

CALIFORNIA JUDGES ASSOCIATION
Judicial Ethics Committee
Opinion 66

ONLINE SOCIAL NETWORKING

I. Introduction

The first decade of the 21st century has seen the birth of a worldwide phenomenon, the explosive growth of online social networking. One such site, Facebook, announced that it had over 500 million users as of July 2010, doubling the number from 2009. Another site, Myspace, claims 122 million monthly active users, 70 million in the United States. Twitter has grown from three million users to 160 million in the last two years. The prevalence of sites like Facebook and Twitter has altered the ways millions of people choose to communicate with each other. They have introduced new words into the vernacular, such as “friending” and “tweeting.” Significantly, this phenomenon has not been confined to younger generations. It has been reported that the largest percentage of users on Facebook are between 35-54 years old and the fastest growing segment are users over 55.

It is safe to assume many judges can be counted in these figures. Their participation raises the question of what ethical constraints arise when a judge participates in online social networking. This opinion, which promises to be the first of many to address this issue in California, will address three of the more fundamental questions presented: 1) May a judge be a member of an online social networking community? 2) May a judge include lawyers who may appear before the judge in the judge’s online social networking? and 3) May a judge include lawyers who have a case pending before the judge in the judge’s online social networking? Although the committee recognizes that significant ethical issues arise in each of these cases, some of which will be discussed in this opinion, the answer to questions 1) and 2) is a very qualified yes. The answer to question 3) is no.

II. Authority

Canon 2A: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Canon 2B(1): “A judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge.”

Canon 2B (2): “A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.”

3B(7): “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 concerning a pending or impending proceeding....”

Canon 3B(9): “A judge shall not make any public comment about a pending or impending proceeding in any court....”

Canon 3E(1): “A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.”

Canon 3E(2): “In all trial court proceedings, a judge shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.”

Canon 4A: “A judge shall conduct all of the judge's extrajudicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.”

Canon 4A Commentary: “Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of a classification such as their race, sex, religion, sexual orientation, or national origin.”

Canon 5A: “Judges and candidates for judicial office shall not...publicly endorse or publicly oppose a candidate for nonjudicial office.”

Canon 5D: “Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice.”

Cal. Code of Civ. Proc. Section 170.1(a): “A judge is disqualified if...6(A) for any reason...(iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.”

III. Discussion

A. What is an Online Social Networking Site?

In order to analyze what ethical issues arise when a judge participates in an online social networking site it is necessary to have some understanding of how these sites work. In essence, these sites allow users (hosts) to create personalized pages within the social network site where the host can post information that is accessible to other participants in the site or community. Sites such as Facebook and Myspace allow hosts to upload photos and videos as well. Participants on these sites can establish connections with other users of the site. Participants who are connected are typically referred to as “friends.” A friend is someone whom the host has given access to his/her page.

Typically one user of a site will invite another to become a friend. If the invitation is accepted the two users are each other's friends. Friends can see the information posted by the host of the page and can post information on the page themselves. This is referred to as writing on the host's "wall." Also, when a user posts something on his/her own wall, it will typically be displayed on his/her friends' pages. Also, other friends can view the posts of both the host and the host's other friends who have written on the host's page.

It is this broad dissemination of information that is one of the attractions of social networking sites. It enables users to post information that is then shared with everyone in their "community." In turn, a user will be able to receive information from all the members of the community. These sites make it very easy for people to keep in touch with one another, sharing events of their day, vacation photos, news of family and friends and the like. They are also used by businesses, business groups and professional organizations. By their very nature, these sites are not private. They are designed to increase the flow of information and they operate like a web of interconnected pages. Once something is sent out into the community, the sender has lost control over it.

Participants in these online communities have varying degrees of control as to who can access the information on their own pages. These controls are referred to as privacy settings. These settings allow a user to limit who can see most of the information on the user's page. However, it is not possible to limit all the information. For instance, Facebook allows a participant to limit who can view the host's wall, photos, videos and profile information. But four things are accessible to anyone using Facebook, the name and gender of the user, the user's profile picture and the networks the user belongs to. Also, while it is possible to limit who can see who the user's friends are, the default settings allow anyone to view that information, and even if the user restricts access to the user's "friends" list, Facebook makes it clear that information is accessible through other sources. For example, if a user is a member of any network, anyone on that network can see who that user's friends are. Also, it is not possible to restrict who can view information on a friend's page. So, unless the friend has changed the privacy settings on his/her page to restrict who can view his/her friends list, anyone would be able to see it.

