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STATE OF WISCONSIN
IN SUPREME COURT
CASE NO. 2017-AP-002132

In re the Paternity of B.J.M.

Timothy W. Miller,

Joint-Petitioner-Appellant,

v.

Angela L. Carroll,

Joint-Petitioner-Respondent-Petitioner.

**BRIEF OF AMICUS CURIAE
WISCONSIN CHAPTER OF AMERICAN ACADEMY OF
MATRIMONIAL LAWYERS**

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TABLE OF CONTENTS

Table of Authorities.....	ii
Introduction	1
Required Disclosures.....	1
Argument	2
I. Electronic Social Media is More Than Facebook and Any Decision Relating to Facebook Will Certainly Impact Judicial Use of Social Media Other than Facebook.	
	6
II. Facebook and Other ESM Connections Should Not <i>Per Se</i> be Considered <i>Ex Parte</i> Communications Under SCR 60.04(1)(g).	
	13
<i>A. Facebook and Other Social Media are Used for Business as Well as Personal Purposes.</i>	
	13
<i>B. Every Post on Facebook or any ESM Platform May Not Be Seen, Even by a Friend or a Follower.</i>	
	15
<i>C. Wisconsin Should Not Adopt a Policy That Every Communication Received by a Judge Results in Recusal or Substitution.</i>	
	18
III. A Bright-Line Rule Prohibiting the Judicial Use of Electronic Social Media Would Be Poor Policy.	
	19
Conclusion	21

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page(s):</u>
<u>Miller v. Carroll</u> , 2019 WI App 10, 386 Wis. 2d 267, 925 N.W.2d 580	6, 17, 21
 <u>Wisconsin Supreme Court Rules</u>	
Wisconsin Supreme Court Rule 60.04 (1)(g)	7-8, 11-12, 17
Wisconsin Supreme Court Rule 60.04 (7) Comment (2019).	18-20
 <u>Secondary Sources</u>	
ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORM OP. 462 (2013).	20
<i>About LinkedIn</i> , LINKEDIN, https://about.linkedin.com/ (last visited Nov. 8, 2019)	11
<i>About Us</i> , NEXTDOOR, https://about.nextdoor.com (last visited Nov. 8, 2019)	10
<i>All About Pinterest</i> , PINTEREST, https://help.pinterest.com/en/guide/all-about-pinterest (last visited Nov. 8, 2019)	8
<i>All Categories</i> , FACEBOOK, https://www.facebook.com/pages/category/ (last visited Nov. 8, 2019)	13
<i>An Update to News Feeds</i> , FACEBOOK, https://www.facebook.com/business/news/update-to-facebook-news-feed (last visited Nov. 8, 2019)	16

Court System Overview, WICOURTS, <https://www.wicourts.gov/courts/overview/overview.htm> (last visited Nov. 8, 2019) 19

NEW MEXICO SUPREME COURT ADVISORY COMMITTEE ON THE CODE OF JUDICIAL CONDUCT, *Advisory Opinion Concerning Social Media* at 17-18 (Feb.15, 2016).....6-7, 12, 20

New User FAQ, TWITTER, <https://help.twitter.com/en/new-user-faq> (last visited Nov. 8, 2019) 9

What Does It Mean to “Like” Something?, FACEBOOK, https://www.facebook.com/help/110920455663362?helpref=uf_permalink (last visited Nov. 8, 2019) 16

What is Instagram?, INSTAGRAM, <https://help.instagram.com/424737657584573> (last visited Nov. 8, 2019) .. 8

What Is Snapchat?, SNAPCHAT, <https://whatis.snapchat.com> (last visited Nov. 8, 2019) 9

INTRODUCTION

The American Academy of Matrimonial Lawyers was founded in 1962 “[t]o provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law.” There are currently more than 1,650 AAML Fellows in 50 states. The AAML Fellows represent individuals in all facets of family law. The Wisconsin Chapter of the AAML advances the education of family law practitioners and judicial officers through its two annual seminars, which are held in Milwaukee and Madison. It is important to note that, pursuant to our organization’s bylaws, neither party to this action is represented by a member of the Minnesota or Wisconsin Chapters of the AAML. The Wisconsin Chapter has an interest in the social media issue raised in this case not only as an organization of practitioners, but in our capacity as educators as well.

