

JUDGES' USE OF SOCIAL NETWORKING SITES

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One of the significant developments in communication in the last few years is the astounding growth of social networking websites. Increasing numbers of people join Facebook or MySpace or LinkedIn or Twitter or other sites as a means to notify others of news in their lives, to learn what their friends and relatives and acquaintances are doing, and to generally stay in touch with other people with whom they have something in common. Businesses, organizations and government agencies may use social networking sites primarily to communicate information about their products and services and get limited feedback. For individuals, and for some kinds of organizations, the appeal of such sites is the opportunity for ongoing back-and-forth communication among large groups of people. Typically a social networking site allows someone to post a profile and photographs, videos, music, etc., and invite others to become “friends” or “fans.” Some information on the site may be shared with the whole world; other parts may be restricted to a select, small group.

For some time now state bar regulatory agencies have been addressing the effect of electronic communication on traditional ethical rules — law firm websites used as advertizing, whether e-mail inquiries establish an attorney/client relationship, etc. Likewise, judges have faced new legal issues involving electronic discovery and searches of computers. Judges are becoming familiar, too, with problems of jurors communicating with the outside world and conducting their own research via their Blackberries, mobile phones with internet access, and other devices.

Compared to the information available on those other electronic communication issues, there is relatively little reference material for judges concerning their own social networking and the Code of Judicial Conduct. The purpose of this paper is to share some information addressing questions of judges’ personal use of social networking sites. I welcome any additional material anyone knows about.

A good overview of social networking issues for judges appears in this April 30, 2010, on-line article from Slate: <http://www.slate.com/id/2252544/> . The article reports that some judges search Facebook and other sites to check on what lawyers and parties are up to, and one judge requires all juveniles appearing before her to friend her on Facebook or MySpace so she can monitor their activities. As the article says, the new social media can generate ethical issues for

judges. One question is the appearance created by a judge and lawyer “friending” each other on a social networking site. Another potential pitfall is the increased opportunity for ex parte communication. The article cites a North Carolina judicial discipline case arising from a Facebook friendship.

The North Carolina disciplinary case mentioned in the Slate article can be found here at the Judicial Standards Commission website:

<http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf> .

The judge and lawyer had decided at the beginning of a child custody/support proceeding to friend each other on Facebook and then had exchanged comments about the case on the social networking site. That contact led to the reprimand for ex parte communication. The judge was also reprimanded for his independent research on the parties, without informing either side, through his visits to the business website of one of the parties, a photography business, to view the party’s photographs and poems.

For another example of how a judge’s use of Facebook can lead to trouble, read this story about the recent resignation of a Georgia judge:

<http://www.law.com/jsp/article.jsp?id=1202437652986>

There are also two recent articles on social networking in American Judicature Society publications, but they are not on-line. One is “Judges and Social Networks” in the Judicial Conduct Reporter, Vol. 32, No. 1, p. 1. The other is “The Too Friendly Judge? Social Networks and the Bench,” by Cynthia Gray in *Judicature* magazine, Vol. 93, p. 236 (May-June 2010).

The question of whether judges should even join social networking websites has been addressed by several state ethics committees. Perhaps the most publicity has been given to the Florida Supreme Court’s Judicial Ethics Advisory Committee’s opinion 2009-20, issued on November 17, 2009. The opinion may be found here:

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

The Florida committee opined that a judge could join a social networking site and post comments and other materials so long as the material did not otherwise violate the Code of Judicial Conduct, but that the judge could not add as friends lawyers who appear before the judge, nor allow lawyers to add the judge as a friend. The committee further said that a judge’s election campaign committee could post material on a social networking website and could allow lawyers and others to list themselves as “fans,” so long as the judge or campaign committee did not control who could list themselves in that manner.

The committee’s concern was that the judge’s acceptance of a lawyer as a friend on the judge’s page on the social networking site would violate the canon which prohibits a judge from

conveying the impression, or allowing others to convey the impression, that a person is in a special position to influence the judge. The committee noted that being listed as a friend as the term is used on social networking sites would not necessarily mean that the lawyer actually was in a special position, but the listing would convey that impression.

