

**ELECTRONIC
COMMUNICATION
& THE ETHICAL
COURT EMPLOYEE**

Use of Electronic Communication

- Twitter - 2 billion tweets a month
 - Facebook - 500 million active users
 - U.S. 13 – 17 year old - sends/receives 3,339 text messages per month
 - Non-federal judges - 40% use social media sites.
-

Use by Courts

- Juror communication
 - Public outreach
 - Emergency notifications
 - Video arraignments
 - Televised oral arguments
 - Online instructional videos
-

Use by Courts

- MICHIGAN: To monitor offenders on probation
 - TEXAS: Monitor juveniles for inappropriate conduct by reviewing Facebook posts
 - Courts admitting evidence pulled from social networking sites
-

Keep Ethical Duties in Mind

- Requirements and restrictions in the real world follow us into virtual world.
 - Always keep your ethical duties in mind when engaging in any online activity.
 - Staff: the potential for ethical problems arising with your employees needs to be addressed as well.
 - Supervising judges who ignore the ethical challenges of electronic communication do so at their own risk.
-

Forms of Electronic Communication

- Email & Text Messaging
 - Chat Rooms
 - Video Sharing (YouTube)
 - Social/Professional Networks
 - (Facebook, LinkedIn)
 - Blogs & Microblogs (Twitter)
-

General Guidelines for Online Activity

- Understand what you are doing before you do it.
 - Example:
 - Website to share documents/photos with friends and family.
 - Created an electronic link between the internet and the files on his personal computer.
 - The judge submitted a video of himself bungee jumping to a website.
 - Instead of posting a copy of the video, the website posted a link to the judge's video file on his home server.
 - Once someone clicked on that link, they had access to the judge's private files.
 - The judge had no idea his personal website and submission of the video created access to his personal files.
-

General Guidelines for Online Activity

- Online Activity is NOT private
 - Example:
 - Lawyer sent law partner to court requesting a continuance of a trial claiming she was sick.
 - Lawyer was Facebook "friends" with the judge's law clerk.
 - Judge saw photos the lawyer had posted from the night before drinking at a nightclub.
 - Request for continuance DENIED and the law partner had to try case that morning.
-

General Guidelines for Online Activity

- Set policies for you and your staff that separate your personal and professional online activity.
-

General Guidelines for Online Activity

- Remember where you work. Whatever you do online also reflects on your profession.
-

GENERAL GUIDELINES FOR EMAILS/TEXTING/INSTANT MESSAGING

- Example:
 - Law clerk's friend is assistant city attorney, scheduled to appear before the judge.
 - Law clerk sent email to friend advising how friend should argue the case based on the judge's leanings.
 - Law clerk concluded email as follows:

"This message will self destruct in two hours."
-

GENERAL GUIDELINES FOR EMAILS/TEXTING/INSTANT MESSAGING

- A. Always consider the ethical implications.
 - B. Remember non-verbal indicators of emotion not present.
 - C. Think before you Send.
 - D. Written email usage policies .
-

GENERAL GUIDELINES FOR EMAILS/TEXTING/INSTANT MESSAGING

- E. Email unto others as you would have them email unto you.
 - F. Don't use office email for personal use.
 - G. Don't get personal in case-related emails.
 - H. Don't lie.
-

GENERAL GUIDELINES FOR EMAILS/TEXTING/INSTANT MESSAGING

- I. Don't be mean, angry, sarcastic, condescending.
 - J. Beware of "Reply All".
 - K. Don't discuss highly sensitive matters in email.
 - L. Make conscious choices about whether to relay information by email or in person.
-

GENERAL GUIDELINES FOR EMAILS/TEXTING/INSTANT MESSAGING

- M. Write an email as if it were a letter.
 - N. Remember where you work.
 - O. No jokes, vacation photos, gossip, chain letters, prayers.
 - P. Don't put anything in an email that you would not want published in the newspaper.
-

GENERAL GUIDELINES FOR EMAILS/TEXTING/INSTANT MESSAGING

- Q. Change your settings so that email addresses won't automatically fill in as you type.
 - R. Keep your email password a secret.
 - S. Remember that email is permanent, even if you delete it.
 - T. Beware of Instant Messaging.
-

INTEGRITY / APPEARANCE OF IMPROPRIETY

- Canons 1 and 2:

A judge shall uphold the integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

- Canon 3:

A judge shall perform the duties of judicial office impartially and diligently.

