



Friending, Following, and Liking

Social Media and the Courts

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“Social media” encompasses an increasingly broad array of online platforms and activities, including Facebook, Twitter, LinkedIn, SnapChat, chat rooms, blogging, online surveys, YouTube, and podcasting. Social media use is ubiquitous, and many judges participate in social networks such as Facebook. But judicial participation in social media comes with significant and multifarious ethical risks. This is because of the nature of web-based activities. For example, even when one intends one’s online comments to be private, others can easily make them public. In addition, online comments are readily taken

out of context. And they are difficult if not impossible to erase permanently.

Many of the ethical issues raised by judicial participation in social media are relatively settled, and much has already been written on such issues.¹ For one, judges are prohibited from commenting on pending cases, which naturally includes comments in the social media sphere.² Moreover, no matter the medium, judges are not permitted to practice law,³ publicly endorse political candidates,⁴ or engage in *ex parte* communications.⁵ The application of these ethics rules in the realm of social media activity is relatively straightforward. For example, a

Georgia state court judge was reprimanded and suspended for his *ex parte* communications over Facebook with a woman who had contacted him about a pending criminal trial that involved her defendant brother.⁶ Instead of ignoring her inquiry or informing her that he was ethically prohibited from responding, the judge engaged in an exchange about the matter.⁷

Social media activities raise a number of judicial ethics questions, however, to which existing ethics rules do not provide easy answers. This article takes up some of these more difficult ethical questions, with a focus on Facebook, which is perhaps the most common social media platform. The article begins by addressing the extent to which judges may interact on social media with local attorneys and others who will potentially appear before them in court. Next, it addresses whether judges who participate in social media communications should identify themselves as judges. Finally, it considers the extent to which judges must monitor postings on their social media accounts. These are live questions in the realm of judicial ethics, with compelling arguments on both sides. In light of the ethical restrictions governing judicial officers, however, the authors do not purport to give answers here. Rather, this article endeavors to survey the range of views on each issue to stimulate further discussion.

To Friend or Not to Friend

Should judges refrain from making social media connections with attorneys who are likely to appear before them in court? And should judges unfriend or unfollow attorneys when those attorneys become involved in proceedings before them? State ethics committees have taken differing views on the ethics of judge–attorney social media relationships.

Many state ethics committees approve of judge–attorney Facebook “friendships.” Some of these committees have pointed out that a Facebook “friend” is a term of art.⁸ A Facebook user is not truly “friends,” as that term is traditionally understood, with everyone identified as such on his or her Facebook account. Thus, the New Mexico Advisory Committee on the Code of Judicial Conduct has observed, “Given the ubiquitous use of social networking, the

mere fact that a judge and an attorney who may appear before the judge are linked in some manner on a social networking site does not in itself give the impression that the attorney has the ability to influence the judge.⁹ The Florida Supreme Court has similarly opined that “[t]he establishment of a Facebook ‘friendship’ does not objectively signal the existence of the affection and esteem involved in a traditional ‘friendship.’”¹⁰

Other states’ advisory committees have approached social media relationships and interactions the same as offline relationships and interactions.¹¹ The New York Advisory Committee on Judicial Ethics, for example, has pointed out that judges “generally may socialize in person with attorneys who appear in the judge’s court” and that a blanket prohibition on online social interactions is, accordingly, unwarranted.¹² After all, the profession accepts that judges and local attorneys are going to interact in a friendly way outside of judicial proceedings.¹³ Thus, whether these interactions are in-person or online is ethically immaterial.¹⁴

Utah’s Judicial Ethics Advisory Committee has taken a perhaps even broader view. That committee has authorized a judge’s practice of “liking” and “following” others. Specifically, the Utah committee has opined that judges may “like” law firms and attorneys on Facebook without ethical problem because, in the committee’s view, “‘liking’ something or someone does not convey much about the judge’s thoughts on a topic.”¹⁵ The committee added, however, that a judge–attorney Facebook friendship “is one factor to consider when deciding whether recusal is necessary.”¹⁶