It is possible for users to remove someone from their friends list. Doing so would disconnect ("unfriend") that person from the user and that person would only have access to the information available to everyone on the social networking site. Some sites allow a user to create a block list that precludes those listed from accessing that user's page.

B. May a Judge Be a Member of an Online Social Networking Community?

The same rules that govern a judge's ability to socialize and communicate in person, on paper and over the telephone apply to the Internet. As a general rule, a judge's extrajudicial activities are governed by Canon 4A which states: "A judge shall conduct all of the judge's extrajudicial activities

so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.” A judge’s participation in an online social networking site does not *per se* cast reasonable doubt on the judge’s ability to act impartially, demean the judicial office, or interfere with the proper performance of the judge’s judicial duties anymore than any other type of social activity.

Judges are not required to isolate themselves from their communities. Indeed, the commentary to Canon 4A expressly states that “a judge should not become isolated from the community in which the judge lives.” In this day and age, that community exists and increasingly interacts in the realm of cyberspace. There is no express rule against participating in an online social network site and, so long as any provisions of the Canons are not otherwise violated, a judge is free to do so. It is permissible to use technology to accomplish what is otherwise permissible under the Code.

Other states that have addressed this issue have arrived at the same conclusion. The New York Advisory Committee on Judicial Ethics concluded: “Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules.”¹ Advisory Committees in South Carolina and Kentucky reached similar results.²

However, the use of technology does pose unique issues that may have significant ethical implications. Many of these issues arise from the loss of control one experiences when interacting in cyberspace rather than in person and with the accessibility and permanence of matters posted on the Internet. While it is permissible to participate in online social network sites, a judge must be cognizant of the ethical implications of doing so. The following is a list of some of the ethical concerns that arise when judges participate in an online social networking community. This list is not intended to be exhaustive.

1. Public Comment on Pending Cases

One cannot assume that comments made on a social networking site are private. Posts on a Facebook page are not private. They appear on the “walls” of other Facebook members the user has “friended.” If a user comments on a friend’s post, that comment is visible not only to the friend, but to any of the friend’s friends. As a result, any comments a judge makes on a social

¹ N.Y. Judicial Ethics Advisory Opinion 08-176.

² Advisory Committee on standards of Judicial Conduct (South Carolina) Opinion No.17-2009; Ethics Committee of the Kentucky Judiciary Formal Judicial Ethics Opinion JE-119.

networking site should be treated as public comments within the meaning of Canon 3B(9), which prohibits public comment on pending or impending cases.

2. Casting Doubt on a Judge's Ability to Act Impartially

Caution is essential when a judge goes onto an online social networking site. Internet communications are permanent and lack the privacy of in-person or telephonic conversations. Judges must be careful to avoid making remarks that would cast doubt on the judge's ability to act impartially. As the commentary to Canon 4A makes plain: "Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of a classification such as their race, sex, religion, sexual orientation, or national origin."

In the context of online social networking, the responsibility to avoid the appearance of bias goes further than simply not making such comments oneself. In a traditional social setting, a judge normally has no obligation to respond to comments made by others, no matter how distasteful or offensive. That is because those comments are normally not attributable to the judge. However such comments on a judge's personal page can become not only permanent but accessible to all of the judge's friends. Leaving them on the page may create the impression that the judge has adopted the comments. Therefore, a judge is obligated to delete, hide from public view or otherwise repudiate demeaning or offensive comments made by others that appear on the judge's social networking site. Moreover, a judge has an obligation to be vigilant in checking his/her network page frequently in order to determine if someone has placed offensive posts there.

3. Demeaning Judicial Office

Social networking sites typically allow users to post photos and videos onto the user's pages. The user may also add links to other Internet sites and indicate favorable or unfavorable reviews of products, websites and public figures. When utilizing such features of social networking sites judges must always be mindful that they have a duty to act at all times in a manner that promotes public confidence in the integrity of the judiciary (Canon 2A) and must refrain from any extrajudicial activities that demean the judiciary (Canon 4A). Online activities that would be permissible and appropriate for a member of the general public may be improper for a judge. While it may be acceptable for a college student to post photographs of himself or herself engaged in a drunken revelry, it is not appropriate for a judge to do so.

