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Let's Be Cautious Friends: The Ethical Implications of Social Networking for Members of the Judiciary

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LET'S BE CAUTIOUS FRIENDS: THE ETHICAL
IMPLICATIONS OF SOCIAL NETWORKING FOR MEMBERS
OF THE JUDICIARY

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ABSTRACT

In recent advisory opinions, courts and ethics committees have considered whether and to what extent judges may use social networking sites such as Facebook without violating the applicable code of judicial conduct. While the committees agree that judges may generally use social networking sites, they disagree as to whether judges may use those sites to connect with lawyers who have appeared or may appear in a proceeding before them. Four states—California, Florida, Massachusetts, and Oklahoma—prohibit judges from becoming online “friends” with attorneys who may appear before them in court, while four states—Ohio, Kentucky, New York, and South Carolina—allow it, albeit with caution. This Article examines the recent trend in advisory opinions governing the use of social media by members of the judiciary and provides practical advice for judges to conform to the code of judicial conduct.

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INTRODUCTION

As the use of social media rises, a number of state ethics committees have begun to analyze the ethical ramifications for judges who participate in online social networking. Recent advisory opinions generally opine that judges may use social networking sites such as Facebook without violating governing ethical canons. However, these opinions also recognize that in certain circumstances a judge’s use of social networking may run afoul of the ethical duties imposed by the state’s code of judicial conduct. This Article explores the ethical duties applicable to judges who use social networking sites, as well as the prospective ramifications of judges’ social networking activities. Finally, the Article provides guidelines for judges to conform to acceptable, ethical conduct on social media sites.

I. OVERVIEW OF SOCIAL NETWORKING AND ITS PREVALENCE
 AMONG MEMBERS OF THE LEGAL PROFESSION

Social networking involves the use of interactive websites and

programs that allow people to share “information, knowledge and experiences” by connecting with and forming communities among other users.¹ Popular social networking sites include Facebook, MySpace, Twitter, and LinkedIn, among others. These sites use terms such as “friends” (on Facebook) and “connections” (on LinkedIn) to signal a networking relationship between users.² In order to “friend” or “connect with” another user on the network, an individual must submit a request to that user. Once the other user accepts, the users become “friends” and may interact online.

The nature and level of online interactions between “friends” or “connections” varies by type of social networking site and by the privacy settings each user selects. On Facebook, “friends” may often see one another’s profile pages, pictures, comments, and status updates. Facebook friends usually interact by posting comments on friends’ profile sites or posts, sending messages, chatting online, “liking” one another’s posts and pictures, and sharing or commenting on status updates and photographs.³ Unless a user selects enhanced privacy settings, other friends in the same network may also view these interactions.⁴ Google+ and MySpace function in much the same way as Facebook, while LinkedIn deemphasizes personal status posts and pictures in favor of sharing information related to work experience and professional development.

Social networking sites have skyrocketed in popularity since their inception circa 2003. Facebook currently boasts more than 845 million active users,⁵ Google+ claims to have 150 million users,⁶

¹ *New Media and the Courts: The Current Status and a Look at the Future*, NEW MEDIA COMM. OF THE CONFERENCE OF COURT PUBLIC INFO. OFFICERS 19 (Aug. 26, 2010), available at <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf>.

² *Id.* at 28.

³ SUPREME COURT OF OHIO BOARD OF COMM. ON GRIEVANCES AND DISCIPLINE, OP. 2010-7 (2010), available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/default.asp [hereinafter OHIO OP. 2010-7].

⁴ *Id.*

⁵ *Facebook’s latest news, announcements and media resources - Fact Sheet*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Feb. 12, 2012).

⁶ *Google+ Has Reached 150 million active users according to un-official statistics, really?*, GOOGLE+ NEWS, (Dec. 25, 2011), <http://google-plus.com/3924/google-has-reached-150-million-active-users-according-to-un->

LinkedIn connects some 135 million professionals,⁷ and MySpace hosts approximately 150 million subscribers.⁸ Social networking sites are popular not only among the general public, but also among members of the legal profession. One recent study investigated the use of social media by the judiciary and found that nearly 40 percent of the judges surveyed used a social networking site—predominantly Facebook—while approximately seven percent of courts surveyed had business profiles on social media sites such as Facebook or Twitter.⁹

II. THE ETHICAL IMPLICATIONS OF SOCIAL NETWORKING

The prevalence of social networking by members of the legal profession highlights the need for clear ethical standards governing online behavior. Judges are central and public figures in the U.S. legal system and are therefore held to high ethical standards in all aspects of their professional and personal lives.¹⁰ Indeed, the American Bar Association (ABA) Model Code of Judicial Conduct prescribes that judges are bound to represent and uphold the honor and integrity of the legal system in all activities, whether judicial or extra-judicial.¹¹ Given the semi-public nature of social networking “friendships” and the associated risk of public scrutiny, participation in social networking sites may be especially problematic for judges.

