The Supreme Court of Ohio

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OFFICE OF SECRETARY

OPINION 2010-7
Issued December 3, 2010

SYLLABUS: A judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct. A judge who uses a social networking site should follow these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), a judge should not make comments on a social201 networking site about any matters pending before the judge—not to a party, not to a counsel for a party, not to anyone. To comply with Jud. Cond. Rule 2.9(C), 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. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), 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. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, 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.

OPINION: This opinion addresses a question regarding a judge and a lawyer being "friends" on a social networking site.

> May a judge be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge?

Introduction

A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily. A social network "friend" may or may not be a friend in the traditional sense of the word.

Anyone who sets up a profile page on a social networking site can request to become a "friend" (or similar designation) of any of the millions of users on the site. There are hundreds of millions of "friends" on social networking sites.

A "friend" of a "friend" can become a "friend" of a "friend" and so on. Consequently, some "friends" do not know each other except for their presence on the social network.

Being a "friend" opens the opportunity for social interaction on the network. A "friend" can interact with another "friend" by posting status updates on newsfeeds and walls, by sharing photographs, by sending messages, or by chatting online. And, unless privacy controls are used, interaction with one friend can be viewed by all friends in the network.

Inevitably, a judge who uses a social network site will be asked to "friend" other users, some of whom may be lawyers, some of whom may represent clients in the court on which the judge serves. Thus, judges seek guidance as to appropriate ethical boundaries, in particular as to being "friends" with lawyers on a social networking site.

Ohio Code of Judicial Conduct

There is no rule in the Ohio Code of Judicial Conduct that prohibits a judge from being friends, online or otherwise, with lawyers—even those who appear before the judge.

Social interaction between a judge and a lawyer is not prohibited. Yet, a judge's actions and interactions must at all times promote confidence in the judiciary. A judge must avoid impropriety or the appearance of impropriety, must not engage in *ex parte* communication, must not investigate matters before the judge, must not make improper public statements on pending or impending cases, and must disqualify from cases when the judge has personal bias or prejudice concerning a party or a party's lawyer or when the judge has personal knowledge of facts in dispute.

Canon 1 states that "[a] judge shall uphold and promote the *independence*, *integrity*, and *impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of *impropriety*. [As explained in the Scope section of the Code at [2], "[t]he canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a rule, the canons provide important guidance in interpreting the rules."]

Jud. Cond. Rule 1.2 echoes Canon 1. Jud. Cond. Rule 1.2 requires that "[a] judge shall act at all times in a manner that promotes public confidence in the *independence*,

integrity, and *impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of *impropriety*."

Canon 2 states that "[a] judge shall perform the duties of judicial office *impartially*, competently, and diligently."

Jud. Cond. Rule 2.4(C) requires 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."

Jud. Cond. Rule 2.9(A) requires, with exceptions not applicable herein, that "[a] judge shall not initiate, receive, permit, or consider *ex parte* communications." Pursuant to the Terminology section of the Code an "'[*e*]*x parte* communication' means a communication, concerning a *pending or impending matter*, between counsel or an unrepresented party and the court when opposing counsel or an unrepresented party is not present or any other communication made to the judge outside the presence of the parties or their lawyers." "'Impending' references a matter or proceeding that is imminent or expected to occur in the near future." "'Pending' references a matter or proceeding that has commenced. A matter continues to be pending through any appellate process until final disposition."

Jud. Cond. Rule 2.9(C) requires that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."

Jud. Cond. Rule 2.10 requires that "[a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter *pending* or *impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."

Jud. Cond. Rule 2.11(A)(1) requires that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned, including but not limited to the following circumstances: The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding."

Jud. Cond. Rule. 3.10 requires that "[a] judge shall not practice law."

Upholding these required virtues may be challenging for a social networking judge. Social interaction on a network occurs rapidly and is widely disseminated.

Other states

Outside Ohio, a judge has received discipline for social networking misconduct. In Ohio, thus far, there has been no discipline of judges for social networking misconduct.

