Ethics: Social Media and Its Use by Attorneys

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Join our networks to expand yours:

Ethical Issues, Social Networking and Bankruptcy

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Problem 7
To Facebook or Not to Facebook

Following an economically unfruitful first year out of law school, former law school classmates, Bob and Ted, decide to become partners and form Bob and Ted, Attorneys at Law. Bob focuses his practice on entertainment law, while Ted, on the other hand, launches an active domestic relations practice.

Wanting to take advantage of the surge in social networking, Bob and Ted create law firm pages on Facebook and My Space, as well as, a Twitter account in which they promote themselves as "the most excellent entertainment and domestic relations lawyers in town." Bob and Ted each have individual pages and accounts as well, which they keep entirely separate from their law firm accounts, surmising that it might be a bad idea for potential clients to see the pictures that they posted during and after law school, especially the ones from the night they celebrated after passing the bar exam. Both have taken active steps to keep their individual pages secure, and only friends may see anything other than their names and hometowns on their profile pages.

One of Bob's friends from high school, Carol, discovered the Facebook page and e-mailed Bob about friending her. Bob responded by friending Carol through his personal account and the two renewed their friendship by chatting on

and off for hours daily.

In one of their chats, Carol tells Bob that she works as a legal assistant for the Chapter 7 bankruptcy trustee, but the two of them agree that since Bob does not practice in the bankruptcy court, there would be no problem with the two of them talking. Before long, their chats begin to include amusing anecdotes about their respective jobs. On one occasion, Bob remarks that he read in the newspaper about local Ponzi schemer, Deacon Oates, being forced into an involuntary bankruptcy case. Carol replies with "from what I've heard, U wouldn't believe the $ this dude's hid or where." Bob replies back with "???,"
but then notices the time and rushes out to make a meeting with a prospective client, not seeing Carol's response of "wouldn't U like 2 know? LOL."

While walking by Bob's desk, Ted reads the left open chat with Carol about Oates and then phones his new client, Darling Oates, and advises her that it appears that her former husband does have money hidden after all. Ted is also late for a hearing before the chancery judge, who reprimands Ted, not only for being late, but for coming to court without his client's file.

Irritated by the chancellor's slap on the wrist, Ted posts on his individual Facebook account, "Ted is wondering why they let old battleaxes remain in positions of power." When questioned about this comment by Rufus, an old high

school friend, Ted replied that he had been treated unfairly by, "that woman who didn't understand that times had changed and that the Dark Ages were over." Ted further stated that he was sure he could "run circles around that bimbo because her skills were obviously lacking." Rufus doesn't reply. Ted makes a few more comments to other friends on his Facebook page, never naming the chancellor or fully describing where his reprimand took place.

The next day, Ted received a call from the chancellor's chambers and realized that he was speaking with Rufus' wife, Alice, who he has also known personally since high school, but who is not on Facebook because she has been working for a chancery judge as her law clerk for several years. Ted wonders why she is unusually curt until she ends the conversation with a warning, "You should really be careful what you post on your Facebook page."

1. Is it appropriate for Bob and Ted, Attorneys at Law, to create a business page on a social networking website and to present information concerning themselves and their firm?

2. Is it appropriate for Bob and Carol to share work related stories through their Facebook accounts?

3. Is it appropriate for Ted to use the information that he discovered from Bob's left open chat for the benefit of his new client, Darling Oates?

4. Was it appropriate for Ted to make disparaging remarks about the chancellor on his "friends only" Facebook individual page, even though he never expressly named the chancellor?

5. Would it be appropriate for the chancery judge to redress Ted for what he said about her on his individual Facebook page?

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a

criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(6) to comply with other law or a court order.

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make or permit to be made a false, misleading, deceptive or unfair communication about the lawyer or lawyer's services. A communication violates this rule if it:

(a) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or

(b) Creates an unjustified, false or misleading expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law; or

(c) States or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

(d) Compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated.

Rule 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicating officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Problem 1

Thomas is a newly admitted attorney. He successfully completed training and obtained a password for the court's electronic filing system. His application waived service of notices of hearings by non-electronic means. He appeared in several cases during his first year, but remains overwhelmed by his practice and a lively Facebook correspondence with former classmates and friends. To help him manage his time, Thomas sets his computer spam filter to screed unwanted Tweets and other unwanted electronic messages. Unfortunately, the setting has also blocked incoming e-mail from the court. As a result Thomas does not receive electronic notice of several matters in which he has appeared on behalf of clients. After he fails to respond to an opponent's motion to dismiss and misses a continued hearing on the motion, opposing counsel - who has traveled from Gulfport for each hearing - complains to the State Bar. Thomas eventually learns of the missed hearings, but takes no steps to advise the court or his opponent of the reason for his absence. Result?

A. Thomas is a novice and so he is not subject to professional discipline for missing the hearings.

B. Assuming Thomas inadvertently blocked incoming email from the court, he has committed no violation of the Rules of Professional Conduct.

C. Thomas's decision to filter spam without ensuring that it would not divert electronic mail from a court was a violation of Rule 3.4(c) of the Rules of Professional Conduct.

D. Thomas is culpable under Rule 8.4(d) of the Rules of Professional Conduct for conduct prejudicial to the administration of justice.

Answer: C, D is an acceptable runner-up.

- Rule 3.4(c): Knowingly disobeying an obligation under the rules of a tribunal.
- Rule 8.4(d): Engaging in conduct that is prejudicial to the administration of justice.
- Rule 3.2: Failing to expedite litigation.
- 9 month suspension appropriate for attorney who intentionally blocked all electronic communication with the court and provided no apology or response to rectify missed hearings. *In re Walters*, 45 So.3d 1016 (La. 2010).

