

JUDICIAL ETHICS AND SOCIAL NETWORKING SITES

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There has been astounding growth of electronic social networks in the last few years. Huge numbers of people have joined Facebook or LinkedIn or Twitter or other on-line social networks as a means to notify others of news in their lives, to keep up with 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 use social networks to communicate information and get feedback about their products and services. For individuals, and for some kinds of organizations, the appeal of such networks is the opportunity for ongoing back-and-forth communication among large groups of people. Typically a social network allows someone to post a profile and photographs, videos, music, etc., and invite others to become “friends” or “fans.” Some information may be shared with the whole world; other parts may be restricted to a select, small group.

The number of judges using social media sites continues to increase, too. A 2012 [report](#) says that 46.1 percent of judges surveyed use a social media profile site. Among those judges, Facebook is most popular, being the choice of 86.3 percent of the users.

For some time state bar regulatory agencies have been addressing the effect of electronic communication on traditional ethical rules for lawyers — the extent to which law firm websites constitute advertising, whether e-mail inquiries establish an attorney/client relationship, and so on. Likewise, judges hearing cases have faced new legal issues involving electronic discovery and searches of computers. Judges are becoming all too familiar also with problems of jurors communicating with the outside world and conducting their own research via their smart phones and other devices.

Until recently, though, there has been 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 networks. I welcome any additional material anyone knows about.

Judges’ use of social networks

A good overview of social networking issues for judges appears in an April 30, 2010, on-line article from Slate entitled “[Tweet Justice.](#)” The article reports that some judges search Facebook and other sites to check on what lawyers and parties are up to, and it tells of one

judge who 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 network. 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.

North Carolina disciplinary case

The North Carolina disciplinary case mentioned in the Slate article is an [April 2009 reprimand](#) issued by the Judicial Standards Commission. The judge and lawyer had decided at the beginning of a child custody/support proceeding to friend each other on Facebook and then exchanged comments about the case on the social network. 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 wife’s business website, a photography business where she posted both photographs and poems.

Articles about judges and social networks

For another example of how a judge’s use of Facebook can lead to trouble, there is the resignation of Georgia judge Ernest Wood as reported in both the [ABA Journal](#).

Another example, also reported in a [local newspaper](#), involves a lawyer who served as a substitute judge in North Las Vegas. He was removed from the office once the district attorney discovered that the judge’s MySpace page said one of his personal interests was “Breaking my foot off in a prosecutor’s ass.”

There are also two 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).

Ethics opinions

The question of whether judges may join social networks and whether they may be social networking friends with lawyers, law enforcement officers and others now has been addressed by eight state ethics committees. There also is an opinion from the American Bar Association based on its Model Code of Judicial Conduct. All the state opinions say that judges may join social networks, but they disagree on the propriety of friending lawyers. Florida, Oklahoma and Massachusetts say no; New York, Kentucky, South Carolina, Ohio and California say yes, though usually with qualifications. All the opinions warn judges about the potential pitfalls of social

networks for embarrassment and damage to the dignity and integrity of the office. The short reviews of the ethics opinions below explain the issues that may arise under the Code of Judicial Conduct.

Florida

The Florida Supreme Court's [Judicial Ethics Advisory Committee's opinion 2009-20](#), issued on November 17, 2009, received a great deal of publicity because it was one of the earliest opinions and because it concluded that judges may not add lawyers as friends on a social network. The opinions from several other jurisdictions have taken a different view, as discussed below.

The Florida committee opined that a judge could join a social network 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 network and could allow lawyers and others to list themselves as "fans," provided 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 network 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 comparable provision in North Carolina's Code of Judicial Conduct is in Canon 2B. The Florida's committee noted that being listed as a friend as the term is used on social network 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 resulting 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 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.

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](#). 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.

South Carolina

In October 2009 the South Carolina Advisory Committee on Standards of Judicial Conduct issued [Opinion 17-2009](#). With little discussion the committee said 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.

