

Judges and Social Media

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“A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.”¹

The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility recently issued Formal Opinion 462 – “Judge’s Use of Electronic Social Networking Media.” The Committee stated that while electronic social media (ESM) can be beneficial, its use raises concerns under the ABA Model Code of Judicial Conduct.²

The requirement underlying a judge’s use of social media is that judges must at all times act in a manner “that promotes public confidence in the independence, integrity, and impartiality of the judiciary,” and must “avoid impropriety and the appearance of impropriety.”³ Against this backdrop, online social networking relationships through ESM raise a number of concerns: (1) some online networks would permit other members to post content onto a judge’s site; (2) it could be argued that a judge participating in a social networking site loses control over the privacy of his or her own communications with others; (3) labels (*i.e.*, “friend”) used by social networking sites often imply a closer personal relationship than actually exists; and (4) social networking relationships are much more public and, therefore, more likely to create an appearance of impropriety.⁴

The ABA ethics opinion provides guidance on six primary issues:

- 1) Judges must comply with Rule 1.2, by acting in a manner that promotes public confidence in the judiciary, when sharing information via ESM.
- 2) Judges should not form relationships that may violate Model Rule 2.4(C) by conveying an impression that others could influence the judge.

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¹ ABA Formal Opinion 462: Judge’s Use of Electronic Social Networking Media (Feb. 21, 2013).

² *Id.*

³ ABA Model Code of Judicial Conduct Rule 1.2. A PBA Task Force on the Code of Judicial Conduct has recommended that the existing Canons be updated in significant respects to conform to the current Model Code provisions. That proposal was approved by the PBA House of Delegates in May 2013 and is pending before the Pennsylvania Supreme Court.

⁴ John S. Summers and Maureen P. Smith, *Judges and Online Social Networking*, BNA Insights, Vol. 12, No. 22 (June 3, 2013).

- 3) Judges must avoid improper ex parte communications under Rule 2.9(A).
- 4) Judges should avoid using ESM to obtain information on a matter before the judge that would violate Rule 2.9(C).
- 5) Judges should not comment on pending or impending matters to comply with Rule 2.10.
- 6) Judges should not offer legal advice in violation of Rule 3.10.⁵

The opinion explains that, although states have treated judges' use of ESM differently,⁶ when "friending" a lawyer or other individual who may appear before the judge, a careful situational evaluation must be undertaken; "context is significant."⁷ A judge should conduct the same sort of analysis made whenever matters before the court involve persons the judge knows or has a connection to.⁸ Lastly, the Committee notes that a judge's use of ESM for election campaign purposes should follow the same rules as any other form of interaction.⁹

The ABA opinion concludes:

*"Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting."*¹⁰

Lawyers Connecting With Judges on Social Media

In the past few years there have been a number of state ethical opinions issued on the subject of social media relationships between lawyers and judges.¹¹ However, these opinions

⁵ John P. Ratnaswamy, *ABA Formal Opinion on "Judge's Use of Electronic Social Networking Media"*, The Benchers (May/June 2013).

⁶ Some states acknowledge that a judge's participation in ESM is generally allowed. *See generally*, Ky. Jud. Formal Jud. Eth. Op. JE-119; New York Jud. Eth. Adv. Op. 08-176. Ethics committees in other states, however, have been more restrictive. *See, e.g.*, Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (a judge may not include lawyers who may appear before that judge in social networks or permit such lawyers to add the judge to their social networks.).

⁷ ABA Formal Opinion 462 – Judge's Use of Electronic Social Media, at 2-3 (Feb. 21, 2013).

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ Kelly Lynn Anders, *Ethical Exits: When Lawyers and Judges Must Sever Ties On Social Media*, 7 Charleston L. Rev. 187, 199 (2012-13) (*citing* Maryland Judicial Ethics Comm., Op. 2012-07 (2012) (opining that social connection alone does not create impropriety); Massachusetts Comm. on Judicial Ethics, Op. 2011-6 (2011) (suggesting how judges should use social media); Oklahoma Judicial Ethics Advisory Panel, Judicial Ethics Op. 2011-3 (2011) (concluding that social networking is permissible, but those who regularly appear before the court may not be added as friends); California Judges Ass'n Judicial Ethics Comm., Op. 66 (2010) (allowing judge to use online social networking); Ethics Comm. of the Kentucky Judiciary, Formal Judicial Ethics Op. JE-119 (2010)

have largely focused on judicial ethics and have been spurred by inquiries on how judges should approach social media relationships.¹² The opinions range from outright prohibitions on lawyers and judges connecting on LinkedIn or friending on Facebook,¹³ to general acceptance of such relationships, with some prudent limitations.¹⁴

Recognizing the increasing prevalence of social media networking, an Ad Hoc Committee appointed by the Supreme Court recently proposed amendments to update the Code of Judicial Conduct to provide greater ethical guidance to judges who use social media outlets.¹⁵ The committee's draft states in a comment that judges should limit their participation in electronic social media networks so the need for recusal or disqualification is reduced.¹⁶

The Ad Hoc Committee proposed that the judge should consider the relationship between the judge and a member of a social media network is of "such caliber" as to warrant recusal or disqualification, or if disclosed to a litigant would create a reasonable perception that the judge could not be fair. A judge would not be required to research all of his or her social media connections if a judge did not specifically recall the connection. In addition, the committee has recommended that "a judge who participates in electronic social media shall avoid comments and interactions that may be interpreted as ex parte communications concerning pending matters."