- Court granted a Rule 60(b)(6) motion for relief from judgment when the plaintiff's attorney was wholly responsible for not notifying his client of a hearing when he did not see the email on his Blackberry. *Mott v. Homecomings Financial Network, Inc.*, 2010 WL 2670157 *4 (N.D. Tex. 2010).

Problem 4

Ethan has just finished the first completed draft of a complicated document reflecting a deal between Ethan's client and a third-party. The document has undergone multiple revisions by several attorneys within Ethan's office, as well as, revisions by Ethan's client. The completed draft included embedded comments about the client's "bottom line" to get the deal done (which is substantially more than the amount the agreement currently provides). Ethan emailed the completed draft document in Word format to opposing counsel for review and comment. Because Ethan did not "scrub" the document before sending it, opposing counsel received the completed draft with the meta-data.

A. Ethan's failure to scrub the meta-date from the document violates the Rules of Professional Conduct.

B. If Ethan had scrubbed the meta-data from the document he would have violated the Rules of Professional Conduct.

C. Ethan's failure to scrub the meta-data from the document was not an ethical violation because opposing counsel is not allowed to review the meta-data without violating the ethics rules herself.

D. Ethan's failure to scrub the meta-data from the document is not an ethical violation because he can just call opposing counsel, tell her the meta-data was inadvertently produced, and pull back that information.

Answer: A

- Ethan failed to protect confidential client information. (Rule 1.6)
- Under F.R.C.P. 26(b)(5)(B), inadvertently disclosed information must be returned, destroyed, or sequestered.
- Ethan must take affirmative action to remedy the disclosure and should request that the document be returned.
- In determining whether an inadvertent disclosure effects a waiver of privilege, courts in the Fifth Circuit consider five non-exhaustive factors:

  (1) the reasonableness of precautions taken to prevent disclosure;

  (2) the amount of time taken to remedy the error;

  (3) the scope of discovery;

  (4) the extent of the disclosure; and

  (5) the overriding issue of fairness.

  Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir.1993); *see also AHF Cmty. Dev., LLC v. City of Dallas*, 258 F.R.D. 143, 148 (N.D. Tex. 2009)

Rule 4.4(b). A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

ETHICS & SOCIAL NETWORKING

2012 ABI Central States Conference

1. THE CASE OF THE ASSISTANT'S FACEBOOK PAGE PART 1

One day, Attorney Tom gets a call from Attorney Andy complaining that Tom's assistant, Tammy, wrote an entry on her Facebook page stating:

"Oh that Attorney Andy! He messed up yet another case! That's like the TENTH one this year! Why do clients keep hiring him? He ought to be ***disbarred***!!!"

Should Tom be concerned about this?

If so, what should Tom do?

Does it matter whether Tom agrees with Tammy?

Can Tom insist that Tammy give him access to her Facebook page to investigate Andy's statements?

What if Tom is a trustee?

This paper was presented at ABI's 2012 Central States Bankruptcy Workshop in Traverse City, Mich.

2. The Case of the Assistant's Facebook Page Part 2

One day, Tom gets a call from Andy stating that Tammy has posted pictures and a video of herself on her Facebook page and that Tom really needs to see them because he won't like them.

Should Tom be concerned about this?

If so, what should Tom do?

Can Tom insist that Tammy give him access to her Facebook page to investigate Andy's statements?

What if Tom is a trustee?

3. The Case of the Tweets

In a large chapter 11 case, attorney Alex represents an official committee of unsecured creditors, of which Harry, a hedge fund manager, is a member. At a recent meeting of the committee, the debtor presented information regarding its ongoing sale process. Alex learns that during that meeting, Harry sent tweets regarding the proposed sale price and whether the sale will generate a dividend to unsecured noteholders.

What should Alex do?

4. The Case of the Undisclosed Facebook Page Part 1

Dorothy is meeting with Art, her attorney, to prepare the schedules for her bankruptcy case. Dorothy mentions that she has a Facebook page, but refuses Art's request to see it. She also refuses to say whether the page shows any of her property as well as Art's advice to disclose the Facebook page in her schedules.

Should Art:

(a) Terminate the representation?
(b) Advise her (again) of the consequences of concealing assets?
(c) Advise her that he is obligated to disclose her Facebook page to the trustee, whether she agrees or not, and that the trustee may ask the Court to order her to disclose it?

5. The Case of the Undisclosed Facebook Page Part 2

Art decides to fire Dorothy as his client.

Six weeks later, he sees Dorothy testify at her meeting of creditors that she does not have a Facebook page and has never had one.

Should Art to talk to:

(a) Dorothy?
(b) Dorothy's new attorney?
(c) The trustee?
(d) The US trustee?
(e) The US Attorney?
(f) The judge?
(g) All of the above?
(h) None of the above?

6. The Case of the Attorney's Facebook Friend Request

One day, Bankruptcy Judge Jones sees on his Facebook page a request from Attorney Arnold to "friend" him. Arnold has many cases assigned to Judge Jones.

What should Judge Jones do?

7. The Case of the Judge's Facebook Friend Request

One day, Attorney Arnold gets a request from Judge Jones on his Facebook page to "friend" him. Arnold has many cases assigned to Judge Jones.

What should Arnold do?

8. The Case of the Secret Facebook Investigation Part 1

Tom represents Debtor Dan's sister, Candy, in her attempt to have Dan's debt to her declared nondischargeable. Tom can't find any grounds for that, but Candy did report that Dan's bankruptcy papers failed to disclose his $25,000 gun collection. Candy also stated that pictures of the gun collection are on Dan's Facebook page but that Dan has since "defriended" her and so she no longer has access to his Facebook page.

Tom's assistant, Tammy, then suggests that she could attempt to "friend" Dan on Facebook, and if he accepts, she could then look for the pictures on his site.

Should Tom accept Tammy's suggestion?