New York

More extended discussions, tending toward the same result as South Carolina but with more helpful analysis and discussion, have come from New York, Kentucky, Ohio and California. The gist of [Opinion 08-176](#) of the New York Advisory Committee on Judicial Ethics, issued on

January 29, 2009, is that there is nothing fundamentally different about a judge socializing through a social network 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 network but how the judge behaves on the network. 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 network page to seek legal advice. The committee observed that in some ways allowing a person to become a friend on a social network 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.

Kentucky

One of the most extensive opinions is [Formal Judicial Ethics Opinion JE-119](#) issued on January 10, 2010, by the Ethics Committee of the Kentucky Judiciary. The Kentucky committee does not believe that being designated a friend on a social network 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.

California

[Opinion 66](#) from the Judicial Ethics Committee of the California Judges Association, issued on November 23, 2010, is well written and useful. The California committee concludes, with qualifications, that a judge may join a social network, even one which includes lawyers who may appear before the judge, but the judge must disclose the social network connection and must defriend the lawyer when the lawyer has a case before the judge.

As to whether a judge may friend a lawyer, the committee answers that it depends on the nature of the social network and whether the lawyer has a case before the judge. If the social network is one limited to the judge's relatives and a few close colleagues and it is used for exchanging personal information, for example, the likelihood will be greater that the lawyer appears to have special influence. There is much less risk, by comparison, when the social network involves individuals and organizations interested in a particular subject or project, say a sports team or a charitable project, and the exchanges are limited to that topic. Regardless of the nature of the social network, however, the California opinion says the judge should always disclose that the judge has a social network tie to a lawyer and must recuse from any case in which a friend from the first kind of network, the more personal one, is participating. Even for

the second kind of social network, the less personal one, the judge should de-friend the lawyer when the lawyer appears in a case before the judge.

One issue the California opinion addresses but others do not is the judge's obligation when others post comments on the judge's personal social network page. The committee says that the ethical obligation to avoid the appearance of bias requires the judge to monitor the judge's page frequently for such comments and to delete the comments, hide them from public view or otherwise repudiate anything others say that is offensive or demeaning. Leaving comments on the page can create the impression that the judge has adopted the comments.

The California opinion also admonishes judges to not create links to political organizations or others that would amount to impermissible political activity. And the judge must be careful not to lend the prestige of the office to another by posting any material that would be construed as advancing that other person's interest.

Finally, the opinion admonishes judges to be familiar with a social network's privacy settings and how to modify them. And the judge should be aware that other participants in the social network may not guard privacy as diligently and may thereby expose the judge's comments, photographs, etc., to others without the judge's permission.

Ohio

The Ohio opinion is Opinion 2010-7, issued December 3, 2010, by the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline. It is the last opinion in the list of [2010 opinions](#).

The Ohio opinion observes that there is no prohibition on a judge being a friend of a lawyer who appears before the judge, thus friending on-line cannot be an ethics violation by itself. The opinion notes the special risks associated with social networks for judges and advises that: (a) the judge must be careful to maintain the dignity of the office in every comment, photograph, etc., posted on the site; (b) a judge should not interact on social networks with individuals or organizations whose advocacy or interest in matters before the court would raise questions about the judge's independence; (c) the judge should not make any comments on a site about any matter pending before the judge; (d) the judge should not use the social network for ex parte communications; and (e) the judge should not undertake independent investigation of a case by visiting a party's or witness' page. Finally, the Ohio opinion advises judges to consider whether interaction with a lawyer on a social network creates any bias or prejudice concerning the lawyer or a party.

