasurer of a political committee, hereby voluntarily endorse, subscribe to, and solemnly pledge myself to conduct the campaign in accordance with the above principles and practices.

Signature

Date

Resources:

Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case? David H. Tennant and Laurie M. Seal, 16 No. 2 Prof. Law.2 (Professional Lawyer 2005).

The Curious Appellate Judge: Ethical Limits on Independent Research, Elizabeth G. Thornburg, 28 Rev. Litig. 131 (Review of Litigation, Fall 2008).

To Friend or Not to Friend?: Judges, Lawyers and Social Media, Jon. K. Guice and Courtney T. Joiner, http://www.lawd.uscourts.gov/Atty-Bar_Info/CLE_SECRETS/CLE_SDOC5221/SDOC5221.pdf

A Fair Trial: Jurors Use of Electronic Devices & the Internet, A Best Practices Paper prepared by the America Bar Association Judicial Division National Conference of State Trial Judges

Prejudicial Effect of Juror Misconduct Arising from Internet Usage, George L. Blum, J.D. 48 A.L.R. 135 (2009).

Should Jurors Use the Internet? The National Law Review (www.natlawreview.com)

"Effective Judicial Campaign Conduct Committees: A How-To Handbook." National Ad Hoc Advisory Committee on Judicial Campaign Conduct. Published by the National Center for State Courts, 2004. www.judicialcampaignconduct.org

Judicial Campaign Ethics Handbook, 2010 Edition. New York State Advisory Committee on Judicial Ethics.