

Answer Key for Judicial Ethics Quiz

Using Online Spaces

1. **I really love cat videos, my grandchildren, and seeing pictures of my “friends” from high school. Can I use social media?**

Answer: Yes. As of 2017, all jurisdictions that have commented on the topic agree that judges can use social media. However, social media platforms include a variety of different tools and functions. For example, public postings can cause concern over propriety and online friendships can spark questions about impartiality. Judges are expected to behave in accordance with their jurisdiction’s Rules and/or Codes of Judicial Conduct, and it is important to consider the function and tools within each social media platform. Although social media is widely seen as acceptable for judges, it is important to maintain the dignity and prestige of the office in every aspect of life including online. See Rule 1.3 of ABA Model Code of Judicial Conduct.

2. **In addition to sitting on the bench, I teach a law class and do some other smaller projects. LinkedIn helps me stay connected. Can I use professional networking sites like LinkedIn?**

Answer: Potentially. Because LinkedIn is generally focused on professional relationships, it may present fewer challenges than other social media platforms that focus on personal relationships. However, most jurisdictions have not specified an acceptable standard for determining whether judges can use all of LinkedIn’s different functions.

For instance, LinkedIn allows users to make “connections” with organizations. Organizational connections could create issues of impartiality per Rule 3.1 of ABA Model Code of Judicial Conduct and may, therefore, be inappropriate in some jurisdictions.

For a list of advisory opinions related to the topic, please see:

<http://justice.gov.mp/uploads/Citations to Judicial Ethics Advisory Opinions on Social Media.pdf>.

3. I live in a small community. I like to participate in community activities and share reviews on Yelp and TripAdvisor. Am I allowed to contribute to websites like Yelp and TripAdvisor?

Answer: Most likely, yes. However, judges should be cautious about what they share online. Rule 1.3 of ABA Model Code of Judicial Conduct states, “A judge shall not abuse the prestige of judicial office to advance the personal or economic interest of the judges or others, or allow others to do so.” In that vein, a New Mexico advisory committee on judicial ethics specifically mentions: “With Yelp, a judge may be inadvertently advancing the economic interests of a restaurant upon giving his or her review.” See National Center for State Courts, Judicial Conduct Reporter, Volume 39, No.2 at 9 (Spring 2017).

Neutrality and upholding the prestige of the office are primary ethical responsibilities; therefore, if an issue arises that is relevant to an online review, a judge could be required to comb through online reviews to divulge prior related online contributions.

4. I am looking for the love of my life and it seems that for most people that person lives online. Am I allowed to use dating sites?

Answer: Most likely, yes. Most judicial ethics codes encourage judges to take part in the online community because they do not want to isolate judges or make them appear like they are out-of-touch.

Ethics opinions that specifically address dating sites and judicial conduct are limited. Therefore, judges should be cautious when communicating romantic intentions with an individual that could be seen to influence their judicial conduct per Rule 2.4 of the ABA Model Code of Judicial Conduct. This may include, but is not limited to, attorneys that appear in their court, former or current litigants, or an employee of a company that may appear in their court in the near future.

Additionally, judges are public figures and online communications with unknown and untrusted individuals could provide opportunities for embarrassment or worse.

5. **I have a blog that reviews new tech and gadgets. I love sharing my opinions and ideas online. I have a thousand people who regularly read my blog. Am I allowed to blog?**

Answer: Most likely, yes. The public may see blogs as holding more weight than other social media platforms because they are open to the public and are often presented like opinion pages in a newspaper. Therefore, blogs may be a hotspot for litigants to question a judge’s bias or for the media to discredit a judge. For instance, in 2013, U.S. District Court Judge Richard G. Kopf was criticized for a single sentence within his blog. See Ashby Jones, Blogger, Federal Judge, Supreme Court Critic, The Wall Street Journal (Apr. 24, 2013) at <https://blogs.wsj.com/law/2013/04/24/blogger-federal-judge-supreme-court-critic/>.

Even if the blogs are created and maintained anonymously, judges should still be cautious about what they share and the possibility of the blog being connected to their professional position because, on the internet, true anonymity is not a guarantee.

Judges should also consider any implications that may arise from receiving income from advertisements on their blogs.

Case & Non-Case Related Communications

6. **I believe judges should be engaged in society, can I share my thoughts online about the news of the day?**

Answer: Most likely, yes. However, it is important to remember that many newsworthy issues may arise in cases that come before a judge. Judges should do their best to ensure public confidence in their independence, impartiality, integrity, and competence. See Preamble [2] of the ABA Model Code of Judicial Conduct.