REQUIRED DISCLOSURES

The American Academy of Matrimonial Lawyers bylaws address amicus brief disclosures and requirements. Some of the members of the AAML are judicial officers. Our bylaws require that we inform the Court, in any amicus brief, that this brief represents the view of the Wisconsin

Chapter of the American Academy of Matrimonial Lawyers. It does not necessarily reflect the views of the American Academy of Matrimonial Lawyers. Additionally, this Brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this Brief or reviewed it before its submission. The Wisconsin Chapter of the American Academy of Matrimonial Lawyers does not represent a party in this matter, is receiving no compensation for acting as amicus, and has done so pro bono publico.

Although this Brief refers to the submitting entity as “AAML” for brevity, this refers solely to the Wisconsin Chapter of AAML and not the national organization.

ARGUMENT

This Court requested that the parties brief two issues. The first issue is whether a judge being a litigant’s “friend” on Facebook alone, without allegations of bias in the matter before the judge, overcomes the presumption that judges are fair, impartial, and capable of ignoring any biasing influences thereby constituting a due process violation and a bright-

line rule prohibiting the judicial use of electronic social media. The second issue is whether a judge “liking” a litigant’s Facebook post unrelated to the pending litigation or commenting on a Facebook post unrelated to the pending action constitute an *ex parte* communication between a party and a judge.

The Wisconsin Chapter of the American Academy of Matrimonial Lawyers (“AAML”) thanks the Court for the opportunity to address the broader policy issues in this case, which have an impact not only on the litigants and counsel in family law cases, but in court proceedings in general. The AAML takes no position on the underlying custody and placement determination or any of the facts related solely to the Court’s determination of custody and placement. The AAML has not reviewed the entire Record or the transcripts in this matter. Normally, this would not be admitted in writing to any Court ever. However, in this case, it is mentioned to emphasize that the AAML’s interest in providing an amicus brief is not about Ms. Carroll or Mr. Miller’s positions, but the policy issues related to the judicial use of social media platforms and *ex parte* communication.

Both parties in their briefing spent considerable time addressing underlying factual disagreements between the parties. Other than as specifically necessary for the analysis of an issue, this Brief will focus on policy concerns pertaining to social media and *ex parte* communication, and also on facts related to social media. The AAML does not feel it is appropriate to weigh in on the factually dependent issues of “great risk of actual bias” or the appearance of impropriety or partiality determination before this Court. Therefore, other than discussing the policy related to a bright-line rule prohibiting social media use by judicial officers, this Brief does not address the first issue that the Court requested that Mr. Miller and Ms. Carroll brief.

However, the Court’s questions to the parties relating to policy issues involved with social media *ex parte* communication, and judicial officials on social media are issues to which the AAML seeks to address. The position taken by the AAML is that regardless of the Court’s determination of partiality and bias, if this Court affirms the Court of Appeals, this Court should decide this case on the narrowest possible terms, based solely upon the facts. After its decision, the AAML requests that the Wisconsin Supreme Court create a task force or committee or requests that

the State Bar of Wisconsin commence a study for the purpose of providing rules or guidelines to judicial officers regarding social media use and their interactions with litigants and attorneys.¹ The AAML requests this because the most effective and thorough manner to address the dynamic media of communication, which includes the ever-changing electronic social media (“ESM”), is not through analysis of the unique facts before the Court in this case. Instead, the most effective manner of addressing ESM will be through a thorough study conducted by the Committee. The Committee will have the opportunity to address this important issue and recommend appropriate rules for ESM and judicial officers, after gathering information from judicial officers, attorneys, experts on social media and the general public. This will allow the Court to develop rules and guidance informed by broader policy considerations, rather than by the interests of the two parties who are understandably focused on a highly contested matter regarding their child.

¹ Hereinafter, these alternatives are referred to as “Committee.”

I. Electronic Social Media is More Than Facebook and Any Decision Relating to Facebook Will Certainly Impact Judicial Use of Social Media Other than Facebook.