The Utah committee further authorized judges to “follow” attorneys on Twitter.¹⁷ In so ruling, the committee explained that the practice of following in and of itself does not pose ethical problems. If, however, an attorney attempted to engage in *ex parte* communications over Twitter, that would be problematic, and the judge would have to stop following the attorney.¹⁸

The California Committee on Judicial Ethics has taken an approach similar to that of the Utah committee. The California committee has stated, for example, that “[t]he same rules that govern a judge’s ability to socialize and communicate in

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person, on paper and over the telephone apply to the Internet.”¹⁹ In an opinion about online social networking, the committee observed:

[E]xtrajudicial activities are governed by Canon 4A which states: “A judge shall conduct all of the judge’s extrajudicial activities so that they do not (1) cast reasonable doubt on the judge’s capacity to act impartially; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.”²⁰

In so ruling, the committee recognized that parties might find it troubling if opposing counsel and the presiding judge were connected on social media sites. To address this concern,

the committee laid out four factors that should be considered in determining whether a social media relationship between a judge and an attorney creates the perception of impropriety: (1) the nature of the social media platform at issue; (2) the number of friends the judge has on that platform; (3) the method the judge uses to decide whom to include among his or her friends on the platform; and (4) how often the attorney at issue appears before the judge.²¹ The committee also set forth a black-line rule: if a judge is Facebook friends with an attorney who has a matter pending before him or her, then the judge must “unfriend” that attorney.²²

Other states—for example, Florida, Massachusetts, and Oklahoma—have taken a far more restrictive view than the above-discussed jurisdictions regarding judges’ interactions with attorneys on social media. The justifications for limiting such social media connections largely revolve around concerns over the appearance of impropriety and undue influence.

The Florida Judicial Ethics Advisory Committee has determined that judges must not “friend” attorneys who are likely to litigate cases before them because this kind of judge–attorney interaction or apparent interaction may convey to parties or the public that certain attorneys have undue influence on judicial decision-making.²³ In the wake of a Florida advisory opinion on social media use, some judges closed their Facebook accounts while others removed many of their “friends.”²⁴

The Massachusetts Committee on Judicial Ethics has likewise interpreted its Code of Judicial Conduct to “prohibit a judge from being Facebook friends with any attorney who is reasonably likely to appear before that judge.”²⁵ The committee went further, however, and ruled that judges must affirmatively review their list of “Facebook friends and ‘unfriend’ attorneys who are reasonably likely to appear before [them].”²⁶ And if an attorney appearing before a judge is a *former* Facebook friend and the judge is aware of that fact, then “the judge should disclose the existence and nature of that past Facebook friendship even if the judge believes there is no basis for disqualification.”²⁷

Like Florida and Massachusetts, Oklahoma has taken a strict position against Facebook

friendships between a judge and attorneys who are likely to appear before the judge in court.²⁸ The Oklahoma Judicial Ethics Advisory Panel reasoned that the “public trust in the impartiality and fairness of the judicial system is [critically] important” and that judge–attorney Facebook friendships pose the risk of undermining such trust—a risk that the panel felt was not worth taking.²⁹

While joining the committees that have expressed skepticism regarding the propriety of social media relationships between judges and attorneys, Missouri’s judicial conduct commission has taken a somewhat softer approach—advising that, “under a best practice consideration, the judge should limit the judge’s ‘friends’ to those persons for whom the judge would recuse in the event such persons appeared in the judge’s court.”³⁰

As the foregoing makes clear, those state ethics committees that have weighed in on the question of social media relationships between judges and attorneys have reached a range of outcomes, and many state judicial ethics committees have yet to opine on the issue. As a result, caution is warranted for judicial officers who have or are considering social media relationships, because the consequences of running afoul of ethics rules in this area can be severe. For example, a Florida appellate court concluded that a trial judge who was Facebook friends with the prosecutor on a case before the judge was required to disqualify himself from that case.³¹ The court explained that the Facebook connection might compromise the perception of a fair and impartial trial.³²

A North Carolina judge who “friended” an attorney litigating a case before him and who then proceeded to communicate with the attorney about the case over Facebook suffered an even harsher sanction. The North Carolina Judicial Standards Commission publicly reprimanded the judge for these Facebook interactions, which the Commission viewed as contrary to the principles of judicial conduct.³³