7. **Can I privately share my thoughts online with my family and friends?**

Answer: Most likely, yes. However, judges should be cautious about what they privately share online because what a judge may perceive as private could still be accessed and shared. Online information—private or public—can impact perceptions of impartiality.

- 8. There is so much information available on Twitter. I swear Twitter knows about things before they even happen. Am I allowed to use Twitter or other social media to learn information about cases that I am involved with?**

Answer: Most likely, no. Rule 2.9(C) in the ABA’s Model Code of Judicial Conduct states that “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.” Online legal research is allowed, but independent fact-finding is almost always prohibited.

For more information related to this topic, please see: ABA, Independent Factual Research by Judges Via the Internet, Formal Opinion 478, (Dec. 8, 2017).

- 9. The internet includes accurate and inaccurate information. Sometimes I see incorrect information about my cases online. I am really worried that people will believe this incorrect information. Can I post something online to clarify the information about my cases?**

Answer: Most likely, no. Rule 3.5 of the ABA Model Code of Judicial Conduct states that “[A] judge shall not intentionally disclose or use non-public information acquired in a judicial capacity for any purpose unrelated to the judge’s judicial duties.” Non-public information has been defined to include information sealed by statute or court order or impounded or communicated in camera, and information offered in dependency cases or psychiatric reports. A correction online may also be perceived as legal advice, which is expressly prohibited by various ethics advisory committees.

- 10. Attorneys and litigants use online spaces to share their thoughts about cases and about my performance. Can I anonymously share my thoughts about my cases and performance?**

Answer: Most likely, no. Rule 2.10(B) of the ABA Model Code of Judicial Conduct states that “a judge shall not, 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. Judges should do their best to ensure public confidence in their independence, impartiality,

integrity, and competence.” See Preamble [2] of the ABA Model Code of Judicial Conduct.

Judges should also remember to be cautious about information shared online, even if done anonymously because information posted online has the potential of being accessed and shared.

Online Interactions with Attorney’s and Litigants

- 11. I currently work as a judge, but I have not always been a judge. I used to just be an attorney. For better or worse, some of my best friends are attorneys. Do I have to get rid of all of my friends online?**

Answer: Potentially. It may become an issue if the attorney appears before the judge. Currently, there is a clear split among several judicial ethics committees’ who have distributed opinions regarding ‘friending’ attorneys who may appear before a judge. While a minority of committees prohibit judges from ‘friending’ attorneys who may appear before them, a majority of committees simply tell judges to consider the nature and scope of the specific relationship.

As of 2017, only Connecticut, Massachusetts, and Oklahoma’s judicial ethics committees have adopted a bright-line rule that advises judges to not ‘friend’ any lawyer, who may appear before them, on Facebook or permit those lawyers to ‘friend’ the judge. See, e.g., Connecticut Informal Opinion 2013-6. This bright-line rule may apply equally to other forms of social media within these jurisdictions.

However, the majority of ethics committees (who have addressed the issue, as of 2017) take a softer approach to ‘friending’ attorneys who may appear before a judge. This majority includes California, Kentucky, Maryland, New Mexico, New York, Ohio, and Utah. These committees advise their judges to assess the nature and scope of the specific relationship. Judges should evaluate the nature and scope of online relationships, much like they would evaluate non-online relationships. It is important to consider if anything about that relationship would potentially impact partiality, in reality or in appearance.

- 12. I love playing games online. Before I was on the bench, I used to play online with an attorney who now appears before me. We are no longer friends online. Do I have to tell all litigants that I have previously communicated with an attorney on the case via social media or other electronic methods?**

Answer: Most likely, yes. Comment 5 to Rule 2.11 of the Model Code of Judicial Conduct says that "A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

- 13. I forgot that I was friends online with an attorney. That attorney just appeared before me in court. Do I have to recuse myself from the case?**

Answer: Most likely, no. Judicial ethics committees have advised that "disqualification is not necessarily required when an attorney with whom a judge has an online connection appears in a case, but that that connection is one factor a judge should consider in deciding whether her impartiality might reasonably be questioned." See National Center for State Courts, Judicial Conduct Reporter, Volume 39, No.1 at 17 (Spring 2017).

Relevant factors that judges must weigh to determine whether recusal is necessary include:

- The frequency of the judge's social media contacts and communications with the individual.
- The substance of the judge's social media contacts and communications with the individual.
- The scope of the social media friendship.
- The nature of the social networking page (for example, whether it is more personal or professional).
- The number of "friends" the judge has on the page.
- The judge's practice in deciding whom to "friend" (in other words, whether the judge is very exclusive or more inclusive when deciding whom to add).
- Whether the judge and the friend have frequent, personal contacts in real life, not just on-line.