9. The Case of the Secret Facebook Investigation Part 2

Assume instead that Tammy took the initiative and friended Dan on Facebook without discussing it with Tom, found the pictures of the gun collection, printed them and showed the pictures to Tom.

Can Tom use the pictures in objecting to Dan's discharge?

Should Tom discipline Tammy or give her a raise?

Should Tom ignore Tammy's pictures and instead seek a court order for discovery of Dan's Facebook page?

What if Dan deletes his Facebook page by the time Tom gets his order?

10. The Case of the Uninvestigated Facebook Page

Dorothy is meeting with Art, her attorney, to prepare the schedules for her bankruptcy case. Dorothy mentions to Art that she has a Facebook page but Art does not investigate it further or include it in the schedules.

Is Dorothy required to disclose her Facebook page in her schedules?

Did Art violate:

(a) 11 USC §526(a)(2)?
(b) 11 USC §707(b)(4)(C)(i)?
(c) 11 USC §707(b)(4)(D)?
(d) F.R.Bankr.P. 9011(b)(3)?

11. The Case of the Deleted Facebook Page Part 1

At Debtor Dean's meeting of creditors, the following exchange with Trustee Tim is recorded:

Q: Do you have a Facebook page?

A: Not anymore.

Q: When did you delete it?

A: Last week after I saw my attorney, Andrea.

Q: Why?

A: She gave me a paper telling me to.

Q: May I see the paper?

Here is what the paper says:

11. The Case of the Deleted Facebook Page Part 1

NOTICE TO DEBTORS REGARDING FACEBOOK

YOU ARE ADVISED THAT IF YOU STILL HAVE A FACEBOOK PAGE AT THE TIME OF YOUR MEETING OF CREDITORS, YOUR TRUSTEE MIGHT REQUEST ACCESS IT IN ORDER TO INVESTIGATE YOUR ASSETS AND INCOME.

IF ANY ASSETS ARE FOUND THERE AND ARE UNDISCLOSED, YOU MAY LOSE YOUR DISCHARGE, AND THOSE ASSETS.

ALSO, DO NOT, UNDER ANY CIRCUMSTANCES, ACCEPT A "FRIEND" REQUEST FROM SOMEONE YOU DO NOT KNOW, BECAUSE IT MIGHT BE YOUR TRUSTEE TRYING TO GET ACCESS TO YOUR PAGE!

Is Andrea:

(a) *Advising the illegal destruction of evidence?*
(b) *Aiding and abetting bankruptcy fraud?*
(c) *Violating 11 U.S.C. § 527(c)?*
(d) *Providing sound and important legal advice to his clients?*

What should Tim do?

12. The Case of the Deleted Facebook Page Part 2

Tim's questioning of Dean continues:

Q: Did Andrea see your Facebook page?

A: Yes

Q: How?

A: I showed it to her.

Q: Did your Facebook page have pictures of your property or recent vacations?

A: Uh, I'm not sure.

Does the attorney-client privilege prohibit Andrea from testifying about her examination of Dean's Facebook page?

If so, should Andrea advice Dean to assert the privilege?

13. The Case of the Aggressive Blogger

Noted consumer lawyer Don Discharge maintains a blog. On the blog he routinely posts that he will "make sure you pass the means test." Also, he posts that he can get you out a jam if the UST is opposing your discharge. He invites visitors to send him questions and interact with him in "real-time" communication about their financial problems.

What issues are presented in this scenario?

What duties does Don owe individuals who communicate with him through the blog?

Is Don having prohibited contact with represented parties?

When does the attorney-client relationship commence?

Is There an "App" for That? - Ethics & Technology

This paper was presented at ABI's 2012 Central States Bankruptcy Workshop in Traverse City, Mich.

Materials

1. Ethics and Technology: The Implications of Facebook and Cloud Computing for the Legal Profession
2. The Supreme Court of Ohio; Advisory Opinions of the Board of Commissioners
3. Florida Supreme Court; Judicial Ethics Advisory Committee

Ethics and Technology: The Implications of Facebook and Cloud Computing for the Legal Profession

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Ethics & Technology:

The Implications of Facebook and Cloud Computing for the Legal Profession

Technology appears to be a pervasive phenomenon in practically every aspect of American society. However, the law often cannot keep up with the pace of change in technological advancements as it relates to computer and on-line networking. [1] Some argue that the ABA's current rules of professional conduct are adequate to provide guidance to attorneys using these technological innovations, while others assert that new ethical rules are necessary to address attorneys' use of social media.[2] Therefore, as the relationship between technology and the legal community continues to evolve, education and ethical guidelines may be necessary to illustrate the benefits and risks of embracing these advancements.[3]

The growing utilization and potential issues of Facebook and cloud computing as it relates to the legal profession will be discussed below with recommendations on how to address these issues.

A. Utilization of Facebook

- One of the latest phenomena in technology is social networking.[4]
- Social networking sites enable users to interact, connect, reconnect, communicate and collaborate with one another through audio, words, pictures, or videos.[5]

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[1] *See* William J. Robinson, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 Geo. L.J. 1195, 1197 (2010).
[2] Angela O'Brien, Comment, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away from Facing a Disciplinary Committee?*, 11 Loy. J. Pub. Int. L. 511, 511. (2010).
[3] *See* Kathleen E. Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" it*, 41 U. Mem. L. Rev. 355, 356 (2010).
[4] *Id.* at 358.