The parties have focused on the Facebook “friendship” between the Honorable Jerome M. Bitney and Ms. Carroll, which started upon Ms. Carroll’s “friend request” to Judge Bitney after the evidentiary hearings in this matter, but prior to Judge Bitney issuing his decision. Miller v. Carroll, 2019 WI App. 10, ¶ 4-6, 386 Wis. 2d 267, 271, 925 N.W.2d 580, 582-83. In the Court of Appeals’ Decision, it utilized the term electronic social media (“ESM”). Id. at ¶ 2. The Court of Appeals’ holding addressed the establishment of an undisclosed Facebook connection between Judge Bitney and one of the litigants. Id. at ¶ 29. The Court of Appeals cautioned “that judges should recognize that online interactions, like real-world interactions, must be treated with a degree of care.” Id.

AAML submits that ESM is not *solely* Facebook and it would be unwise to treat all ESM platforms as though they are identical. There are multiple online platforms that are in the business of connecting people, which at its core, is the intent of social media.² Some popular ESM platforms (in no particular order) are:

² Other court systems have provided excellent descriptions of the definition of social media and different platforms, and options for maintaining privacy, such as the New

1. Instagram
2. Snapchat
3. YouTube
4. TikTok
5. Facebook
6. LinkedIn
7. Twitter
8. Pinterest
9. Flickr
10. Tumblr
11. Nextdoor
12. Reddit

Some ESM platforms are focused on imagery, such as Instagram, Flickr, and Pinterest. This Brief will discuss a few of the ESM platforms, in large part to show how different the platforms are and how one size—or rule—does not fit all. AAML is aware that a judge “must not independently investigate facts in a case and must consider only evidence

Mexico Supreme Court Advisory Committee on the Code of Judicial Conduct opinion dated February 15, 2016, which was cited by Ms. Carroll.

presented,” this Brief seeks to highlight some of these ESM platforms for the Court. SCR 60.04 (1)(g), Comment (2019).

Instagram is a free photo- and video-sharing application that allows an individual to “like” or comment on posts from other individuals and to re-post them on the user’s own social media account. *What is Instagram?*, INSTAGRAM, <https://help.instagram.com/424737657584573> (last visited Nov. 8, 2019). It is analogous to a personal photo album with captions. Pinterest, like Instagram, is based on images and links. As Pinterest describes it, “Pinterest is a visual discovery engine for finding ideas like recipes, home and style inspiration, and more.” *All About Pinterest*, PINTEREST, <https://help.pinterest.com/en/guide/all-about-pinterest> (last visited Nov. 8, 2019). Unless you create a “secret board,” Pinterest boards are public and can be viewed or followed by anyone. *Id.* Like Facebook, Pinterest generates a “news feed.” *Id.* It is analogous to sharing information on a bulletin board. While Pinterest and Facebook are both largely visual media, their purpose, and the way individuals utilize them, are quite different.

Other social media sites are focused on videos, but allow for “subscribing” to another’s page to follow the videos the individual posts or

commenting on videos if you have an account, such as YouTube. Yet another ESM platform, Snapchat, has a variety of functions, including photo filters, a Chat format with messages that disappear after a set period to time, videos and pictures, Discover for obtaining news from mainstream news sources, a Snap Map function, and a personal emoji. *What Is Snapchat?*, SNAPCHAT, <https://whatis.snapchat.com> (last visited Nov. 8, 2019). It is used by 180 million people a day. *Id.*

This Brief will give special consideration to Twitter because there are several Wisconsin judicial Twitter pages, and organizational Twitter handles as well as individual pages. Twitter:

is a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages. People or organizations post Tweets, which may contain photos, videos, links, and text. These messages are posted to your profile, sent to your followers, and are searchable on Twitter search.

New User FAQ, TWITTER, <https://help.twitter.com/en/new-user-faq> (last visited Nov. 8, 2019). On Twitter, “following someone means you've chosen to subscribe to their Twitter updates. When you follow a person, organization or company, every time they post a new message, it will appear on your Twitter Home timeline.” *Id.* You can like or re-tweet another person’s message or reply (or comment) to a person’s Tweet. *Id.* A page owner can choose a private or public profile.

Somewhat unique to Twitter (as compared to Facebook in particular), individuals can “tag” another Twitter user, which could be an organization or a person. For example, if Judge Jane Smith had a public Twitter account, whether or not she consented, John Public could tweet at her public account. Mr. Public could write, “@JudgeJaneSmith is amazing!” Judge Smith would see the message on her Twitter feed, but Judge Smith did not have the opportunity to consent to the use of her Twitter handle of @JudgeJaneSmith. Because of this feature, a Twitter user has no control over who tweets a reference to the user’s public account, and no control over the content of the Tweet.