Oklahoma

The Oklahoma Judicial Ethics Advisory Board issued its [Judicial Ethics Opinion 2011-3](#) on July 6, 2011. Oklahoma supports the Florida point of view, that while a judge may participate in social networking sites the judge should not be social network friends with lawyers, law enforcement officers, social workers or others who may appear in the judge's court. In the panel's view such a relationship can convey the impression that the person is in a special position to influence the judge. It is immaterial whether the person actually is in such a position, it is the possible impression that matters, and in the opinion of the Oklahoma committee, "We believe that public trust in the impartiality and fairness of the judicial system is so important that [it] is imperative to err on the side of caution where the situation is 'fraught with peril.'"

Massachusetts

The last state opinion issued is [CJE Opinion No. 2011-6](#) from the Committee on Judicial Ethics of the Massachusetts Supreme Judicial Court. Massachusetts relies on the Florida analysis in concluding that a judge may join a social network site but may not friend any lawyer who appears before the judge. "Stated another way, in terms of a bright-line test, judges may only 'friend' attorneys as to whom they would recuse themselves when those attorneys appeared before them." Friending creates the impression, Massachusetts concludes, that the lawyer is a special position to influence the judge.

The Massachusetts opinion repeats briefly the warnings from other opinions about the posting of embarrassing photographs, the avoidance of ex parte communications, and the like, and also adds a new caution. It tells judges not to identify themselves as judges on the social network site, nor allow others to do so. Such identification would run afoul of the code provisions against using the prestige of the office to advance private interests, in addition to the problem of creating an impression that others are in a special position to influence the judge.

American Bar Association

The latest word on the subject is [Formal Opinion 462](#) issued by the American Bar Association on February 21, 2013. As would be expected from the ABA, the document identifies issues and cites the state bar opinions more than it provides specific direction. While generally saying that an electronic social media relationship is subject to the same analysis as relationships formed in person, the ABA warns of the dangers inherent in electronic communication — retransmission by others without permission, wider dissemination, a longer life, and an increased likelihood of comments being taken out of context.

The ABC opinion does not address specifically whether a judge may friend lawyers and others, instead referring to the various state opinions, but it says the issues of whether a judge should

disclose an electronic social media relationship and should disqualify should be analyzed the same as with in-person professional or personal relationships. The opinion does say that the “open and casual” nature of electronic social media communications means a judge seldom will have an affirmative duty to disclose such a connection. Nor does a judge need to search all social network connections if the judge does not have any specific knowledge of a connection that arises to the level of a problematic relationship.

As for social networks and campaigning, the opinion warns of the danger of appearing to endorse a candidate by clicking an “approve” or “like” button on the candidate’s social media site. It also advises judges to pay close attention to privacy settings so that a permissible private expression of opinion about a candidate does not become public.

Summary

Although the number of state opinions about judges and social networks is still small, there does seem to be a consensus building on several issues. There appears to be general agreement among the ethics committee that:

- (1) Judges may join on-line social networks.
- (2) Social networks create opportunities and temptations for ex parte communication that judges must be careful to avoid.
- (3) 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.
- (4) Judges need to avoid on-line ties to organizations that discriminate, just as they are prohibited from joining such organizations.
- (5) Judges also need to avoid on-line ties to organizations that may be advocates before the court.
- (6) Judges need to avoid posting comments on social network sites or taking other actions on such sites that lend the prestige of the judge’s office to the advancement of a private interest.

The ethics committees divide most sharply on the issue of a judge accepting a lawyer as a friend on a social network. The majority of the states opining on the issue to date conclude that friending does not by itself establish such a relationship as to imply that the lawyer has special influence and does not by itself require the judge to recuse from cases with that lawyer, although they recognize that a social network friendship may create such problems when combined with other circumstances. In the view of those states, being a friend of a judge on a social network is no different than being a friend in person and does not by itself lead to automatic recusal. On the other hand, the ethics committees of three states have concluded that a social network friendship is sufficiently likely to create the impression of special influence

that it should be barred. Although such an impression of favoritism may be mistaken, the approach of those ethics committee is to err on the side of caution when it comes to appearances of fairness.

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 network can provide lots of information to someone who is dissatisfied with the judge's decisions and wants to do harm.

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