- Facebook is probably the most prevalent social network site in the U.S. with 40% of the U.S. population estimated to have a Facebook account.[6]
- When Facebook launched in 2004, it was geared towards college students; but, today its use is pervasive with an estimated 500 million active users.[7]
- Though attorneys are generally slower than the general public to adopt new technology, they are increasingly utilizing Facebook and other social networking sites for both marketing and as a source of evidence.[8]
- The ABA's 2010 Legal Technology Survey Report found that 56% of attorneys in private practice have a presence in an on-line social network with only 43 % having such a presence in the center's 2009 survey and 15 % in 2008.[9]
- With this increased usage, there has also been an increase in the number of attorneys violating rules of professional conduct by their use of social media in the areas of advertising, communications, and confidentiality. [10]

i. Analysis of attorney's use of Facebook and potential issues relating to:

(i) Advertising

- Facebook offers lawyers a new way to market themselves.
- Marketing through Facebook is free and allows attorneys to:

1) Establish themselves as experts in certain areas of law;

2) Attract potential clients;

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[5] *Id.*
[6] David L. Raybin & Benjamin K. Raybin, *What to Tell Clients about Facebook and Other Social Media Sites*. 47 Tenn. B.J. 19, 19 (2011).
[7] Vinson, *supra* at 361
[8] Sharon Nelson, John Simek & Jason Fotlin. *The Legal Implications of Social Networking*, 22 Regent U.L. Rev. 1, 1 (2009/2010); Vinson, *supra* at 388.
[9] Steven Seidenberg, *Seduced: For Lawyers, the appeal of social Media is Obvious. It's also Dangerous*. 97 A.B.A.J. 48, 48 (2011).
[10] *Id.*

3) Attract media attention;

4) Receive speaking invitations and business opportunities;

5) Gather information to keep themselves current in their area of practice;

6) Create an on-line network that can sometimes be moved offline;

7) Follow what others in their field are doing and emulate them whenever good ideas crop up; and

8) Start up conversation with those in their target markets.[11]

- Law firms and solo practitioners alike are creating Facebook pages, and it is believed that this type of marketing is helping to level the playing field among solo practitioners, small firms, and large law firms.[12]
- However, since there is so much ambiguity on how the ethics rules apply to new technologies, many attorneys simply do not know what they can and cannot do in the realms of advertising through social media.[13]
- One issue is that it is often difficult to distinguish between personal communications and advertisements on Facebook.[14]
    - For example, if an attorney gets a substantial verdict in a case and announces the victory on Facebook is that

[11] Nelson, Simek, & Foltin, *supra* at 10-11.
[12] Vinson, *supra* at 389.
[13] Seidenberg, *supra* at 48.
[14] *Id.*

advertising or merely communicating to friends on Facebook?

- Some experts suggest that motive is important in making that distinction. If online activities promote a law practice, it is attorney advertising; but, if you never mention you are a lawyer or your firm, it is probably not.[15]

- Second, when Facebook post are advertisements, it can be difficult to make these ads comply with ethical standards.[16]
  - Many states require attorney advertisements to contain specific disclosures and disclaimers, but due to character limits it is often impractical to shoehorn these statements into social media.[17]
  - Some states require attorney's ads to be approved, but since social media changes rapidly, obtaining approval is often impractical as well.[18]
- Also prohibitions on false or misleading information (ABA Model Rule 7.1) can be tricky to apply to social media.[19]
  - Rule 7.1 includes electronic communication as a type of communication that constitutes advertising, but it is not clear if that applies to Facebook profiles.[20]

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Vinson, *supra* at 396.

- Since Facebook is not limited to a single state or country, Facebook advertising may be subject to various state regulations on advertising.[21]
- This rule may also require attorneys to police not only their posts, but also what other users or "friends" post in reply.[22]
- SC Bar & Ohio Board of Commissioners both have suggested that even a wonderful recommendation from another must comply with Rule 7.1, since any such recommendation may create unjustified expectations or otherwise mislead a prospective client.[23]

- Finally, since an attorney's Facebook profile may reach clients in various states and countries simultaneously, an attorney with a highly active Facebook profile could be engaged in the unauthorized practice of law.[24]
  - ABA Model Rule 5.5 prohibits a lawyer who is not admitted to practice in a particular jurisdiction from establishing a continued presence in the jurisdiction for the practice of law or hold to the public that he/she is admitted to practice in that jurisdiction.[25]

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[21] Seidenberg, *supra* at 48.
[22] *Id.*
[23] *See, e.g., Id.* (quoting SC Bar Ethics Advisory Opinion 09-10 (2009)); Vinson, *supra* at 393.
[24] Vinson, *supra* at 397.
[25] *Id.*

- Under Rule 8.5, lawyers who are not admitted to practice in a jurisdiction are still subject to disciplinary action in that jurisdiction if they offer legal services there.[26]

- ***Ethical Advertising Recommendations***[27]
  - Be careful to include disclaimers on Facebook profiles
  - Be extremely cautious when using networks as business generating tools, as ethical rules vary from state to state.
  - Limit reach to those jurisdictions whose ethical guidelines the attorneys have observed for advertising and solicitation

(ii) Inappropriate communication

- *Ex Parte communications*
  - Ethics opinions disagree on whether a judge can friend an attorney on Facebook or other social media if the attorney might appear before the judge.[28]
  - The primary concern in this area of communications is the obligation to "avoid impropriety and the appearance of impropriety in all of the judge's activities"[29]
  - Jurisdictions that allow participants to participate in social networks with members of the legal field suggest that a judge should not become isolated from the community.[30]

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[26] *Id.*
[27] *Id.* at 397-98
[28] Seidenberg, *supra* at 48.
[29] Ido J. Alexander, *Should Judges 'Friend' You? Judicial Ethics in the Age of Social Media.*
[30] Such networks are fine as long the parties avoid discussing work-related matters. Vinson, *supra* at 401.