Another ESM platform is Nextdoor, which is self-described as “the world’s largest social network for the neighborhood. Nextdoor enables truly local conversations that empower neighbors to build stronger and safer communities.” *About Us*, NEXTDOOR, <https://about.nextdoor.com> (last visited Nov. 8, 2019). This site links people in a given neighborhood or area and allows for individuals to post questions and comment on the posts of others. For example, there may be a request for the name of a reliable plumber or there may be a link to a Ring camera video showing a stolen package on Nextdoor.

Finally, LinkedIn claims to be “the world's largest professional network with nearly 660+ million users in more than 200 countries and territories worldwide” and “[t]he mission of LinkedIn is simple: connect the world’s professionals to make them more productive and successful.” *About LinkedIn*, LINKEDIN, <https://about.linkedin.com/> (last visited Nov. 8, 2019).

If the Court is fully familiar, through use, with these ESM platforms, hopefully the Court skimmed this section. The AAML is fully aware that many individuals are intimately familiar with these ESM platforms because they are integrated into the daily lives of millions of Americans. However, given the policy considerations, the Brief sought to demonstrate the wide variety of ESM platforms and also, the risk of generalizing and deciding that *every* contact or connection on *every* ESM platform is prohibited *ex parte* communication.

According to SCR 60.04(1)(g), a “judge may not initiate, permit, engage in or consider *ex parte* communications concerning a pending or impending action or proceeding” except with limited exceptions, one of which is if the judge “reasonably believes that no party will gain a procedural or tactical advantage,” but if the communication “may affect the

substance of the action” that the judge notifies the parties and allows an opportunity to respond. SCR 60.04(1)(g), Comment (2019). Viewing a Pinterest board about recipes is entirely different from receiving daily Snapchats with disappearing messages. While both would be communications, Snapchat could be regarding the pending action and lead to the appearance of impropriety, while Pinterest may be a harmless exchange of recipes, entirely unrelated to any pending legal action.³

Thus, an “undisclosed connection” on an ESM platform, in and of itself, may not be prohibited *ex parte* communication concerning the pending or impending action. For this reason, AAML requests that the Court create a Committee to hone the definition of *ex parte* communication in the social media era for judicial officials. The Committee should address the judiciary’s ESM contacts with litigants, as well as ESM contacts with counsel who appear before the courts.

³ The New Mexico Supreme Court addressed the anonymous use of social media by judicial officials. NEW MEXICO SUPREME COURT ADVISORY COMMITTEE ON THE CODE OF JUDICIAL CONDUCT, *Advisory Opinion Concerning Social Media* at 17-18 (Feb.15, 2016). The AAML suggests that in any rule or guidelines issued by this Court that the ability for a judge to be anonymous online is addressed.

II. Facebook and Other ESM Connections Should Not *Per Se* be Considered *Ex Parte* Communications Under SCR 60.04(1)(g).

A. *Facebook and Other Social Media are Used for Business as Well as Personal Purposes.*

AAML notes that there are multiple categories of Facebook pages.

When a page is established on Facebook, the page administrator has a number of categories from which to choose: Business, Community Organization, Interest (e.g., sports, science, visual arts), Media, Non-Business Places, Other and Public Figure, in addition to an individual's personal pages. *All Categories*, FACEBOOK, <https://www.facebook.com/pages/category/> (last visited Nov. 8, 2019).

Under each of these categories, there are many sub-categories that an organization or business can choose. *Id.* Facebook is not solely for communications between individuals, it is also for business and other pursuits. Each post may be limited to a selected audience or be publicly available to anyone on Facebook or off. Many other social media platforms, such as YouTube and Twitter, also include business and organizational page options.

