

Friend Requests and Beyond

Judicial Ethics in the Social Networking Sphere

By Lorie Savin

Generally speaking, the State Bar Committee on Judicial Ethics issues advisory opinions in response to ethical issues that may arise from anticipated conduct on the part of a judge, quasi-judicial officer, or judicial association. Our rules do, however, allow the committee to issue advisory opinions without a request if, in the judgment of the committee, it would be of interest to or for the benefit of the judiciary.

Because of the popularity of social networking on the Internet and the fact that at least four states (Florida, New York, Ohio, and South Carolina) have recently issued ethical advisory opinions concerning the conduct of and contact between lawyers and judges in this forum, the committee felt it would be helpful to publish this article in lieu of issuing an opinion as a way of informing the judiciary of potential ethical issues to consider.

The article has been reviewed and endorsed by the Committee on Judicial Ethics for the information and benefit of judges and quasi-judicial officers in Michigan.

—Hon. Elwood Brown, Chairperson,
SBM Committee on Judicial Ethics

The Obvious Applications of the Michigan Code of Judicial Conduct to the Twenty-First Century Watering Hole

Social networking sites are an efficient means to share thoughts, opinions, activities, and photos rapidly with a large group of people with little effort. But because using these sites is so easy, this means of communication is ripe with the potential to create ethical problems if caution is not used.

Without a doubt, judges and quasi-judicial officers are prohibited from discussing matters pending before them or engaging in ex parte communication.¹ Judicial officers

should carefully self-monitor posts on social networking sites. Unlike others, judges are not able to comment about routine happenings in their workday when the comments might qualify as discussing a pending matter. Even something as simple as commenting that an unnamed attorney is dragging out a trial too long could be problematic if someone involved in the litigation sees or learns of the post. A good example of how an innocuous remark posted to a social networking site can lead to a slippery path of inappropriate conduct can be found in a North Carolina judicial misconduct matter.²

Generally, Michigan Code of Judicial Conduct Canon 2A warns: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." More specifically, Canon 5A allows a judicial officer to engage in social activities that "do not detract from the dignity of the office . . ." The number of postings on social networking sites detailing wild nights and displaying photos of scantily clad individuals is still shocking given that this information can be accessible to others who were not intended to be direct recipients. Although judges are allowed to have personal lives, they should be cautious regarding how much information they choose to share on social networking sites, knowing that once this information is posted it is no longer within their exclusive control and their conduct must ensure maintenance of public confidence in the judiciary.

What Everyone's Talking About: "Friending" and "Connecting" with Judges

Confirming a "friend" on Facebook or accepting a "connection" on LinkedIn takes just a quick click. Several states have issued advisory ethics opinions regarding this simple action when one of the parties involved is a judge. The concern articulated in each state that has addressed the matter is a simple one: does this relationship appear to be improper when it occurs between a judge and an attorney practicing before the judge, a litigant, or a potential witness?

This article is not intended to advise those subject to the Michigan Code of Judicial Conduct to act one way or another when it comes to making connections to others through social networking sites; its intent is to cause judicial officers to carefully consider how their actions in such a public forum might be perceived and to act cautiously to avoid misconduct under the canons. Although social networking sites often afford privacy controls, their policies may change and, with the increasing use of mobile devices to access these sites, it is far easier to share information with people who are not connected through the site. Your wallet stuffed with photos of the grandkids has now gone digital, and any of your Facebook friends can share them with others on their smartphones.

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Take the time to consider each action undertaken in the context of the canons when using social networking sites.

As early as January 2009, the New York Advisory Committee on Judicial Ethics issued Opinion 08-176, addressing the broader question of whether a judge could participate in a social network.³ While it advised that such conduct was acceptable, avoiding impropriety or the appearance of impropriety was of concern. Preserving the “integrity and impartiality of the judiciary” and not detracting “from the dignity of judicial office” were the guiding forces for a judge’s conduct on a social networking site.

Since the general caveat issued by New York, South Carolina issued an advisory opinion that briefly and summarily allowed a magistrate judge to be Facebook friends with law enforcement officers so long as they did not discuss the judge’s position as a magistrate.⁴ The Florida Supreme Court Judicial Ethics Advisory Committee stated unequivocally that a judge may not be friends on a social networking site with an attorney who may appear in his or her court.⁵ The opinion specific to friending in Facebook and similar sites (like LinkedIn and MySpace) found this conduct objectionable because both the judge and attorney affirmatively took action to make public their friendship status. In the committee’s opinion, the Florida canons prohibited such conduct because it “conveys or permits others to convey the impression that [the attorneys involved] are in a special position to influence the judge.”

In an opinion issued just last December, the Supreme Court of Ohio Board of Commissioners on Grievances and Discipline issued a broader opinion contrary to Florida’s.⁶ It concluded that the mere existence of a social networking relationship between an attorney or litigant and the judge presiding over a matter involving that attorney or litigant did not in and of itself violate the canons, but the social networking connection could be one of multiple factors relating

to a social relationship requiring the judge to disqualify himself or herself from the case. In discussing a similar conclusion by the Ethics Committee of the Kentucky Judiciary, the Ohio board pointed out that being friends in a social networking site “does not reasonably convey to others an impression that such persons are in a special position to influence the judge.”⁷