- However, other jurisdictions have ruled that judges may not friend lawyers who may appear before them or allow such lawyers to friend them.[31]
  - A NC judge was publicly reprimanded for communicating with defense counsel about the case on his Facebook page during a pending child custody case.[32]
  - A GA judge retired after it was discovered that the judge had contacted a defendant through Facebook and advised her on how to plead before the court.[33]

- *Interactions with Persons that have Already Retained Counsel*
  - Model Rule 4.2 provides that a lawyer cannot communicate about the subject matter of a representation with a person the lawyers knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[34]
  - However, competing attorneys may share mutual friends on Facebook.[35]
  - If one attorney who knows that his competition is already representing some of their mutual friends post a message about

[31] *Id.* at 401.
[32] *Id.*
[33] *Id.* at 402.
[34] *E.g.*, O'Brien, *supra* at 520; Yvette Ostolaza & Ricardo Pellafone, *Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites*, 11 J. High Tech. L. 56, 56. (2010).
[35] O'Brien, *supra* at 520.

practicing the same type of law at a more affordable rate, this conduct could violate Rule 4.2.[36]

- However, the observation exception is a well-recognized exception to rule 4.2 which allows an attorney to observe a represented party's conduct if an attorney is acting as a member of the general public in their interactions with the represented party.[37]
- As it relates to Facebook, this exception would permit an attorney to view public profiles and open network profiles, but private profiles would be barred.[38]

- *"Friending" the Enemy*
  - Issues also arise when an attorney seeks to use Facebook to gain access to someone unrepresented by counsel, such as an opposing party's witness.[39]
  - Model rule 4.1 prohibits an attorney from making a false statement of material fact or law to a third person, and rule 8.4 (c) forbids an attorney from engaging in dishonest, fraudulent, or deceitful conduct.[40]

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[36] *Id.*
[37] Ostolaza & Pellafone, *supra* at 83-85.
[38] Public Facebook profiles can passively be viewed by anyone, requiring no contact with the represented party by any viewer. The open network profile is less public but still allows their content to be made available to anyone who wishes view it, and the profile owner need not be contacted. On the other hand, private profiles require prior approval from the profile's owner and the general public would not have access. *Id.* 83-89.
[39] Seidenberg, *supra* at 48.
[40] *Id.*

- The NY and Philadelphia Bar Associations have suggested that both of these rules are violated when an attorney friends an individual on Facebook under false pretenses.[41]
- However, ethical opinions disagree on whether strategic information can be withheld when making a friend requests.
  - While some suggest that this act is no different than an investigator starting a conversation at bar where the witness is known to hang-out, other suggests that any omission designed to induce the witness to allow access to their Facebook profile is deceitful.[42]

Communications Recommendations

- Social networking creates opportunities to interact with an expanding universe of people, but it also creates obligations and responsibilities for appropriate legal and ethical use.[43]
- Therefore, members of the legal community should seek out educational opportunities and monitor guidelines to avoid blurring the boundaries of their personal and professional worlds.[44]

(iii) Privilege/confidentiality waiver

- Facebook's mission is "to share and make the world more open and connected."[45]

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[41] *Id.*
[42] *Id.*
[43] Vinson, *supra* at 411.
[44] *See Id.* at 412
[45] *Id.* at 362.

- Facebook is highly interactive and allows users to post nearly anything on their own page or their friend's pages.[46]
- Though Facebook has several security features and provides customization to limit access to content, Facebook thrives from public sharing of data; therefore, most information is defaulted to be shared to everyone and custom restrictions are often difficult to find and utilize.[47]
- However, the culture of the legal community, including privacy, confidentiality and conservatism, conflicts with the disclosure culture of Facebook.[48]
- The legal profession's duty of confidentiality is one of their most valuable services. When that duty is violated, there is not only a breach of the rules of professional conduct; but there is also a disservice to the profession.[49]
- Under ABA Model Rule 1.6(a), a lawyer must not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph b.[50]
    - Violations of Rule 1.6 can occur when attorneys post on Facebook about their cases or communicate with their clients via Facebook.[51]
    - The more specific the information is, the more likely client confidences will be revealed; yet, even seemingly harmless posts can be revealing.[52]

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[46] Raybin & Raybin, *supra* at 19.
[47] *Id.*
[48] Vinson, *supra* at 376.
[49] Josh Camson, *Is your Free E-mail an Ethics Violation*, The Lawyerist (2011) http://lawyerist.com/is-your-free-e-mail-an-ethics-violation.
[50] O'Brien, *supra* at 515.
[51] *Id. at 516.*
[52] *Id.*

- For example, a well-know divorce attorney posts "just met with another unhappy wife looking to get out, poor guy has no clue!" While this post seems general, the wife's secret could be discovered by her husband if the attorney and the wife have become Facebook friends and her husband is also a Facebook participant.[53]

- ***Privilege/Confidentiality Recommendations***
  - Since Facebook can be used to encourage lasting client relations, some suggests that attorneys should not be prevented from contacting their client through social networking sites.[54]
  - However, attorneys should never use Facebook to communicate with their clients about ongoing or past matters related to their case.[55]
  - Attorneys should also remember that even if privacy settings are in place, information may still be inadvertently revealed that may damage the case and/or violate the duty of confidence.[56]
  - Attorneys should be wary that their content can be used against them by colleagues, and that a public linking (i.e. being Facebook friends with a client) might give away confidential information.[57]
  - Finally, even if an attorney feels that his/her postings do not violate any client confidence (such as a matter of public record), it is still wise to obtain the client's permission before posting information on Facebook.[58]

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[53] *Id.*
[54] *Id.* at 535
[55] *Id.*
[56] *Id.* at 535-36.

ii. Issues relating to juror/witness searches and utilization of Facebook.