4. Impermissible Political Activity

Canon 5A prohibits judges from publicly endorsing or opposing any candidate for non-judicial office. Canon 5B prohibits a judge from engaging in "any political activity other than in relation to measures concerning the

improvement of the law, the legal system, or the administration of justice.” By their very nature statements posted on social networking sites are public. Therefore, it would be inappropriate to endorse or oppose candidates for non-judicial office on a social networking site. In addition, using features of a site could constitute political activity. For example, creating links to political organizations or posting a comment on a proposed legislative measure would be improper.

5. Lending the Prestige of the Judicial Office

Canon 2B(2) states: “A judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others.” There are a number of ways the use of a social networking site could potentially contravene Canon 2B(2). If the host of a page is identified as a judge any posting written by the judge could be considered a “written communication” within the meaning of Canon 2B(2). A judge thus must be careful not to post any material that could be construed as advancing the interests of the judge or others.

The intent of the foregoing discussion is to illustrate some of the ethical concerns that may arise when a judge participates in an online social networking site. The number of these sites is constantly growing as are the number of people participating in them. In addition, the sites themselves evolve constantly, adding features and changing privacy settings. It is often difficult to discern what information is transmitted by the operators of the site to third parties and to which third parties. Judges who choose to participate in online social networking sites must exercise a high degree of caution when doing so, and should never assume any of the information they are transmitting or receiving is private or accessible to only the intended recipients.

C. May a Judge Include Lawyers Who May Appear Before the Judge in the Judge’s Online Social Networking?

There is no ethical rule prohibiting judges from interacting with lawyers who appear before them. The commentary to Canon 4A points out that a judge should not be separated from the community in which the judge lives. Judges are not only allowed, but are encouraged to participate in bar associations and other groups dedicated to the improvement of the law. Judges are permitted to participate in organizations such as the American Inns of Court where judges and lawyers interact socially in an effort to foster civility and professionalism. While bar associations are open to all lawyers, Inn of Court chapters limit their membership. Judges are permitted to join social and civic organizations that include attorneys who may appear before them. Some of those social or civic organizations are open to all, others not. The same considerations apply to interacting with lawyers on online social networking

sites. Accordingly, a *per se* prohibition of social networking with lawyers who may appear before a judge is not mandated by the Canons.

The ethical rules that apply to a judge's relationship with lawyers who may appear before the judge are the rules pertaining to the appearance of bias or undue influence, disclosure and disqualification and *ex parte* communications. If the nature of the online interaction would give rise to an appearance of bias or undue influence it would violate Canon 2A, which requires that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," Canon 2B, which prohibits a judge from conveying or permitting others to "convey the impression that any individual is in a special position to influence the judge," as well as Canon 4B(1), which requires that a judge's extrajudicial activities not "cast reasonable doubt on the judge's capacity to act impartially." Moreover, if the online interaction in question would lead to disqualification, engaging in that interaction would be prohibited by Canon 4B(3), which prohibits judges from engaging in extrajudicial activities that would interfere with the proper performance of the judge's judicial duties. Finally, assuming that the interaction does not violate any of these Canons, there is still the issue of whether disclosure is required by Canon 3E(2).

Although the committee does not believe a *per se* prohibition of social networking with lawyers who may appear before a judge is mandated by the Canons, it is important to stress that a judge's interaction with attorneys who may appear before the judge will very often create appearances that would violate the Canons. The following analysis focuses on the various factors that need to be considered in determining whether it would be permissible to interact with attorneys on a social networking site and the effect of such interaction on a judge's ethical obligations.

1. Appearance Issues

Among the primary areas of concern with judges "friending" attorneys who may appear before the judge are the appearances that connection may create. Depending on the nature of the site, a reasonable person could conclude that an attorney who interacts with a judge on the judge's social networking site is in a position of special influence and could reasonably question the judge's ability to be impartial in cases involving that attorney. This is especially true where, as in Facebook, it is possible to learn who a user's friends are regardless of the privacy settings utilized by the host. Given the increased use of Internet searches of party opponents by tech-savvy litigators this concern cannot be taken lightly. In this day and age, one should assume that lawyers, parties and even witnesses involved in a case may search Facebook and other sites to obtain background information about opposing counsel, parties and the judge. In conducting that search, it would be troubling, to say the least, to discover that the opposing counsel and the judge are "friends" on a social networking site.