There has been a relative absence of ethics opinions regarding the permissibility of lawyers contacting judges using social media. Most of the inquiries regarding social media conduct by lawyers have been in relation to third parties, either witnesses or other parties.¹⁷ The general sense is that it is permissible to review publicly available profiles, while private profiles create ethical dilemmas.¹⁸

(permitting online social networking but advising extreme caution); Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7 (2010) (finding no per se prohibition of judges' social networking under state rules); Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2009-20 (2009) (addressing judges' online social networking interactions with lawyers and election campaigns); New York Advisory Comm. on Judicial Ethics, Op. 08-176 (2009) (permitting online social interaction that does not violate rules governing judicial conduct); South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009) (permitting magistrate to use Facebook and explaining that judicial social networking "allows the community to see how the judge communicates and gives the community a better understanding of the judge").

¹² *Id.* at 199-200.

¹³ Florida Supreme Court Judicial Ethics Advisory Comm., Op. 2012-12 (2012); and Fla. Op. 2009-20 (2009). The Florida committee also recently opined that judges running for reelection may use a Twitter account as a campaign tool, but the preferred approach would be for such account to be created and maintained by the campaign committee or manager to eliminate the potential for ex parte communication. See Fla. Op. 2013-14 (July 30, 2013).

¹⁴ See, e.g., California Judges Ass'n Judicial Ethics Comm., Op. 66 (2010); Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7 (2010).

¹⁵ A. Elliott-Engel, *Ethics Ad Hoc Committee Suggests Black-and-White Judicial Canons*, The Legal Intelligencer, July 2, 2013.

¹⁶ Ad Hoc Committee Draft proposed Rule 2.11 (Recusal and Disqualification), Cmt. [6].

¹⁷ See Philadelphia Bar Assoc. Prof'l Guidance Comm. Op. 2009-02 (March 2009) (Lawyer would be in violation of several rules of professional conduct if lawyer asked a non-lawyer assistant to "friend" the witness, without the assistant explaining the reason for the request or disclosing that the assistant worked for the attorney).

¹⁸ Compare Oregon State Bar Assoc. Op. 2005-164 (2005) (A lawyer who reads information posted for general public consumption simply is not communicating with the represented owner of the Web site), with San Diego County Bar Legal Ethics Comm. Op. 2011-2 (2001) (rules bar an attorney from making an ex parte friend request of a represented party).

Although there has been limited guidance on the issue of lawyers connecting with judges on social media, lawyers should be mindful of the Rules of Professional Conduct when deciding whether to connect with a judge on social media. In Pennsylvania, Rule 3.5 (Impartiality and Decorum of the Tribunal), is particularly relevant. The rule states that “[a] lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;¹⁹
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- ...
- (d) engage in conduct intended to disrupt a tribunal.”²⁰

Although there is no outright prohibition on a lawyer connecting with a judge on social media in Pennsylvania, a lawyer should bear in mind the relevant Rules of Professional Conduct when considering such activity.²¹ Lawyers must be mindful that an attempt to connect with a judge may create an ethical dilemma for them both, potentially requiring recusal by the judge to avoid any appearance of impropriety or resulting in disqualification of counsel to the detriment of the client.²² The guidance put forth concerning how judges should conduct themselves on social media is equally instructive for attorneys. If the judge is subject to a prohibition from initiating a social media relationship, an attorney should similarly refrain from doing so.²³

When in doubt, it may be best to avoid such social media connections with anyone acting in an adjudicative capacity. However, should a lawyer decide to connect with a judge on social media or have an existing connection, strict adherence to the same Rules of Professional Conduct governing traditional social relationships will help to avoid creating any perceived appearance of impropriety for the presiding judge and any potential prejudice to the lawyer’s client.

¹⁹ Rule 8.4(e) provides that it is professional misconduct to “state or imply an ability to influence improperly a government agency or official,” and therefore complements Rule 3.5(a).

²⁰ Rule of Professional Conduct Rule 3.5 (Impartiality and Decorum of the Tribunal). *See also* Phila. Bar Prof. Guidance Comm. Op. 98-15 (Under Rule 3.5(b), form of communication with judge does not alter lawyer’s obligation to give timely notice to other parties).

²¹ For example, the timing of a social media connection may be critical to the assessment of the conduct. If the social media interaction is initiated or continued during the course of a proceeding, the impartiality of the tribunal may be called into question. *See* Rule of Professional Conduct 3.5 and Cmt. [2]: “During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, ..., unless authorized to do so by law or court order.” The rule is intended to curb communications designed to improperly influence the tribunal, not every oral or written communication as between an attorney and a judicial officer. However, lawyers (and judges) should operate on the assumption that any communication via social media or otherwise that is not shared with other counsel in a case may be examined at some later stage with an eye to the question whether the communication was appropriate under the governing ethical rules.

²² In an extreme case, a prosecutor in Florida who engaged in extensive ex parte contacts via cellphone and text messages with the presiding judge during a death penalty trial was suspended for two years by the Florida Supreme Court. *Florida Bar v. Scheinberg*, No. SC11-1865 (June 20, 2013). The communications apparently did not concern the trial itself. The trial judge is facing a one year recommended suspension.

²³ *See also* Rule of Professional Conduct 8.4(f) (lawyer may not knowingly assist a judge in conduct that is a violation of applicable rules of judicial conduct).