Additionally, it is important to consider the following:

- The guideline for judicial recusal first asks judges to generally and realistically appraise psychological tendencies and human weaknesses. Then it asks judges to objectively assess whether their interest may pose a risk of bias that could threaten due process. See *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009).
- The United States Code says that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455 (2012).
- Florida’s Supreme Court in *Law Offices of Herssein & Herssein v. United Serv. Auto. Ass’n*, ruled that a judge was not disqualified if the judge was Facebook “friends” with an attorney appearing before him or her. 229 So.3d 408 (Nov. 15, 2018). Florida was the first state supreme court to comment on this issue.

14. I use social media and feel inclined to respond to all who reach out to me. Can I respond if a current or future litigant reaches out to me?

Answer: Most likely, no. Judges must do their best to avoid ex parte communications. Rule 2.9 of the ABA’s Model Code of Judicial Conduct precludes ex parte communications concerning a pending or impending matter. There are very few exceptions to this rule.

15. Must a judge recuse themselves if they receive a social media message from a victim’s first-degree relative that contains substantive discussion of the case?

Answer: No, but... according to *New York Advisory Opinion 2017-53*, it is necessary for the judge to disclose the ex parte communication to all parties. Recusal is not required and is within the judge’s discretion if a request is made.

Politics & Fundraising Online

16. We elect judges in my jurisdiction and it is impossible to get elected without an online presence. Am I allowed to engage in political activities online for my candidacy?

Answer: Yes, most advisory committees agree that judges can use social media as a tool to raise campaign funds and to provide information about their candidacy, but there are restrictions to those political activities.

One particularly notable restriction is outlined in Rule 4.1(A)(4) of the ABA Model Code of Judicial Conduct. This rule prohibits judicial candidates from using their personal social media pages to solicit funds. Judges may only use a designated campaign social media page maintained by their campaign committee to solicit funds.

Additionally, there are limitations for the social media pages that are maintained by the candidate's campaign committee. Specifically, they are advised to limit information to the judge's identity, qualifications, present position, or other facts that are relevant for voters to make an informed decision.

For a more complete list of restrictions, please refer to Rule 4.1 and 4.2 of the ABA Model Code of Judicial Conduct and local codes of judicial conduct.

17. I help to organize fundraising activities for a local non-profit. Can I set up a social media page called "Judge [Your name]'s fundraising page" in order to help raise funds?

Answer: Most likely, no. The ABA Code of Judicial Conduct highly encourages judges to engage in civic and charitable activities. However, judges are restricted from activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality per Rule 3.1(C). The Code has explicitly condemned personal solicitations for contributions to charitable organizations by judges per Rule 3.7(A)(2). Therefore, a social media page called "Judge [Your name]'s fundraising page" would likely be improper.

- 18. Can a judicial candidate establish a Facebook page to request that individuals sign a petition to permit the candidate to qualify without paying a fee otherwise required by law?**

Answer: Most likely, no. According to *Florida Advisory Opinion 2017-24*, a judge is not permitted to set up a Facebook account for that purpose, however a committee of responsible persons may do so as long it is clear that the Facebook page is not maintained by the candidate personally. This rule may be different across states.

- 19. Can a judge be removed from office for implying in emails and on Facebook that a judicial opponent is unfit because they worked as a defense attorney?**

Answer: No. A judge in Florida was removed from office for statements in e-mail and on Facebook stating, “Attorney [Name] has made a lot of money trying to free Palm Beach County’s worst criminals. Now he’s running for judge!” Inquiry Concerning Santino (Florida Supreme Court October 19, 2018).

- 20. Can somebody I work with, like my law clerk, help me set up a social media page to raise funds for a local non-profit organization?**

Answer: Most likely, no. If a law clerk helps to set-up the page, it may create the appearance that the judge is asking for money, which is deemed unethical by the ABA Model Code of Judicial Conduct per Rule 2.12. It may also appear like the law clerk is using the prestige of the law clerk’s position to collect money.

For more information, related to this topic, please see:

Federal Judicial Center, Ethics for Federal Judicial Law Clerks (2d Ed. 2011)

[https://oscar.uscourts.gov/assets/Maintaining the Public Trust Ethics for Federal Judicial Law Clerks 2011.pdf](https://oscar.uscourts.gov/assets/Maintaining%20the%20Public%20Trust%20Ethics%20for%20Federal%20Judicial%20Law%20Clerks%202011.pdf).

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