- It has become common practice to search Facebook and other social networking sites to find out information about opponents, clients, witnesses, and jurors.[59]
- However, the ability to use information from social networking sites is still being debated and courts may need to consider evidentiary issues such as relevance, authentication, and hearsay.[60]
- Despite evidentiary issues Facebook may be a useful tool for attorneys in the jury selection and cross-examination.[61]
- Using Facebook is particularly appealing during jury selection and the cross-examination of witnesses because these sites often provide quick access to candid, personal information generated directly by the user.[62]
    - Attorneys can use public Facebook profiles to obtain information about potential jurors (i.e. political views, truthfulness in answering the juror questionnaire) and may use this information to tailor arguments to juror interests and social views.[63]

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[57] *Id.* at 536.
[58] *Id.*
[59] Vinson, *supra* at 390.
[60] *Id.* at 392.
[61] *See Id.* at 392-93.
[62] Lee Nash. *Searching for Details Online, Lawyers Facebook the Jury*. The Wall Street Journal. (February 22, 2011); Vinson, *supra* at 393.
[63] Vinson, *supra* at 404.

- *Juror Utilization of Facebook*
  - As the use of social networking increases, so does the likelihood that jurors will use these sites to post information during trials.[64]
  - Many jurors are so accustomed to posting their daily experiences on Facebook that they may not consciously recognize the risk of posting information about a case.[65]
  - As a result, jurors researching and discussing cases on Facebook has caused mistrials and overturned verdicts.[66]
    - If a juror uncovers extraneous facts about parties that were specifically excluded from trial for evidentiary purposes, the knowledge of those outside facts might have a prejudicial effect on a party.[67]
  - However, though jury misconduct is now frequently occurring through the use of a social media, jury misconduct, in general, is not a new phenomenon.[68]
  - Courts have been struggling to limit jurors' access to outside information since the beginning of our legal system.[69]
    - Before the social media rage, jurors were going home and sharing details of cases with their spouses, reading newspapers or watching TV coverage of the case, and

[64] Vinson, *supra* at 402.
[65] *Id.* at 402.
[66] *Id.*
[67] Amanda McGee, Note and Comment, *Juror Misconduct in the 21st Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 Loy. L.A. Ent. L. Rev. 301, 303 (2010).
[68] *Id.* at 311.
[69] *Id.*

investigating crime scenes to learn more about an incident.[70]

Recommendations to Combat Juror Utilization of Facebook during trials

- Several suggestions have been proffered to deal with the growing utilization of Facebook and other forms of social media by jurors during trial and deliberations.
  - Attorneys can reduce the risk of juror misconduct by searching for Facebook profiles before, during, and after voir dire.[71]
  - Trial attorneys can also help by asking jurors during voir dire about their Facebook use so that their profiles may be monitored during trial.[72]
  - Judges can give precise jury instructions before and during trial to make jurors aware that researching, blogging or posting messages about their case on the Internet constitutes misconduct.[73]
  - The confiscation of cellular phones and other handheld devices prior to courtroom entry by all persons may not be practical.[74] However, discouraging and/or restricting access to such devices by jurors during the proceedings and deliberations has become increasingly popluar in courts across the nation.[75]

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[70] *Id.*
[71] Vinson, *supra* at 404.
[72] *Id.*
[73] McGee, *supra* at 316.
[74] *See Id.* at 315.
[75] *Id.*

B. Cloud Computing

Discussion concerning growing utilization of "cloud" computing services/programs and potential privilege/confidentiality waivers:

- Cloud Computing is the ability to run applications (such as documents, excel spreadsheets, webmail, etc.) and store data on a service provider's computers over the Internet rather than on a person's desktop or laptop computer.[76]
- The cloud is configured to divide the tasks of running applications and storing data into small chunks and to distribute them among the server's aggregate resources.[77]
- The market for this type of service has increased dramatically in recent years.
- Revenue for cloud services for 2010 alone is estimated to be around 56 Billion dollars, and that number is expected to increase 20% year over year.[78]
- Why such an increase? Well, Cloud Computing has several benefits:
    - Cost- savings and efficiency- 1) Traditional storage methods require individuals to often purchase much more storage capacity than necessary to meet their needs, while most cloud-service providers offer pay-as you-go services.[79] 2) Also, the assembly and maintenance of traditional computer equipment and applications can be time consuming and costly.[80]
    - Reduced need for redundant storage- When computer hard drives crash, essential data is lost unless redundant storage or processing power is

[76] Robinson, *supra* at 1199-1200.
[77] *Id. at 1199*.
[78] Andrew C. DeVore. *Cloud Computing: Privacy Storm on the Horizon?*, 20 Alb. L.J. Sci. & Tech. 365, 367 (2010).
[79] *Id.* at 367.

available to remedy the problem.[81] Storing documents in the cloud eliminates the risk of losing files due to these types of computer failures.

- Collaborative opportunities- Cloud computing allows several individuals to jointly review or edit a document or presentation.[82]
- Security advantages-Most small and medium sized companies do not have the resources to provide the security to best protect their stored information.[83] However, with a third-party cloud provider that provides expert services, companies can get the very best security protocols and information management practices already built in.[84]
- Eliminate risks posed by insiders-A 2008 study found that 88% of security breaches were caused by insiders. Cloud computing helps to reduce and/or eliminate this risk.[85]

- However, there are also potential privacy and security risks associated with cloud computing.[86]
  - Hackers are becoming increasingly more sophisticated and are trying to gain access to information.[87]
  - Glitches on permissions can lead to non-authorized users being able to view the private content of others.[88]

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[80] Robinson, *supra* at 1200-01.
[81] *Id.* at 1201.
[82] *Id.*
[83] DeVore, *supra* at 368.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 368.
[87] *Id.*
[88] *Id.* at 369.