INTEGRITY / APPEARANCE OF IMPROPRIETY

- [Canon comments] :
 - Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.
 - A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and a judge must accept the restrictions imposed by the Code of Judicial Conduct.
-

INTEGRITY / APPEARANCE OF IMPROPRIETY

- Social Networking:
 - A judge should not post pictures or commentary that may be of questionable taste
 - Reflects poorly on the judiciary
 - Judges held to higher standard
-

EX PARTE COMMUNICATIONS

- Canon 3B(7)

A judge shall accord to every person who has a legal interest in a proceeding the right to be heard according to law. 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.

EX PARTE COMMUNICATIONS

- Email:
 - DSS case – Judge sent email to state attorney:
“I am considering summarily rejecting the father’s requests. Do you want me to let the father’s attorney have a hearing on this or do we cut him off and run the risk of reversal on appeal? I say screw the father and let’s cut his attorney off without a hearing OK? By the way, this will self-destruct in five seconds”
 - Lawyer responded by email that he did not feel comfortable with the ex-parte discussion.
 - Judge’s reply: “Chicken.”
-

EX PARTE COMMUNICATIONS

- Social Networking: Whitley vs. Whitley
 - Judge and Defense Counsel became Facebook friends
 - Judge and Defense counsel began discussing case on Facebook
 - Judge googled wife's website and recited poem from website
 - Order vacated, new trial was ordered.
 - Both have cancelled their Facebook accounts
 - Judge received public reprimand
-

INDEPENDENT RESEARCH

- Comments to Canon 3:

A judge must not independently investigate facts in a case and must consider only the evidence presented.

UNDUE INFLUENCE/CONFLICTS

- Canon 2B:

A judge shall not convey or permit others to convey the impression that they are in a special position to influence the judge.

- Canon 3E:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

- Canon 4:

A judge shall conduct outside activities to minimize the risk of conflict with official position.

UNDUE INFLUENCE/CONFLICTS

Who is in your network?

"Who is in your network?"

- Litigants or potential litigants?
 - Lawyers?
 - Staff & law clerks?
-

UNDUE INFLUENCE/CONFLICTS

Who is in your network?

Example:

- Lawyers complained because judge sending invitations to them to join his Facebook network
 - Claimed it put them in an awkward position:
 - Say “no” and risk offending the judge?
 - Say “yes” and expose their own online activity to him?
 - Saying “yes” also exposes their client’s cases to delay on appeal if opposing party raises the online relationship as bias or disqualification
 - Judge not sanctioned, but moved to another jurisdiction.
-

UNDUE INFLUENCE/CONFLICTS

Who is in your network?

- SOME GUIDANCE:
 - South Carolina: Advisory Committee on Standards of Judicial Conduct (Opinion No. 17-2009)
 - Florida: Judicial Ethics Advisory Committee (Opinion No. 2009-20)
 - Kentucky: Ethics Committee of the Judiciary (Formal Judicial Ethics Opinion JE-119)
 - Ohio: Disciplinary Opinion
-

UNDUE INFLUENCE/CONFLICTS

Who is in your network?

- South Carolina: Advisory Committee on Standards of Judicial Conduct (Opinion No. 17-2009)
 - Magistrate inquired about including law enforcement officers in online social network.
 - Advisory Committee: proper, as long as do not discuss anything related to the judge's judicial office.
 - Commission and the Court have not ruled on this issue.
-

UNDUE INFLUENCE/CONFLICTS

Who is in your network?

- Florida: Judicial Ethics Advisory Committee (Opinion No. 2009-20)
 - Judges cannot friend lawyers: conveys to others that they are in a special position to influence the judge.
 - Judge's staff can friend lawyers: as long as utilizes site outside of administrative responsibilities and independent of the judge, making no reference to the judge or the judge's office.
 - If the lawyer attempts an ex-parte communication, judge should direct the judicial assistant to immediately defriend the lawyer and immediately report it to the judge.
-

UNDUE INFLUENCE/CONFLICTS

Who is in your network?