In North Carolina, a judge received a public reprimand for social networking misconduct. See *Public Reprimand of Terry*, North Carolina Judicial Standards Commission, Inquiry No. 08-234, April 1, 2009. While presiding over a child custody and child support hearing, a judge became social network "friends" with an attorney for the defendant in the proceeding. In a meeting with both counsel in the judge's chambers, father's counsel mentioned Facebook. The mother's counsel said "she did not know what 'Facebook' was, and that she did not have time for it." The judge and the father's counsel became Facebook "friends." At another meeting in chambers, in which the judge and both counsel were reviewing prior testimony that suggested one of the parties was having an affair, the father's counsel stated "I will have to see if I can prove a negative." The father's counsel posted on Facebook "how do I prove a negative." One evening the judge saw the posting. The judge posted he had "two good parents to choose from." The judge also posted "[the judge] feels that he will be back in court" referring to the case not being settled. The father's counsel posted "I have a wise judge." The next day in a break in the proceedings, the judge told the mother's counsel of the exchanges. On another day, the judge posted "he was in his last day of trial" to which the father's counsel posted "I hope I'm in my last day of trial" to which the judge posted "you are in your last day of trial." Id.

Further, the North Carolina judge used an internet site to find information about the mother's photography business. He viewed samples of the photography and found numerous poems. Prior to announcing his findings in the case, the judge recited, with minor changes, a poem the mother had on her website. The judge did not disclose to counsel or the parties during the four days of trial that he had conducted independent research on the mother or visited the mother's website. Following the conclusion of the hearing and after orally entering an order, the judge requested the bailiff to summon the attorneys back to the courtroom where the judge disclosed that he had viewed the mother's website and quoted the poem he found on her website. The judge told the Commission's investigator he quoted the poem because it gave him "hope for the kids and showed that [the mother] was not as bitter as he first thought." Id.

The North Carolina Judicial Standard Commission concluded that the judge had *ex parte* communications with a party's counsel in a matter being tried before him and that the judge was influenced by information he independently gathered by viewing a party's website while the hearing was ongoing, even though the contents of the site were never offered or entered as evidence. The judge's misconduct included "failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the Court (Canon 3A(4)). Judge Terry's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C. Const. art IV, § 17 and N.C.G.S. § 7A-376(a))." Id.

In several states, advisory opinions have been issued offering advice to judges as to "friend" issues. In Ohio, thus far, there are no advisory opinions providing ethical guidance.

In Kentucky, the Ethics Committee of the Kentucky Judiciary answered a "Qualified Yes" to the question: "May a Kentucky judge or justice, consistent with the Code of Judicial Conduct, participate in an internet-based social networking site, such as Facebook, LinkedIn, Myspace or Twitter, and be 'friends' with various persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials?" Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Op. JE-119 (2010).

While Ohio's Code of Judicial Conduct is not identical to the Kentucky Code of Judicial Conduct, the advice offered by the Kentucky committee is instructive. The Kentucky committee noted that "[w]hile the nomenclature of a social networking site may designate certain participants as 'friends,' the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge." Id. The Kentucky committee's consensus "is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically do not 'convey or permit others to convey the impression that they are in a special position to influence the judge.' Canon 2D." Id. The Kentucky committee stated that like New York, Judicial Ethics Advisory Opinion 08-176, it believes that judges should be mindful of whether on-line connections, alone or with other facts, rise to a close social relationship that should be disclosed and/or required recusal pursuant to Canon 3E(1). Id.

The Kentucky committee noted that the opinion should not be construed as a statement that judges may participate in social networking sites in the same manner as members of the general public. The committee cited Canon 1 (requiring judges to establish, maintain and enforce high standards of conduct, and to personally observe those standards) and Canon 2(A) (requiring judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). The committee stated "pictures and commentary posted on sites which might be of questionable taste, but otherwise acceptable for members of the general public, may be inappropriate for judges." The committee cited Canon 3(E)(1)(a) (disqualifying a judge when a judge has personal knowledge of disputed evidentiary facts); Canon 3B(7) (prohibiting a judge from engaging in *ex parte* communication with attorneys and their clients); and the Commentary to 3B(7) (stating that a judge must not independently investigate facts in a case and must consider only evidence presented). The committee cited Canon 3(B)(9) (prohibiting public comments, while a proceeding is pending or impending in any court, that might reasonably be expected to affect a proceeding's outcome or impair its fairness), and cited Canon 4(G) (prohibiting a judge from practicing law or giving legal advice). The committee noted that judges must be careful that any comments they make on a social networking site do not violate these rules.

Neither New York nor South Carolina advisory committees prohibit a judge from being a member of a social networking site. New York, Advisory Committee on Judicial Ethics, Op. 08-176 (2009). South Carolina, Advisory Committee on Standards of Judicial Conduct, Op. 17-2009 (2009).

The New York committee, among other advice, stated that a "judge should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a 'close social relationship' requiring disclosure and/or recusal. (*compare* Opinion 07-141 *with* Opinion 06-149)." New York, Advisory Committee on Judicial Ethics, Op. 08-176 (2009).