If a judicial officer has either a personal or a professional (such as a campaign) page on Facebook and the judge “likes” or “follows” the page of

another individual, organization, or entity, this fact alone should not automatically imply that a judge is incapable of rendering a fair and impartial decision regarding the owner of that page. This issue reaches beyond the family law context and has implications in general litigation. For example, if a circuit court judge had a Facebook page and “liked” the Milwaukee Brewers organizational page, it should not somehow suggest that the judge was biased and partial and, therefore, not permitted to decide cases involving the Milwaukee Brewers. Similarly, if a judge “liked” or “followed” an organizational page for MillerCoors, it should not be considered bias *per se* or an *ex parte* communication that would prevent the court from hearing any determination regarding MillerCoors. This logic can carry forward into other social media platforms, such as Twitter or LinkedIn.

Even if a judge “liked” a specific post from a company (rather than solely the company’s Facebook page), it would not necessarily be indicative of actual bias. For example, if a member of this Court “liked” or enjoyed (or even just viewed) one of the Budweiser Clydesdale commercials, which are both on television and also are posted to Budweiser’s social media pages, would that render a member of this Court

incapable of deciding a case about the use of the term “corn syrup” in advertising? On the other hand, a member of this Court specifically “liking” or publicly commenting on a Twitter Tweet that either MillerCoors or Budweiser had a washed-up legal argument could suggest actual bias for that specific Justice in the matter.

AAML’s concern is that using the present case to create a bright-line rule about judicial use of ESM, and whether ESM contact constitutes *ex parte* communication may have unintended consequences. The Court, through referral to a Committee for a more thorough analysis, will reduce that risk an overbroad approach to ESM policy.

B. Every Post on Facebook or any ESM Platform May Not Be Seen, Even by a Friend or a Follower.

It may be elementary that every social media post may not, in fact, be seen by the intended recipient. In his Brief, Mr. Miller contended that it was a “communication” between Judge Bitney and Ms. Carroll each and every time she “liked” posts on Facebook. However, Facebook sorts and filters content based on what it determines may be “relevant” to an individual.⁴ Thus, *even if* a judge has a Facebook connection with a litigant

⁴ There is no indication in the Court of Appeals’ Decision or the briefs that Judge Bitney commented or liked any of Ms. Carroll’s posts, but instead that she commented on posts of his and liked his posts.

and the litigant posts something on Facebook that is germane to the case, it is possible the judge will never see the post.

Facebook has stated, “[o]ne of the main reasons people come to Facebook is to see what’s happening in their News Feeds. Our goal with News Feed has always been to show people the things they want to see. When people see content that’s relevant to them, they’re more likely to be engaged with News Feed, including stories from businesses.” *An Update to News Feeds*, FACEBOOK, <https://www.facebook.com/business/news/update-to-facebook-news-feed> (last visited Nov. 8, 2019).

Moreover, content that appears on one Facebook user’s feed – and therefore available for that user to “like” – is not necessarily available for all of that user’s contacts to see and “like.” In order to see Ms. Carroll’s comments on or “liking,” let’s say, Ms. Carroll’s grandmother’s post, Judge Bitney would need to have authority through the post’s privacy settings to view the Grandmother’s post. *What Does It Mean to “Like” Something?*, FACEBOOK, https://www.facebook.com/help/110920455663362?helpref=uf_permalink (last visited Nov. 8, 2019).

The Court of Appeals stated that Judge Bitney was “in a position” to view [Ms. Carroll]’s Facebook activity” as an underpinning of its holding. 2019 WI App 10 at ¶ 26. While Facebook users may see content that Facebook’s algorithms determine to be relevant to them, it is unlikely Judge Bitney saw all content, comments and third-party page likes from his more than 2,000 Facebook “friends.” (Petitioner’s Br. at 15-16, *citing* App. 125-27.)

The Court of Appeals’ holding in the present case was based upon the appearance of impartiality, on which this Brief provides no opinion. 2019 WI App 10 at ¶ 29. However, dicta in the Decision declares that “ex parte communication occurred to the extent that Judge Bitney and [Ms.] Carroll viewed each other’s Facebook posts.” *Id.* at ¶ 24-25. This statement, followed by the observation that *ex parte* communications are prohibited could be read as prohibiting *any* ESM communication, whether or not it is “concerning a pending or impending action or proceeding.” SCR 60.04(1)(g) (2019). AAML requests that this Court create a Committee to help clarify what constitutes *ex parte* communication in the ESM era. Judges and lawyers will benefit from guidelines on what is permissible.