- Documents stored in the "Cloud" are probably not protected by Constitutional or statutory privacy protections.
  - If you have private confidential information, you have certain privacy interests and legal protections as long as you maintain the privacy and secrecy of the information. However, if you given that same information to a third-party (i.e. the "Cloud" provider) you effectively lose those protections.[89]
- Cloud providers may be unable to satisfy the contractual obligations a firm or organization may have to maintain the secrecy and confidentiality of certain information.[90]

- **Note: Cloud computing in the context of bankruptcy**- There are lots of questions that arise in connection with the cloud and bankruptcy that remain unexamined: 1) What happens when the companies disappear? 2) What happens to the information stored on their servers? 3) What is the back-up situation? 4) Can that information be disposed of as an asset of the company in a bankruptcy?[91]
- ***Cloud Computing Recommendations***

Attorneys and law firms should take several things into consideration prior to using cloud services:

- Terms of Service (TOS)- Most TOS allows the cloud provider to assess, view, and turn data over in the event that the Government or a third-party asks for it.[92] Therefore firms/attorneys should view the TOS to see if the

[89] *Id.* at 370.
[90] *Id.* at 372
[91] *Id.*
[92] *Id.* at 372-73.

provider can satisfy the requirements for maintaining confidential information.

- Sensitivity of information- Firms/attorneys should assess the information that they have and use to determine what controls need to be in place in order to protect that information.[93]
- Contractual agreements- Craft agreements with the service provider that build in the controls needed to get the desired protection.[94]
- Hybrid approach- Firms should consider using a hybrid approach. In light of all the privacy and security issues arising, truly sensitive and confidential information should not be placed in the cloud.[95]
- Encryption- this has become a baseline norm and best practice for the protection of sensitive information and firms/attorneys should consider using encryption to help satisfy some of the security and privacy concerns.[96]

C. Conclusion

- Although an attorney must consider ethical rules, privacy, and confidentiality issues associated with the use of Facebook and Cloud Computing, attorneys should be not be afraid to embrace computer and on-line networking.[97]
- Education and continued publicity to these topics are necessary to ensure that the legal community is prepared to assess the benefits and manage the risks associated with these technological advancement.

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[93] *Id.* at 373.
[94] *Id.*
[95] *Id.*
[96] *Id.*

[97] *See* Obrien, *supra* at 539.

The Supreme Court of Ohio

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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 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.

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.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.

FLORIDA SUPREME COURT

Judicial Ethics Advisory Committee

Opinion Number: 2009-20
Date of Issue: November 17, 2009

ISSUES

Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend."

ANSWER: No.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may post material on the committee's page on a social networking site, if the publication of the material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may establish a social networking page which has an option for persons, including lawyers who may appear before the judge, to list themselves as "fans" or supporters of the judge's candidacy, so long as the judge or committee does not control who is permitted to list himself or herself as a supporter.

ANSWER: Yes.

FACTS

Social networking sites, such as Facebook, MySpace, and LinkedIn, generally serve two functions, as exemplified by the questions posed by the inquiring judge. First, the site can be used by the member simply to post pictures, comments, and other material that visitors to the site can view. Second, the site can also be used to identify a member's "friends". The member of the social network must approve a person who requests to be identified as the member's "friend".

When used simply to post materials, social networking sites are similar to an internet webpage where information is posted and made accessible for the public to view. Certain social networking sites permit the member to set levels of privacy permitting the member to restrict information, including the identification of the member's "friends", to certain visitors to the

member's page. For example, the member might be permitted to set the privacy settings in a manner such that only the member's "friends" could see the names of the member's other "friends".

In the social network, a "friend" may post comments and links to other websites on the member's home site, known as the member's "wall." The member may reply to these postings or delete them, but they will remain on the member's site until deleted. The "friend's" comments will be visible to anyone the member permits to view the site.

The Facebook website contains the following explanations about "friends" and privacy concerns:

Your friends on Facebook are the same friends, acquaintances and family members that you communicate with in the real world. We built Facebook to make it easy to share information with your friends and people around you. We understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information. Our default privacy settings limit the information displayed in your profile to your networks and other reasonable community limitations that we tell you about. Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that restrict other users from accessing your information. We allow you to choose the information you provide to friends and networks through Facebook. Our network architecture and your privacy settings allow you to make informed choices about who has access to your information.
(http://www.facebook.com/policy.php?ref-pf)

Political campaigns may also establish pages on social networking sites which allow users to list themselves as "fans" or supporters of the candidate. However, as the practice exists on Facebook, the campaign is not required to accept or reject a "fan" in order for their name to appear on the campaign's Facebook page. Anyone desiring to be listed as a "fan" may do so unilaterally, without the campaign's knowledge or consent.

DISCUSSION

The first and third questions above, relating to the posting of materials by either the judge or the campaign committee are answered in the affirmative because they relate only to the method of publication. The Code of Judicial Conduct does not address or restrict a judge's or campaign committee's method of communication but rather addresses its substance. Therefore, this proposed conduct, whether by the judge or the campaign committee, does not violate the Code of Judicial Conduct. Of course, the substance of what is posted may constitute a violation. The Committee has previously concluded that campaign committees may establish websites for otherwise permitted campaign purposes. Fla. JEAC Op. 99-26. See also Fla. JEAC Opns. 00-22 and 08-11 related to campaign activities and internet websites.

However, the second question poses a fundamentally different issue because the inquiring judge proposes to permit lawyers who may appear before the judge to be identified as "friends" on the judge's social networking page. Similarly, the inquiring judge contemplates the lawyers who

may appear before the judge will list the judge as a "friend" on their pages, such listing requiring the consent of the judge in order to take effect.

The inquiring judge proposes to identify lawyers who may appear in front of the judge as "friends" on the judge's page and to permit those lawyers to identify the judge as a "friend" on their pages. To the extent that such identification is available for any other person to view, the Committee concludes that this practice would violate Canon 2B.

Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

With regard to a social networking site, in order to fall within the prohibition of Canon 2B, the Committee believes that three elements must be present. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page. Third, the identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. It is this selection and communication process, the Committee believes, that violates Canon 2B, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.[1]

While judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities, some restrictions upon a judge's conduct are inherent in the office. Thus, the Commentary to Canon 2A states:

"Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

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[1] By way of contrast, many other websites do not have these characteristics and a judge's use of them does not conflict with Canon 2B. For example, there are many subject matter websites which people with similar interests use to communicate with one another. Parents of students in a particular club or organization in a high school, for example, may register as a part of a parent group, with the names of all of the members of the group being visible to all of the other members. Similarly, persons with an interest in studying a particular subject, or members of a club, might be a part of a group on a website, with the names of the members visible to one another, or to the public at large. However, even if a judge is listed on one of these sites, and even if a lawyer who appears before the judge is also listed, Canon 2B is not implicated because the judge did not select the lawyer as a part of the group, nor have the right to approve or reject the lawyer's being listed in the group. The only message conveyed to a person viewing the website would be that both the judge and the lawyer both have children in the band, or are both interested in the study of a particular subject. Because the judge played no role in the selection of the lawyer whose name appears on the website, no impression is afforded to those who view the website that the lawyer is in a special position to influence the judge.

A judge's participation in a social networking site must also conform to the limitations imposed by Canon 5A, which provides:

> A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:
>
> 1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
> 2. undermine the judge's independence, integrity, or impartiality;
> 3. demean the judicial office;
> 4. interfere with the proper performance of judicial duties;
> 5. lead to frequent disqualification of the judge; or
> 6. appear to a reasonable person to be coercive."

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. This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

The Committee notes, in coming to this conclusion, that social networking sites are broadly available for viewing on the internet. Thus, it is clear that many persons viewing the site will not be judges and will not be familiar with the Code, its recusal provisions, and other requirements which seek to assure the judge's impartiality. However, the test for Canon 2B is not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge. Viewed in this way, the Committee concludes that identifying lawyers who may appear before a judge as "friends" on a social networking site, if that relationship is disclosed to anyone other than the judge by virtue of the information being available for viewing on the internet, violates Canon 2(B).

The inquiring judge has asked about the possibility of identifying lawyers who may appear before the judge as "friends" on the social networking site and has not asked about the identification of others who do not fall into that category as "friends". This opinion should not be interpreted to mean that the inquiring judge is prohibited from identifying any person as a "friend" on a social networking site. Instead, it is limited to the facts presented by the inquiring judge, related to lawyers who may appear before the judge. Therefore, this opinion does not apply to the practice of listing as "friends" persons other than lawyers, or to listing as "friends" lawyers who do not appear before the judge, either because they do not practice in the judge's area or court or because the judge has listed them on the judge's recusal list so that their cases are not assigned to the judge.

A minority of the committee would answer all the inquiring judge's questions in the affirmative. The minority believes that the listing of lawyers who may appear before the judge as "friends" on a judge's social networking page does not reasonably convey to others the impression that these lawyers are in a special position to influence the judge. The minority concludes that social networking sites have become so ubiquitous that the term "friend" on these pages does not convey the same meaning that it did in the pre-internet age; that today, the term "friend" on social networking sites merely conveys the message that a person so identified is a contact or acquaintance; and that such an identification does not convey that a person is a "friend" in the traditional sense, i.e., a person attached to another person by feelings of affection or personal regard. In this sense, the minority concludes that identification of a lawyer who may appear before a judge as a "friend" on a social networking site does not convey the impression that the person is in a position to influence the judge and does not violate Canon 2B.

The question then remains whether a campaign committee may establish a social networking page which allows lawyers who may practice before the judge to designate themselves as "fans" or supporters of the judge's candidacy.

To the extent a social networking site permits a lawyer who may practice before a judge to designate himself or herself as a fan or supporter of the judge, this practice is not prohibited by Canon 2B, so long as the judge or committee controlling the site cannot accept or reject the lawyer's listing of himself or herself on the site. Because the judge or the campaign cannot accept or reject the listing of the fan on the campaign's social networking site, the listing of a lawyer's name does not convey the impression that the lawyer is in a special position to influence the judge.

Although Facebook has been used as an example in this opinion, the holding of the opinion would apply to any social networking site which requires the member of the site to approve the listing of a "friend" or contact on the member's site, if (1) that person is a lawyer who appears before the judge, and (2) identification of the lawyer as the judge's "friend" is thereafter displayed to the public or the judge's or lawyer's other "friends" on the judge's or the lawyer's page.

REFERENCES
Florida Code of Judicial Conduct: Canon 2B; Commentary to Canon 2A.
Florida Judicial Ethics Advisory Committee Opinions: 99-26, 00-22, and 08-11.

The Judicial Ethics Advisory Committee is expressly charged with rendering advisory opinions interpreting the application of the Code of Judicial Conduct to specific circumstances confronting or affecting a judge or judicial candidate.

Its opinions are advisory to the inquiring party, to the Judicial Qualifications Commission and the judiciary at large. Conduct that is consistent with an advisory opinion issued by the Committee may be evidence of good faith on the part of the judge, but the Judicial Qualifications Commission is not bound by the interpretive opinions by the Committee. See Petition of the

Committee on Standards of Conduct Governing Judges, 698 So. 2d 834 (Fla. 1997). However, in reviewing the recommendations of the Judicial Qualifications Commission for discipline, the Florida Supreme Court will consider conduct in accordance with a Committee opinion as evidence of good faith. See Id.

The opinions of this Committee express no view on whether any proposed conduct of an inquiring judge is consistent with the substantive law which governs any proceeding over which the inquiring judge may preside. This Committee only has authority to interpret the Code of Judicial Conduct, and therefore its opinions deal only with the issue of whether the proposed conduct violates a provision of that Code.

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