- Kentucky: Ethics Committee of the Judiciary (Formal Judicial Ethics Opinion JE-119)
 - Judges may participate in online social networks, but cautioning judges about posting commentary, information, and photos that do not meet the high standards of conduct imposed on the judiciary and reminding them that they are the subject of constant public scrutiny.
 - Ohio: Disciplinary Opinion
 - Judges and staff can – with care – friend attorneys who appear before them in court.
-

Should You Friend Your Staff?

- South Carolina Advisory Opinion:
 - Not unethical to include court personnel in online social networks
-

Should You Friend Your Staff?

Questions to consider:

- A. Disclosure of confidential information
 - B. Over-accessibility
 - C. Blurring the line: employee or friend?
 - D. Professionalism
-

CONFIDENTIALITY

- Canon 3B(11):

A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

- Do not talk about court business

PROFESSIONALISM / CIVILITY

- Rule 502.1 (OATH):

Judge pledges to treat all persons who enter the courtroom with civility, fairness, and respect.

- Canon 3B(4):

A judge shall be patient, dignified, and courteous to those he deals with in an official capacity and shall require similar conduct of staff.

PROFESSIONALISM /CIVILITY

- Risk of incivility in electronic communication for several reasons:
 - Casual
 - Not private
 - Instant gratification
 - Eliminates tone and nonverbal communication
 - Available 24/7
-

PUBLIC COMMENT

- Canon 3B(9):

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.

PUBLIC COMMENT

- Example:
 - Ohio judge – over 80 posts on a newspaper website about inner workings of the court system and a number of judge’s high profile cases
 - One post criticizes a lawyer who appeared in judge’s court
 - One post criticizes jury verdict
 - Newspaper tracked the email address of the poster – judge’s personal AOL email account .
-

SUPERVISION OF EMPLOYEES

- Canon 2B: Improper Influence

A judge shall not allow[others] to influence the judge's judicial conduct or judgment. A judge shall not ... permit others to convey the impression that any person ... is in a position to influence the judge.

- Canon 3B(5): Bias, prejudice, harrassment

A judge shall not [permit court staff, court officials, and others subject to the judge's direction and control] to manifest bias or prejudice, or engage in harassment ...based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

SUPERVISION OF EMPLOYEES

- Canon 3B(4): Incivility

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

SUPERVISION OF EMPLOYEES

- Canon 3B COMMENT: Ex Parte Communications
 - A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) (ex parte communication) is not violated through law clerks or other personnel on the judge's staff.
-

SUPERVISION OF EMPLOYEES

- Canon 3C(1): Court time, court computers
A judge shall perform judicial and administrative duties competently and diligently.
 - [Comment]:
Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials ... cooperate with the judge to that end.
-

SUPERVISION OF EMPLOYEES

- Canon 3C(2): Fairness/Loyalty/Diligence

A judge shall require staff... 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.

Questions for Supervising Judge

- How big of a problem is use of electronic communication anyway?
 - What are the ethics and human resources issues that you have to address with the employee?
 - In some cases, what could you have done to prevent any ethical problems from happening in the first place?
-

SUPERVISION OF EMPLOYEES

Example #1

- A court employee is a member of LinkedIn. In her profile, she identifies her court employment with a Circuit Court Judge. Another LinkedIn member starts a discussion item about the merits of a particular legal argument on an issue that is likely to come before the judge. The court employee posts a comment that she supports the particular legal argument and she wishes that the judges would better adhere to the constitution in their decisions.

Ethical implications for the supervising judge?

SUPERVISION OF EMPLOYEES

Example #2

Attorneys had a status conference with Judge and indicated they were not ready to proceed to trial. After the status conference, Judge's law clerk used the court computer to comment on his personal Facebook page:

"To those lazy, whining attorneys who claim to be unprepared: We got a good laugh after you left, too bad your case will be called for trial anyway and then we can laugh at you some more."

Ethical implications for the supervising judge?

HOW TO AVOID ETHICAL PROBLEMS WITH EMPLOYEES

- Assert control
 - Develop Social Media/Acceptable Use Policy
 - Employees should know your ethical rules
 - Open door policy
 - Background checks
 - Consequences
 - IT Controls
-

THE END