Whether interacting with an attorney on a social networking site would create the impression the attorney is in a special position to influence the judge and cast doubt on the judge's ability to be impartial depends on the following factors:

1). The nature of the social networking site

The more personal the nature of the page, the greater the likelihood that including an attorney would create the appearance that the attorney would be in a special position to influence the judge, or cast doubt on the judge's ability to act impartially. On the other hand, pages that are used for interacting with distinct groups such as sections of a bar association, alumni organizations and the like would be no more likely to create the impression of special influence or bias than would actively participating in those groups in the first place.

2). The number of "friends" on the page

The greater the number of "friends" on the judge's page the less likely it is one could reasonably perceive that any individual participant is in a position to influence the judge. Interacting on a page with hundreds of participants is different from interacting on a page with a small number of participants.

3). The judge's practice in determining whom to include

As with the number of people on the page, the more inclusive the page the less likely it is to create the impression that any individual member is in a special position to influence the judge. On the other hand, if the judge elects to allow some attorneys to participate on the judge's social networking page and excludes others it would give rise to the appearance that the judge is partial to those attorneys included and biased against those excluded. This becomes especially true if, for example, a judge's group of friends includes a large number of prosecutors but no criminal defense counsel, or a large number of plaintiff's lawyers and no insurance defense counsel.

4). How regularly the attorney appears before the judge

If the likelihood that the attorney will actually appear before the judge is low, the more likely it is that the interaction would be permissible. On the other hand, if the attorney appears frequently before the judge the interaction is less likely to be permissible.

Additional factors relating to the nature of the offline relationship, while not addressed in the opinion, must be taken into consideration in determining whether interacting in an online social network site is permissible. For example, if the nature of the contacts with an attorney is such that disclosure is required when the attorney appears before the judge, including that attorney in any social networking site may be improper regardless of the nature of the site

because that additional factor may be enough to lead a reasonable person to question the judge's ability to be impartial.

The following examples are intended to illustrate the application of the factors outlined above. The Committee recognizes that a myriad of possible permutations exist between the two examples given. The closer a given situation comes to one of these examples, the more likely it is that "friending" an attorney is either permissible or prohibited.

1). Where the interaction would be prohibited

Judge maintains a social networking site where s/he updates family and friends about her/his extrajudicial activities. Judge includes such items as vacation photos, updates on the judge's children, and the judge's thoughts about books movies and restaurants. The site is shared with the judge's extended family, old friends and a few colleagues. A former law school classmate of the judge, who is not a close friend, has requested to be included in the judge's social networking site (which would in turn make the judge a participant in the former classmate's page). The former classmate practices in the judge's jurisdiction and will occasionally appear before the judge.

Under these facts, it would be improper for the judge to include the attorney in his/her social networking site. The site is personal and includes mostly people who are close to the judge. A person aware of the facts could reasonably conclude that the attorney is in a special position to influence the judge.

2). Where the interaction would be permissible

Judge is on the executive committee of a section of the local bar association. Judge is also a member of local Inn of Court. The judge would like to communicate with members of both organizations using the judge's social networking site. The judge does not intend to use the site to update participants on his/her personal nonprofessional activities. Rather the judge would like to update participants about the activities of the two organizations and discuss issues related to the legal community and profession. The two organizations include some attorneys who occasionally appear before the judge. Any lawyers who wish to be included in the site would be permitted to do so even if he or she is not a member of the organizations.

Under these facts it would be permissible to include attorneys who may appear before the judge. The site is not being used to share personal information. It is being used to facilitate professional interactions. A person aware of these facts could not reasonably conclude that any individual participant is in a special position to influence the judge simply by virtue of being included in the site.