The voluntary judicial association in California issued a hybrid opinion in November 2010. It did not find the practice of judges friending attorneys to be prohibited per se, but instead offered that the entire context of the interaction be considered. Factors like the number of social networking friends the judge has, the types of people the judge accepts friendships with, and the frequency of an attorney appearing before the judge are all considerations in whether the attorney might appear to have a special relationship with a judge. The opinion prohibited a

judge from being friends with an attorney on a social networking site while the attorney has a case pending before the judge.⁸

Canon 2A of the Michigan Code of Judicial Conduct requires a judge to “avoid all impropriety and appearance of impropriety.” Canon 2C prohibits a judge from allowing social relationships to influence judicial conduct or judgment. Canon 5A allows a judge to engage in social activities so long as they do not “interfere with the performance of judicial duties.” To date, there is no clear direction in Michigan if a judge violates one or any of these canons by accepting a social networking connection with an attorney, litigant, or witness who might appear before the judge, but judicial officers should be mindful of the perception such action could engender. Judges are already cognizant of this when attorneys with whom they are friends practice in front of them or when they are familiar with a litigant or witness; they just need to be aware that this new forum is a lens through which the public can now view and examine that connection. Even if social networking connections between judges and attorneys, litigants, and witnesses were condoned as a broad concept, each specific relationship should be evaluated by the judge to determine if a reasonable person might believe that the social relationship between the judge and other

party could influence the judge's conduct or judgment in a legal proceeding.

Uncharted Territory: The Use of Social Networking to Integrate Judges' Consumer Patterns and Interests

An aspect of social networking sites that has not been widely discussed with respect to judicial ethics is the increasing use of these sites for commercial and fundraising purposes. Everything from retailers to charitable groups to online publications encourage you to "like" them or post their information to Facebook, Twitter, or other social networking sites. Some retailers even reward you for subscribing to their pages by offering discounts and other perks. When these actions are taken, they are displayed to others on an individual level and not as one among a group. For example, when a person likes a fundraising event on Facebook, it will show up as a personal preference on that individual's page and in all his or her friends' news feeds. When a person subscribes to a Facebook page supporting a business, it will appear on that individual's profile. Determining appropriate judicial conduct in this context is even murkier because as individuals in a large society, rarely have we been able to express our personal interests and preferences in such public forums before the advent of social networking sites.

As stated earlier, a judge is required to promote public confidence in the integrity and impartiality of the judiciary according to Canon 2B, so care should be taken when a judicial officer chooses to comment on an article or organization. For example, a judge may want to use greater care in learning about an organization before deciding to like it on Facebook. Some groups may sound innocuous but have blatantly inflammatory agendas once they are investigated further. A judge who has not done due diligence before endorsing an organization may appear less than impartial with respect to an issue that could arise during litigation before the court.

Although a judge is allowed to "participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality,"⁹ the judge must not "individually

solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the office for that purpose."¹⁰ Yet the judge may join a general appeal.¹¹ In light of the canons, it is clear that a judge cannot solicit funds for an organization using a social networking site if the judge could not have done so through more traditional methods. But it is less clear whether the judge can make public his or her support for an organization by joining a fan page, liking the organization, or taking some similar action on a social networking site. The question is whether such a step is analogous to a judge being listed on an organization's letterhead as an officer, which is permitted conduct.¹² Alternatively, the conduct could be problematic because the judge's support of the organization is disseminated to people who may not have already been involved or interested in the organization and because, through the judge's individual page, he or she is not listed as one among many supporters.

A judge is not permitted to "use the prestige of office to advance personal business interests of others."¹³ While at work, it would be inappropriate for a judge to encourage someone to use a relative as an insurance agent. But it is less clear if this canon is violated if a judge, during his or her personal time, were to post to a social networking site that he or she likes the ice cream at a relative's ice cream store. When individuals post such comments, are they really just expressing that they enjoyed a great scoop of ice cream for dessert or could they be trying to help drum up business for a relative? Would the intent of the post matter? Does this canon extend to something as simple as posting to your Facebook page a Super Bowl ad you really liked, even when you don't care about the product being sold in the ad? Is a judge using the "prestige of office" when posting this personal opinion on his or her page?

Summary

Unfortunately, this burgeoning new communication method with its expanding creative uses leads to more questions than answers about where to draw the line between appropriate and inappropriate judicial con-

duct. Until we get more direction from the unfortunate mistakes some people will make as we muddle through this new terrain, the best advice for judges and quasi-judicial officers is to take the time to consider each action undertaken in the context of the canons when using social networking sites. ■

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FOOTNOTES

1. Code of Judicial Conduct, Canon 3A(6) and Canon 3A(4).
2. North Carolina Judicial Standards Commission, *Public Reprimand of Terry*, Inquiry No. 08-234 (April 1, 2009), <<http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>>. All websites cited in this article were accessed November 28, 2011.
3. New York Advisory Committee on Judicial Ethics, Opinion No. 08-176 (January 29, 2009), <<http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>>.
4. South Carolina Judicial Department Advisory Committee on Standards of Judicial Conduct, Opinion No. 17-2009 (October 2009), <<http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>>.
5. Florida Supreme Court JEAC, Opinion No. 2009-20 (November 17, 2009), <<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>>.
6. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion No. 2010-7 (December 3, 2010), <http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/op_10-007.doc>.
7. See Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Opinion JE-119 (2010), <<http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf>>.
8. California Judges Association Judicial Ethics Committee Opinion 66 (November 23, 2010), <<http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>>.
9. Code of Judicial Conduct, Canon 5B.
10. Code of Judicial Conduct, Canon 5B(2).
11. *Id.*
12. *Id.*
13. Code of Judicial Conduct, Canon 2C.