C. *Wisconsin Should Not Adopt a Policy That Every Communication Received by a Judge Results in Recusal or Substitution.*

The treatment of *all* connections or contacts on ESM as *ex parte* communication could result in “the involuntary recusal of judges [which] has greater policy implications in the supreme court than in the circuit court and court of appeals.” SCR 60.04 (7) Comment (2019). Even so, there remains a risk at the circuit court and Court of Appeals level. While researching for this brief, this author found a Tweet from an individual that stated, “How best/easiest to ‘get messages’ to @JudgeJaneSmith w/o a trail” [sic, Judge’s name substituted]. Wisconsin judges were “tagged” in the litigant’s Tweets, which appeared to concern a long-closed case. Because of the nature of Twitter, no judge needed to consent to being tagged in the Tweets. The benefit (and curse) of Twitter is that messages can be “tweeted at” individuals who never requested them.

It would be a poor policy if litigants could force recusal by either commenting on a judge’s public post or by “tweeting at” a judge. Judges do not always make decisions that are popular to all of the litigants before them, and comments about their decisions can be expected. Additionally, a comment made on a judge’s page immediately prior to trial could force an adjournment. Automatic recusal by social media contact could embolden

litigants to force the recusal of judges, weaponizing social media postings by targeting the judge in posts. The potential ramifications of a judge being on the receiving, rather than the initiating, end of social media communications must be considered when clarifying what constitutes *ex parte* communications on ESM.

III. A Bright-Line Rule Prohibiting the Judicial Use of Electronic Social Media Would Be Poor Policy.

Our state has 237 municipal courts, 249 circuit court judges in 72 counties, and 16 Court of Appeals Judges in four districts. *Court System Overview*, WICOURTS, <https://www.wicourts.gov/courts/overview/overview.htm> (last visited Nov. 8, 2019). A bright-line rule that all of them are prohibited from participation in ESM is, in effect, a rule that they cannot be involved in a dynamic part of our society. It is a concern to imply that judges must stay in the 1990s, before the advent of ESM, by instituting a bright-line rule against social media use by judges.

Wisconsin circuit and appellate court judges are elected officials, and it is common for candidates for these offices to secure endorsements. It is well understood that not every endorsement, by itself, requires a judge's recusal from proceedings involving the endorser, nor does every campaign

contribution create a probability of bias requiring a judge's recusal. SCR 60.04(7), Comment (2019).

There is personal and political utility in allowing judges to participate in social media, either directly or through campaign committees. ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORM OP. 462 (2013). The "designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person." *Id.* at 3. Being a "friend" with a person on Facebook or liking a particular page does not mean the two are friends in any traditional sense. NEW MEXICO SUPREME COURT ADVISORY COMMITTEE ON THE CODE OF JUDICIAL CONDUCT, *Advisory Opinion Concerning Social Media* at 17 (February 15, 2016).

AAML submits that not every connection or communication, whether in person or through ESM, is a prohibited *ex parte* communication. The Wisconsin Supreme Court should take a measured approach towards the issue of social media, as have many other states and the American Bar Association. The measured approach should include the creation of a Committee to research the issue and recommend appropriate rules for ESM that apply to our state and to our judges.

CONCLUSION

Many judges choose to stay off ESM platforms or choose to modify the privacy settings of their ESM platform pages to limit their contacts. However, having a choice is substantially different from a bright-line prohibition generated because of the potential of the “great risk of actual bias resulting in the appearance of partiality.” [Quoted section from Miller v. Carroll, 2019 APP 10, ¶ 29.] AAML recognizes that there may be cases where an ESM contact weighs in favor of a finding of “great risk of actual bias” and that this Court may indeed find that to be the case here. However, AAML requests that this case be decided narrowly, and the holding limited to the unique facts of this case. Given the depth and breadth of the research required to fully address the use of ESM by judges, AAML respectfully asks that a Committee be created to study the matter and make recommendations for rules governing ESM for judicial officers.

Dated: November 12, 2019



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of this brief is 4,157 words.

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CERTIFICATION REGARDING COMPLIANCE
WITH RULE §809.19 (12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. §809.19(12). I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

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I hereby certify that on this 12th day of November, 2019, I caused three copies of this Brief to be served upon each of the following parties via U.S. Mail:

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