As several state ethics committees have recently noted, a judge’s use of social networking sites implicates various canons of the Code of Judicial Conduct. Specifically, certain canons require a judge to

official-statistics-really/.

⁷ *About Us*, LINKEDIN, <http://press.linkedin.com/about> (last visited Feb. 12, 2012).

⁸ *MySpace Usage Statistics*, BUILTWITH TECHNOLOGY USAGE STATISTICS, <http://trends.builtwith.com/cms/MySpace> (last visited Feb. 12, 2012).

⁹ *New Media and the Courts: The Current Status and a Look at the Future*, NEW MEDIA COMM. OF THE CONFERENCE OF COURT PUBLIC INFO. OFFICERS, 65 (Aug. 26, 2010), available at <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf>.

¹⁰ AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT, Preamble, (2010), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.

¹¹ *Id.*

avoid conduct that would give the appearance of impropriety or outside influence, and to abstain from conduct that could create a conflict of interest or the appearance of such a conflict.¹² As the advisory opinions demonstrate, a judge is more likely to violate these ethical duties by accepting a “friend request” from a party who will appear or has appeared before the judge in court. Given the concern over the potential impropriety of such online “friendships” and the subsequent communications involved, ethics committees in at least seven states to date have considered the ethical ramifications for judges who partake in online social networking.

III. MOST ADVISORY COMMITTEES AGREE: JUDGES MAY USE SOCIAL NETWORKING SITES

While many states have yet to consider the ethical duties imposed on attorneys or judges involved in social networking, the emerging consensus holds that the ethical standards set forth in the Code of Judicial Conduct do not prohibit a judge from using social networking sites. State ethics committees in California, Kentucky, Massachusetts, Ohio, Oklahoma, New York, South Carolina, and Florida agree that a judge may use social networking sites, provided the use adheres to certain limitations.¹³ Some states, including Ohio

¹² See *id.* at Canon 2; Canon 3.

¹³ See OHIO OP. 2010-7; S.C. ADVISORY COMM. ON STANDARDS OF JUDICIAL CONDUCT, OP. 17-2009 (2009), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009> [hereinafter S.C. OP. 17-2009]; N.Y. ADVISORY COMM. ON JUDICIAL ETHICS, OP. 08-176 (2009), available at www.nycourts.gov/ip/judicialethics/opinions/08-176.htm; ETHICS COMM. OF THE KY. JUDICIARY, FORMAL JUDICIAL ETHICS OP. JE-119 (2010), available at <http://www.courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> [hereinafter KY. OP. JE-119]; OKLA. JUDICIAL ETHICS ADVISORY PANEL, JUDICIAL ETHICS OP. 2011-3, 2011 WL 3715149 (July 6, 2011) [hereinafter OKLA. OP. 2011-3]; FLA. SUP. CT., JUDICIAL ETHICS ADVISORY COMM., OP. 2010-5 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2010/2010-05.html> [hereinafter FLA. OP. 2010-5]; and MASS. JUD. ETHICS COMM., CJE OP. No. 2011-6, available at <http://www.mass.gov/courts/sjc/cje/2011-6n.html> [hereinafter MASS. OP. 2011-6].

and Kentucky, extend this ruling to permit a judge to “friend”¹⁴ an attorney who appears in proceedings before the judge, while other states, including California, Florida, Massachusetts, and Oklahoma, are officially opposed to the practice and forbid judges from making online connections with any attorney who may appear before the judge in court.¹⁵

These state committees base their opinions on two main ethical duties imposed by the state’s Code of Judicial Conduct, in combination with other lesser duties. The most important ethical considerations concern a judge’s duty to remain impartial and to avoid the appearance of outside influence or impropriety.

A. *Maintaining Impartiality*

The second canon of the Model Code of Judicial Conduct holds that a judge “shall perform the duties of judicial office impartially, competently, and diligently.”¹⁶ Although this blanket rule is relatively vague, various rules refine the definition. In particular, Rule 2.10 states that a judge shall not make any public comment that might “reasonably be expected” to affect the outcome of a pending or impending proceeding before the judge, or that would impair or substantially interfere with the fairness of the trial or hearing.¹⁷ A judge’s comments on a social networking site would implicate, and likely violate, this duty if they in any way relate to the status of an ongoing or upcoming trial.