The South Carolina committee concluded that "[a] judge [magistrate judge] may be a member of Facebook and be friends with law enforcement officers and employee's of the Magistrate [magistrate judge] as long as they do not discuss anything related to the judge's position as a magistrate." The committee noted that "[a]llowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge." South Carolina, Advisory Committee on Standards of Judicial Conduct, Op. 17-2009 (2009).

But a Florida committee answered "No" to the question of "whether a judge may add lawyers who may appear before the judge as 'friends' on a social networking site." Florida Sup.Ct., Judicial Ethics Advisory Committee, Op. 2009-20 (2009). "The Committee believes that listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge." Id. Later, in Op. 2010-06 (2010), the Florida committee advised "No" when asked whether a judge "may allow an attorney access to the judge's personal social networking page as a 'friend' if the judge sends a communication to all attorney 'friends' or posts a permanent, prominent disclaimer on the judge's Facebook profile page that the term 'friend' should be interpreted to simply mean that the person is an acquaintance of the judge, not a 'friend' in the traditional sense." Also, in Op. 2010-06 (2010), the Florida committee advised "No" when asked whether a judge may friend attorneys who appear before the judge "if the judge accepts as 'friends' all attorneys who request to be included or all persons whose names the judge recognizes, and others whose names the judge does not recognize but who share a number of common friends."

For other "friend' related issues addressed by the Florida Supreme Court Judicial Ethics Advisory Committee see Opinion 2010-04 (2010), Opinion 2010-5 (2010), Op. 2010-06 (2010) (addressing a "defriending" question along with the questions addressed above).

Guidelines for Ohio judges who use social network sites

As with any other action a judge takes, a judge's participation on a social networking site must be done carefully. Some guidelines are as follows. Following these guidelines as to social networking will require a judge's constant vigil.

A judge must maintain dignity in every comment, photograph, and other information shared on the social network. As required by Jud. Cond. Rule 1.2, a judge must act at all times 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. It should go without saying that upholding the law is a key component of maintaining the dignity of office, displaying anything to the contrary on a social networking site is imprudent and improper.

A judge must not foster social networking interactions with individuals or organizations if such communications will erode confidence in the independence of judicial decision making. As required by Jud. Cond. Rule 2.4(C), a judge must not convey the impression that any person or organization is in a position to influence the judge; and must not permit others to convey that impression. For example, frequent and specific social networking communications with advocacy groups interested in matters before the court may convey such impression of external influence.

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. As required by Jud. Cond. Rule 2.9(A), a judge must avoid initiating, receiving, permitting, or considering *ex parte* communications. Even though Jud. Cond. Rule 2.9(A)(1) allows "[w]hen circumstances require it, an *ex parte* communication for scheduling, administrative, or emergency purposes, that does not address substantive matters or issues on the merits . . . provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication," it would be prudent to avoid any such job related communications on a social networking site as it increases the chance of improper *ex parte* exchanges. If a judge receives an *ex parte* communication, the judge should reveal it on the record to the parties and their attorneys.

A judge should not view a party's or witness' page on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. As required by Jud. Cond. Rule 2.9(C), a judge must not investigate facts in a matter independently and must consider only the evidence presented and any facts that may properly be judicially noticed. The ease of finding information on a social networking site should not lure the judge into investigative activities in cases before the judge.

A judge should avoid making any comments on a social networking site about pending or impending matters in any court. As required by Jud. Cond. Rule 2.10 "[a] judge shall not

make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter *pending* or *impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." Avoidance of any pending or impending case related comments is advised.

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. Not all social relationships, online or otherwise, require a judge's disqualification. For example, see *In re Disqualification of Bressler* (1997), 81 Ohio St.3d 1215, "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." There is no bright-line rule to determine when a social relationship is a disqualifying factor. As required by Jud. Cond. Rule 2.11, a judge shall disqualify when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding." As explained in Comment [1] to Jud. Cond. Rule 2.11, "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of division (A)(1) to (6) apply." Further, as noted in Comment [5], "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

A judge may not give legal advice to others on a social networking site. As required by Jud. Cond. Rule 3.10, a judge is prohibited from practicing law. Giving legal advice to another on a social network site implicates the practice of law.

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.

Conclusion

In conclusion, the Board advises as follows. A judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct. A judge who uses a social networking site should follow these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), 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. To comply with Jud. Cond. Rule 2.9(C), 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. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), 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. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, 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.

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