A related question to that discussed above is whether a judge may “friend” or “follow” non-lawyers who may be involved in proceedings before the judge. As in the case of judge–attorney

social relationships, those state ethics committees that have opined on the issue have expressed a range of opinions. For example, Arizona’s Judicial Ethics Advisory Committee has opined that judges may not be friends with sheriffs or local law enforcement officers and may not “like” pages associated with such officers.³⁴ In contrast, Kentucky’s Judicial Ethics Committee has advised that judges are permitted to interact over social media with individuals who appear before them, such as social workers and law enforcement officers, because, although judges are required to “avoid impropriety and the appearance of impropriety in all . . . activities,” the fact that a judge is Facebook friends with a person who appears before him or her does not in itself convey the impression that such a person is “in a special position to influence the judge.”³⁵ After all, even setting Facebook aside, it is no secret that judges have extrajudicial relationships “with any number of persons, lawyers or otherwise, who may have business before the judge and the court over which he or she presides.”³⁶

Similarly, the Tennessee Court of Criminal Appeals has determined that a judge need not be disqualified from presiding over a case in which the judge was Facebook friends with a confidential informer who served as a witness at the trial,³⁷ and a Texas appellate court has concluded that a trial judge need not be disqualified from presiding over a criminal trial in which the judge was Facebook friends with the victim’s father.³⁸ And Utah’s Advisory Committee has determined that judges may be online “friends” with candidates running for political office as well as elected officials.³⁹

Again, however, given the wide range of viewpoints on this issue, judges should proceed with caution in establishing social relationships with non-attorneys with whom the judge may interact in his or her courtroom.

Identifying as a Judge

Another question that appears to have divided state ethics committees is whether judges should identify themselves as judges, making their professional roles explicit, if they decide to use social media. State ethics committees have advanced a variety of positions on this issue.

A Utah informal advisory opinion provides that judges *may* identify themselves as such on social media platforms like LinkedIn and may even appear in robes in photos they post online, provided that “the photograph was taken in an appropriate setting where wearing the robe would otherwise be appropriate, such as in the judge’s chambers.”⁴⁰ The same opinion further indicated, however, that judges are permitted to conceal their identities when the online communication calls for it—for example, when posting a restaurant review.⁴¹

A Massachusetts advisory opinion likewise expressed the view that judges are permitted to reveal their professional identities on social media.⁴² But this opinion, too, concluded that judges may have good reason to conceal their identities on social media—for example, “concerns over the personal safety of the judge or the judge’s family members”—and that judges are permitted to conceal their judicial roles if they so choose.⁴³

In contrast to the foregoing opinions, the New Mexico Advisory Committee has taken the position that a judge who uses social media *must* disclose his or her true identity. The committee stated, “If a judge decides to participate in social media use, the judge must take ownership of his or her use” and “may not hide behind an alias or pseudonym,” since judges have a duty at all times to act in a manner that does not “undermine[] the dignity of judicial office or . . . conflict with the Code . . .”⁴⁴

Finally, some states that allow judges to interact over social media behind the cover of a pseudonym have stated that the judges are still subject to judicial ethics rules.⁴⁵ Others, such as Idaho, provide that “[a] judge should not identify himself as such, either by words or images, when engaging in commentary or interaction that is not in keeping with the limitations of this Code.” The Idaho Code thus implicitly appears to permit a judge to engage in behavior that defies the code of conduct as long as the judge does not identify himself or herself as a judge when engaging in that behavior, although Idaho does not yet appear to have addressed that precise question.

As these opinions make clear, a judge’s posting online implicates the judge’s duties

to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and [to] avoid impropriety and the appearance of impropriety.”⁴⁶ In some cases, issues might potentially be avoided by, for example, using an alias when posting a restaurant review. In other cases, however, posting either with or without identifying oneself as a judge may be ethically problematic—for example, if a judge promotes a political candidate on social media platforms.