Similarly, Rule 2.9 prohibits the judge from *ex parte* communications with any party to the litigation.¹⁸ This rule is

¹⁴ The verb “friend” refers to the act of issuing or accepting a “friend request” from a social network user, particularly on Facebook. While the ethics opinions cited in this Article consider the ramifications for judges who *accept* friend requests, the same rules likely apply for judges who wish to issue a friend request to another user.

¹⁵ See OHIO OP. 2010-7; KY. OP. JE-119; OKLA. OP. 2011-3; FLA. OP. 2010-5.

¹⁶ See MODEL CODE OF JUDICIAL CONDUCT Canon 2.

¹⁷ See MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.10.

¹⁸ See MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.9 (stating that 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, concerning a pending or impending matter,” except when circumstances

particularly problematic for judges who accept or extend “friend requests” to or from a party to the pending or ongoing proceeding before the judge, as the judge could then use the social networking site as a means of communication to the exclusion of the other parties. In theory, the judge could communicate with the lawyer by sending messages or posting comments relating to the litigation, or by viewing information posted by the attorney on his or her own networking page.

B. *Avoiding the Appearance of Outside Influence and Impropriety*

All ethics committees to consider the question have noted that the appearance of outside influence and impropriety is a crucial concern in a judge’s use of social networking sites. The first canon of the Model Code of Judicial Conduct prescribes that “a judge shall uphold and promote the independence, integrity, and impartiality of the judiciary,”¹⁹ where “independence” is defined as “freedom from influence or controls other than those established by law.”²⁰ Rule 1.2 holds that “a judge shall act at all times in a manner that promotes public confidence in the . . . judiciary, and shall avoid impropriety and the appearance of impropriety.”²¹ Similarly, Rule 2.4 holds that a judge “shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”²² As several advisory opinions demonstrate, the designation of the lawyer, party, or witness as a “friend” of the judge implicates these ethical rules in the social networking context.

As the term implies, a “friendship” between a judge and a party or counsel to a proceeding before the judge may constitute an improper and unethical relationship, because the friend could potentially leverage this personal connection to improperly influence the judge. Most committees resolve this issue by noting that terms such as “friend,” “follower,” or “fan” are terms of art used by the site and

require, such as for scheduling or administrative purposes).

¹⁹ See MODEL CODE OF JUDICIAL CONDUCT Canon 1.

²⁰ See MODEL CODE OF JUDICIAL CONDUCT, TERMINOLOGY.

²¹ See MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.2.

²² See MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.4(C).

thus should not be understood in the typical sense of the word.²³ For example, the Ethics Committee of the Kentucky Judiciary explained that a listing as a “friend” or equivalent does not, by itself, “reasonably convey to others an impression that such persons are in a special position to influence the judge.”²⁴ Under this view, the use of the term “friend” should not be sufficient to implicate an improper relationship.

Ethics committees in Florida, California, and Oklahoma disagree with this point. Although the Florida committee was split on the issue, the majority “believe[s] that allowing lawyers who practice before a judge to appear as ‘friends’ on the judge’s Facebook page . . . conveys the impression to the public what Canon 2B prohibits, i.e., that the lawyer is in a special position to influence the judge.”²⁵ In other words, the Florida committee majority is not swayed by the argument that “friend” is merely a term of art; rather, it believes that the term connotes an actual friendship or relationship. Thus, Florida prohibits judges from becoming “friends” with any attorney who may litigate in a proceeding before the judge.²⁶ Advisory committees in Massachusetts and California recently adopted this rule, and similarly ban judges from accepting friend requests from parties who may appear before the judge in court. Oklahoma also agrees, and even extends the rule to people who “regularly appear in court in an adversarial role,” including “social workers, law enforcement officers, or others.”²⁷

In determining how a judge could avoid the appearance of impropriety, the grievance committee of the Ohio Supreme Court explained that a judge should disqualify himself or herself from a proceeding “when the judge’s social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party.”²⁸ However, the committee noted that there is no bright-line rule for

²³ KY. OP. JE-119.

²⁴ *Id.*

²⁵ FLA. SUP. CT., JUDICIAL ETHICS ADVISORY COMM., OP. 2010-06 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>.

²⁶ *Id.*

²⁷ OKLA. OP. 2011-3.

²⁸ OHIO OP. 2010-7.

determining when the online relationship reaches such a level. Instead, the committee explained that “the mere existence of a friendship between a judge and an attorney or between a judge and a party will not disqualify the judge from cases involving that attorney or party.”²⁹ The Kentucky committee noted that judges should be “mindful” of whether online “connections” rise to the level of a “close social relationship,” whether viewed alone or in combination with other facts.³⁰ Yet the committee declined to outline factors to consider in determining whether the relationship is a “close” one.