The original Florida opinion generated additional inquiries and has resulted in three follow-up opinions. The first is Opinion Number 2010-04 which advises that judicial assistants may add as Facebook friends lawyers who may appear before the judge for whom the assistant works, so long as the assistant's Facebook activity is conducted independently of the judge and does not mention the judge or court. The opinion may be found here:

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-04.html>

The next Florida opinion, number 2010-05, advised that candidates for judicial office are not subject to the original opinion and that they, thus, may add as Facebook friends lawyers who are likely to appear before them if elected. The opinion is based on the wording of the Florida Code of Judicial Conduct which specifies the portions that apply to candidates. The link to this opinion is:

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html>

Finally, the Florida Judicial Ethics Advisory Committee revisited and reiterated its support for its original opinion on March 26, 2010, with Opinion Number 2010-06, found here:

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>

The new opinion was prompted by several inquiries, two of which proposed disclaimers on judges' Facebook pages and one of which asked about an organization's Facebook page. The committee advised, first, that a judge who is a member of a voluntary bar association which uses a Facebook page may use that page to communicate with other members, including lawyers, about the organization and about non-legal matters, and does not have to "de-friend" lawyer members who might appear before the judge. The opinion emphasized that the organization, not the judge, controlled the Facebook page and decided which friend requests would be accepted and rejected.

One judge asked whether the concerns expressed in the original opinion could be addressed by including a disclaimer on the judge's Facebook page stating that (a) the judge would accept as a friend anyone the judge recognized or who shared a number of common friends; (b) the term "friend" does not mean a close relationship; and (c) no one listed as a friend is in a position to influence the judge. Another judge inquired about a similar approach, proposing to state on

the judge's Facebook page that the judge would accept as a friend all lawyers who requested to be added.

The Florida committee rejected both proposals and stuck to its original opinion. The committee majority said that the disclaimer failed to cure the impression that a lawyer listed as a Facebook friend had special influence. The majority observed that lawyers who chose not to use Facebook would not be listed as friends and that there was no assurance that someone viewing the page would see or read the disclaimer. A minority of the committee wrote a dissent, calling for withdrawal of the original opinion, arguing that judges are not prohibited from having lawyers as friends in the historic sense of the word and that adding a lawyer as a Facebook-defined friend creates no stronger impression of special influence than does ordinary socializing. The minority would advise that a judge may accept lawyers as Facebook friends and that any motion to require the judge to recuse because of that relationship would need to include additional specific allegations supporting the impression of special influence.

Other state ethics committees have taken the Florida minority's view and are not as concerned as the Florida majority about the appearance of special influence. In October 2009 the South Carolina Advisory Committee on Standards of Judicial Conduct issued this opinion 17-2009: <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>. With little discussion the committee says that a magistrate may join Facebook and be friends with law enforcement officers and court employees so long as the site is not used for discussion of judicial business.

More extended discussions, reaching the same result as South Carolina, have come from New York and Kentucky. Advisory opinion 08-176 of the New York Advisory Committee on Judicial Ethics, issued on January 29, 2009, may be found here: <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>.

The gist of the New York opinion is that there is nothing fundamentally different about a judge socializing through a social networking website and socializing in person, and nothing fundamentally different about communicating electronically rather than face to face. The key question for the committee was not whether a judge could join a social networking site but how the judge used the site. The judge, said the committee, needs to be aware of the public nature of comments posted on such a site; the potential of creating the appearance that a lawyer who friends the judge will have special influence; and the likelihood that people might use the judge's social networking site to seek legal advice. The committee observed that in some ways allowing a person to become a friend on a social networking site is no different than adding the person's contact information to a Rolodex, but still cautioned that when combined with other circumstances the friending can lead to the appearance of a close social relationship requiring disclosure or recusal.

The most recent and most extensive opinion is the one from Kentucky, ethics opinion JE-119, issued on January 10, 2010, by the Ethics Committee of the Kentucky Judiciary. It may be found here:

<http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> .

The Kentucky committee does not believe that being designated a friend on a social networking site by itself conveys an impression of a special relationship. The committee repeats the cautions of the New York opinion, though, and notes that “social networking sites are fraught with peril for judges” Personal information, photographs and comments that might be appropriate for someone else may not satisfy the higher standards for judges. The committee also warns of the problem of ex parte communications and cites the North Carolina reprimand.

It would not be appropriate to use the word consensus to describe the result of so few opinions, but there does seem to be general agreement among the several ethics committee that have formally addressed the issue of social networking sites that: (1) Judges may join social networking sites; (2) Accepting a lawyer as a friend on a site does not by itself establish such a special relationship as to imply that the lawyer has special influence (though the Florida majority might disagree), and does not by itself require the judge to recuse from cases with that lawyer, but may create such problems when combined with other circumstances; (3) Social networking sites create opportunities and temptations for ex parte communication that judges must be careful to avoid; and (4) Judges are still judges when posting materials on their social networking pages and need to realize that the kinds of comments and photographs posted by others may not be appropriate for them. Judges also should be aware of the security issues that come with social networking. A judge’s page on Facebook or MySpace or other social networking site can provide lots of information to someone who is dissatisfied with the judge’s decisions and wants to do harm.

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