2. Disclosure and Disqualification

In those cases where “friending” an attorney is permissible, the issue then becomes what ethical obligations arise when the attorney appears before the judge. It is the committee’s view that at the very least disclosure is required in every case. For example, even though generally a judge need not disclose that an attorney appearing before him/her is a member of a bar association in which the judge is also a member, if the judge and the attorney are both members of a social networking site utilized by members of that organization the judge should disclose this fact as well as the extent and nature of the professional and online contacts. The need for disclosure arises from the peculiar nature of online social networking sites, where evidence of the connection between the lawyer and the judge is widespread but the nature of the connection may not be readily apparent. Assuming that including the lawyer was permissible, disclosure should be sufficient to dispel any concerns that the attorney is in a special position to influence the judge or that the judge would not be impartial.

If the site is the personal site of the judge the type of which would normally make it improper to include lawyers who appear before the judge, and the judge allowed the connection with the lawyer because the judge believed it was highly unlikely the attorney would ever appear before the judge, the judge should disqualify him or herself if that lawyer does appear. This would be so even if the judge feels he/she could be impartial, because under these circumstances a person aware of the facts might reasonably entertain a doubt about the judge’s ability to be impartial, and therefore, the judge would be disqualified under Cal.Code of Civ. Proc. section 170.1(a)(6)(A)(iii).

3. *Ex Parte* Communications

The potential that a judge may receive improper *ex parte* communications is much greater when the judge is interacting with attorneys who may appear in the judge’s court. With the exception of client confidences, attorneys are freer to discuss their pending cases than are judges. The judge’s page will include posts the attorneys make on their pages, and if the judge visits an attorney’s page, it may contain posts by other attorneys who are friends with the judge’s attorney friend. So, the danger of receiving an *ex parte* communication through an attorney is a significant concern.

D. May a Judge Include Lawyers Who Have a Case Pending Before the Judge in the Judge’s Online Social Networking Site?

While it may be permissible for a judge to interact on a social network site with an attorney who *may* appear before the judge, it is not permissible to interact with attorneys who have matters pending before the judge. When a judge learns that an attorney who is a member of that judge’s online social networking community has a case pending before the judge the online interaction with that attorney must cease (i.e. the attorney should be

“unfriended”) and the fact this was done should be disclosed along with the disclosure discussed above. Regardless of the nature of the social networking page, maintaining online contacts while a case is pending creates appearance issues that cannot be overcome through disclosure of the contacts.

If the online interaction were permitted, a judge would have to disclose not only the fact that the interaction took place in the first instance, but also that it is going to continue. This continuing contact could create the impression that the attorney is in a special position to influence the judge simply by virtue of the ready access afforded by the social networking site.

IV. Conclusion

To set out a *per se* rule barring all interactions with attorneys who may appear before the judge would ignore the realities of an increasingly popular and ubiquitous form of social interaction which is used in a wide variety of contexts. It is the nature of the interaction that should govern the analysis, not the medium in which it takes place. Although the committee has concluded it is permissible for a judge to be a member of an online social networking site and that under some limited circumstances it is permissible to interact with attorneys who may appear before the judge on an online social networking site, it is impermissible for judges to interact with attorneys who have cases pending before the judge, and judges who choose to participate in online social networks should be very cautious. A judge should not participate in an online social networking site without being familiar with that site’s privacy settings and how to modify them. Also, a judge who chooses to participate must be aware of the affirmative obligations the Code places on the judge to monitor the site and whether it violates any of the many ethical rules which could apply.

All the concerns involved in participating in the online social network generally are magnified when it includes attorneys who may appear before the judge. Moreover, even where disqualification is not required a judge must disclose the online relationship and it could raise questions in the minds of the litigants that would have never otherwise arisen. Judges should also bear in mind that determining which attorneys may appear before them can be greatly complicated whenever reassignment of the judge is possible.

Although not strictly an ethical concern, judges who choose to participate should be mindful of the significant security concerns that such participation entails. By their very nature social networking sites are the antithesis of maintaining privacy. It is frightening how much someone can learn about another person from a few Internet searches. The judge’s site may be set with the most restrictive privacy settings, but his/her friends’ sites might not. Data imbedded in photos posted on the Internet may be accessible to others. Used in connection with cellular phones, some sites let other participants know a participant’s physical location at any given time.

In short, notwithstanding the explosion of participation in online social networking sites, judges should carefully weigh whether the benefit of their participation is worth all the attendant risks.

2010/11 JUDICIAL ETHICS COMMITTEE

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