Again, the ethics opinions that have been issued to date offer diverse guidance on the question, but all seem to agree that judges must exercise caution when they participate in, or consider participating in, social networking, and that judges should be sensitive to the potential improprieties and perceived improprieties of such participation.

Monitoring Online Friends

On social networking sites like Facebook, users often have hundreds of “friends,” and most do not keep track of the content that each of those friends is posting. Obviously, in many cases, friends’ postings are not controversial. But what if a friend posts political commentary or racist, sexist, or homophobic jokes or memes? Does such a posting reflect on the judge? Because of this risk, do judges have an ethical responsibility to monitor the posts of their Facebook friends? To some, such an obligation might seem unreasonably demanding. Others might respond that the burden is appropriate because judges are subject to demanding ethical rules that do not apply to members of the general public, and they can always choose not to participate in social media during their judicial tenures.

Perhaps unsurprisingly, states have differing perspectives on this issue. Massachusetts, for example, has issued an advisory opinion stating that judges have no duty to police the posts of their social media friends.⁴⁷ The committee explained:

We are aware that a Facebook user often has no knowledge concerning the communications made by Facebook friends, and do not believe that a reasonable person would consider a judge to have endorsed

a Facebook friend’s communication unless the judge has so indicated by taking some affirmative action (e.g., “liking,” “following,” commenting, or reposting).⁴⁸

The opinion further suggests that judges may “follow” or “like” another’s Facebook page without monitoring all of the content posted on that page.⁴⁹ If a judge gains knowledge of “content that negatively influences the integrity or impartiality of the judiciary,” however, then the judge must sever his or her connection with the suspect page.⁵⁰

Missouri, in contrast, has issued an advisory opinion indicating that judges have a duty to monitor their friends’ Facebook pages.⁵¹ While acknowledging “the impossibility of policing all posts of all ‘friends’ or of all ‘friends of friends’ of the judge,” the opinion asserts that a judge who decides to participate in social media “must make reasonable efforts to review such posts and sever or ‘unfriend’ anyone whose conduct or postings would place the judge in a position of appearing to endorse [inappropriate content].”⁵² Although Missouri’s position imposes a significant burden on judicial participation in social media, judges who follow the Missouri Commission’s guidance should be well protected against accusations of impropriety and impartiality.

This issue, perhaps more than any other, reflects the dangers and risk of relationships between judges and others on social media. As the above-described ethics opinions recognize, it is impossible for any person to monitor every posting that may be linked directly or through a series of links to one’s page. Yet it is not difficult to envision how a linked political opinion or inappropriate joke might implicate a judge’s duties to, for example, “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and . . . avoid impropriety and the appearance of impropriety.”⁵³

Accordingly, any judge who chooses to participate in a form of social media in which others can post is well advised to explore methods to block or limit posting and to explore any other possible means to ensure that improper postings do not interfere with the judge’s proper role and the ability to carry out judicial duties.

Conclusion

Social media has become a ubiquitous part of contemporary interaction and communication. Because judges are people too, perhaps they should not be expected to refrain from participating in all social media. Nevertheless, judges are constrained by rules of judicial ethics that do not affect most users of social media and that serve the valuable purpose of ensuring trust and confidence in those who are tasked with deciding issues of great significance to the parties who appear before them and to society as a whole. Just how demanding and specific these constraints should be is, in many contexts, an open question.

Increasingly, state judicial ethics committees are grappling with questions concerning judges and their social media participation, and they will no doubt continue to do so, as judicial ethics rules begin to catch up to society’s increasingly web-based reality.

In the meantime, judges who wish to participate in social media should proceed with caution, asking themselves before acting whether their social media activities could be deemed by a reasonable person to undermine the judges’ independence, integrity, or impartiality; place the judiciary in disrepute; or interfere with their ability to carry out the substantial duties that have been entrusted to them. CL

A version of this article was presented at the ABA Section of Environment, Energy, and Resources’ (SEER) 48th Spring Conference in Denver on March 27–28, 2019.