IV. PROBLEM AREAS AND THE NEED FOR CAUTION

While all state ethics committees have opined that judges may generally use social networking sites, the opinions caution that judges may not take the same liberties as laymen and that judges must obey strict requirements in order for their use to comply with the Model Code of Judicial Conduct. These requirements generally restrict the judge’s participation in comments, messages, status updates, pictures, and research of parties and witnesses.

A. *Comments, Messages, and Status Updates*

Whether a judge posts his or her own “status update” or comments on the post or status of a friend, ethics committees suggest that the judge should absolutely refrain from making any comments related to a current or pending proceeding before the judge. As the Ohio advisory committee cautioned, “A judge should not make comments on a social networking site about any matters pending before the judge—not to a party, not to a counsel for a party, not to anyone.”³¹ The committees thus construe this requirement quite strictly: if a judge participates in social networking, the judge should never write about or comment on proceedings pending before that judge.

Disregarding this advice may warrant a public reprimand or other disciplinary action. In one recent case, a North Carolina judge was

²⁹ *Id.*

³⁰ KY. OP. JE-119.

³¹ OHIO OP. 2010-7.

disciplined after “friending” a defense attorney involved in a child custody proceeding before the judge and commenting on counsel’s posts regarding the proceeding.³² While the parties were discussing settlement agreements, the judge posted a status update that he had “two good parents to choose from,” and that he “[felt] that he [would] be back in court.” Shortly thereafter, the judge wrote that he “was in his last day of trial” and posted a note on defense counsel’s wall stating “you are in your last day of trial.”³³ The North Carolina Judicial Standards Commission publicly reprimanded the judge for this conduct, proclaiming that the judge failed “to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” as required by the code of judicial conduct.³⁴

B. *Posting Pictures and Commenting on Pictures Posted by Others*

Although not as controversial as posting comments or status updates, judges should still use discretion in posting pictures or commenting on pictures posted by others. The Kentucky advisory committee noted that judges are held to a higher standard than the average person, and therefore must avoid the appearance of impropriety in posting pictures or commenting on pictures posted by others.³⁵ Yet beyond specifically prohibiting the posting of explicit material, the standards and expectations for members of the judiciary are unclear. General bounds of professional responsibility would suggest that all professionals—lawyers and judges alike—should not post pictures depicting improper or unprofessional behavior, or comment on inappropriate pictures posted by others. However, judges should also be aware that publicly commenting on pictures posted by an attorney involved in a proceeding before the judge could appear

³² *Public Reprimand of B. Carlton Terry*, N.C. Judicial Standards Comm., Inquiry No. 08-234 (2009), available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

³³ *Id.*

³⁴ *Id.*

³⁵ KY. OP. JE-119, at 4.

improper. Members of the judiciary should therefore refrain from commenting on any picture posted by opposing counsel and should carefully select their own pictures to post in accordance with their desired professional image.

C. *Researching Parties and Witnesses*

The advisory opinions suggest that judges must refrain from using Facebook or other social networking sites to monitor the activity of parties or witnesses, or to obtain information that exceeds the scope of the facts presented in the case at issue. As one committee explicitly stated, “a judge should not view a party’s or witnesses’ pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge.”³⁶ This advice is closely tied with the prohibition against “Googling” parties to a pending proceeding before the judge, which is an accepted ground for disciplinary action.³⁷

In short, as the Supreme Court of Ohio ethics committee suggested, “A judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.”³⁸

CONCLUSION

The few states to consider the ethics of making “friends” with judges on Facebook are divided on whether a judge may accept a “friend request” from a lawyer who has appeared or will appear before the judge in court. Ethics committees in those states that permit the practice express the need for caution in social networking interactions, because a judge must structure online communications to avoid the appearance of impropriety or undue influence. Although the majority of states have yet to address this issue, judges in all states should approach social networking cautiously in order to avoid

³⁶ OHIO OP. 2010-7.

³⁷ See, e.g., *Public Reprimand of B. Carlton Terry*, N.C. Judicial Standards Comm., Inquiry No. 08-234 (2009).

³⁸ OHIO OP. 2010-7.

violating the ethical duties governing the judiciary.

PRACTICE POINTERS

- As most states have yet to decide whether judges may “friend” attorneys who practice before the judge, judges should consider declining friend requests from attorneys who have been or may be involved in a proceeding before the judge.
- Judges who are already “friends” with attorneys involved in active proceedings should consider using privacy settings to restrict the content available to these parties.
- Members of the judiciary should never comment on a social networking site about any pending proceeding, whether in a status update or as a response to another person’s post.
- Attorneys should avoid “friending” a judge before whom the attorney has appeared or will likely appear in court.