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NOTES

1. See generally Singh, "Friend Request Denied: Judicial Ethics and Social Media," 7 *JOLTI* 153 (2016); Gray, "Social Media and Judicial Ethics: Part 1," 39 *Jud. Conduct Rep.* (Spring 2017); Gray, "Social Media and Judicial Ethics: Part 2," 39 *Jud. Conduct Rep.* (Summer 2017).
2. Colo. Code of Jud. Conduct R. 2.10(A) (2010) ("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.").
3. Colo. Code of Jud. Conduct R. 3.10 (2010) ("A judge shall not practice law except as permitted by law or this Code.").
4. Colo. Code of Jud. Conduct R. 4.1(A)(3) (2010) ("Except as permitted by law, or by this Canon, a judge or a judicial candidate shall not . . . publicly endorse or oppose a candidate for any public office.").
5. Colo. Code of Jud. Conduct R. 2.9(A) (2010) ("A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter . . .").
6. *In re Bass*, Public Reprimand, Ga. Judicial Qualifications Commission (Mar. 18, 2013).
7. *Id.* (discussing case procedure and stating that he would "handle it").
8. See, e.g., *Jud. Ethics Op. JE119*, 2010 WL 8973626 at *2 (Ethics Comm. Ky. Jud. Jan. 20, 2010) (conceiving "such terms as 'friend,' 'fan' and 'follower'" not in "the ordinary sense" but rather as "terms of art used by the site"); Informal Op. 12-01, 2012 WL 11916794 at *4 (Utah Jud. Ethics Adv. Comm. Aug. 31, 2012) (agreeing with the Kentucky committee that the concept of a Facebook "friend" does not match "the usual understanding of the term ['friend']").
9. Advisory Opinion Concerning Social Media, 2016 WL 4423337 at *6 (N.M. Adv. Comm. Jud. Ethics Feb. 15, 2016).
10. *Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, 43 Fla. L. Weekly S565, 2018 WL 5994243 at *6 (Fla. Nov. 15, 2018).
11. See, e.g., Judge Must Consider Limitations on Use of Social Networking Sites, 2012 WL 12134911 at *3 (Md. Jud. Ethics Comm. June 12, 2012) (stating that "[t]he committee sees no reason to treat 'Facebook friends' differently [from other types of personal relationships]"); Informal Op. 12-01 (Utah Jud. Ethics Adv. Comm. Aug. 31, 2012) (asserting that "whether a person is a 'friend' that might require a judge's recusal is based on the same criteria as when an individual personally observes a judge's interactions with others" and that "[b]eing friends with someone is not a violation of the Code of Judicial Conduct").
12. Provided That the Judge Otherwise Complies with the Rules Governing Judicial Conduct, He/she May Join & Make Use of an Internet-Based Soc. Network, N.Y. Jud. Adv. Op. 08176, 2009 WL 10207074 at *1 (N.Y. Adv. Comm. Jud. Ethics Jan. 29, 2009).
13. See, e.g., *id.* (noting that judges "generally may socialize in person with attorneys who appear in the judge's court").
14. See, e.g., *Online Social Networking*, Cal. Jud. Ethics Comm. Op. 66 at 4 (Judges Ass'n Jud. Ethics Comm. 2010) ("The same rules that govern a judge's ability to socialize and communicate in person, on paper and over the telephone apply to the Internet.").
15. Informal Op. 12-01, WL 11916794 at *7 (Utah Jud. Ethics Adv. Comm. Aug. 31, 2012).
16. *Id.* at *6.
17. *Id.* at *8.
18. *Id.*
19. *Online Social Networking*, Cal. Jud. Ethics Comm. Op. 66 at 4 (Judges Ass'n Judicial Ethics Comm. 2010).
20. *Id.* at 3-4.
21. *Id.* at 8.
22. *Id.* at 10.
23. Fla. Jud. Ethics Op. 2009-20, 2009 WL 8484617 (Fla. Jud. Ethics Adv. Comm. Nov. 17, 2009).
24. Lundy, "Judges find Facebook can be a lonely place," *Orlando Sentinel* (Jan. 1, 2010), http://articles.orlandosentinel.com/2010-01-01/news/0912310148_1_facebook-friends-judges-question-social-networking-site (detailing Florida state judges' reactions to the state's advisory opinions on judges and Facebook). The Florida Supreme Court, however, recently expressed disagreement with the state's advisory committee, concluding that "an allegation that a trial judge is a Facebook 'friend' with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification." *Law Offices of Herssein & Herssein, P.A.*, 43 Fla. L. Weekly S565 at *1. One judge, however, concurred to "strongly urge judges not to participate in Facebook." *Id.* at 9. And three justices dissented on the basis that "having a lawyer as a Facebook 'friend' not only 'may undermine confidence in the judge's neutrality' but in this case warranted the judge's recusal based on a 'well-founded fear of not receiving a fair and impartial trial.'" *Id.*
25. Facebook: Using Social Networking Site, CJE Opinion No. 2016-01, 2016 WL 4720469 at *4 (Mass. Sup. Jud. Ct. Comm. Jud. Ethics Feb. 16, 2016).
26. *Id.*
27. *Id.*
28. See, e.g., *In re Judicial Ethics Opinion 2011-3*, 261 P.3d 1185, 1186, 2011 Okla. Jud. Eth. 3 (Okla. Jud. Ethics July 6, 2011).
29. *Id.*
30. Mo. Adv. Op. 186 (Comm. on Retirement, Removal, and Discipline Apr. 24, 2015).
31. *Domville v. State*, 103 So.3d 184 (Fla. Dist. Ct. App. 2012), *disapproved of by Law Offices of Herssein & Herssein, P.A.*, 43 Fla. L. Weekly S565.
32. *Id.*
33. Crowell, "Judicial Ethics and Social Networking Sites," U.N.C. Sch. Gov't (Aug. 10, 2012), www.sog.unc.edu/sites/www.sog.unc.edu/files/RS01-Drennan-Judges%20social%20networking%20Aug%2012.pdf.
34. Ariz. Jud. Adv. Op. 20141, 2014 WL 2559546 at *2 (Ariz. Sup. Ct. Jud. Ethics Adv. Comm. May 5, 2014).
35. *Jud. Ethics Op. JE119*, 2010 WL 8973626 at *1 (Ethics Comm. Ky. Jud. Jan. 20, 2010).
36. *Id.*
37. *State v. Ferguson*, No. M201300257CCAR3CD, 2014 WL 631246 at *13 (Tenn. Crim. App. Feb. 18, 2014).
38. *Youkers v. State*, 400 S.W.3d 200, 204-07 (Tex. App. 2013).
39. Informal Op. 12-01, 2012 WL 11916794 at *6 (Utah Jud. Eth. Adv. Comm. Aug. 31, 2012). See also Ariz. Jud. Adv. Op. 20141, 2014 WL 2559546 at *4 (endorsing no blanket prohibition on judges being Facebook friends with elected representatives, since such a friendship does not amount to an endorsement).
40. Informal Op. 12-01, 2012 WL 11916794 at *6 (Utah Jud. Eth. Adv. Comm. Aug. 31, 2012).
41. *Id.* at 8.
42. Facebook: Using Social Networking Site, CJE Opinion No. 201601, 2016 WL 4720469 (Mass. Sup. Jud. Ct. Comm. Jud. Eth. Feb. 16, 2016).
43. *Id.* at 3.
44. Advisory Opinion Concerning Social Media, 2016 WL 4423337 at *8 (N.M. Adv. Comm. Jud. Ethics Feb. 15, 2016).
45. See *Judicial Discipline & Disability Comm'n v. Maggio*, 440 S.W.3d 333 (Ark. 2014) (removing from office a judge for, among other activities, posting inappropriate content online under a pseudonym).
46. Colo. Code of Jud. Conduct R. 1.2 (2010).
47. Facebook: Using Social Networking Site, CJE Opinion No. 201601, 2016 WL 4720469 (Mass. Sup. Jud. Ct. Comm. Jud. Eth. Feb. 16, 2016).
48. *Id.* at 3.
49. *Id.*
50. *Id.*
51. Mo. Adv. Op. 186 (Comm. on Retirement, Removal, and Discipline Apr. 24, 2015).
52. *Id.* at 1.
53. Colo. Code of Jud. Conduct R. 1.2 (2010).