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Judges and social networks by Cynthia Gray

Internet-based social networks such as Facebook enable users to create personal pages on which they post information about themselves, incorporate information from other pages and sites, and connect with other people. The "broad dissemination of information . . . is one of the attractions of social networking sites." *California Advisory Opinion 66* (2010).

> It enables users to post information that is then shared with everyone in their "community." In turn, a user will be able to receive information from all the members of the community. These sites make it very easy for people to keep in touch with one another, sharing events of their day, vacation photos, news of family and friends and the like. They are also used by businesses, business groups and professional organizations. . . . They are designed to increase the flow of information and they operate like a web of interconnected pages.

Social networking has also become an apparently indispensable tool in election campaigns.

Some of the people using social networks are judges, according to a 2012 survey by the Conference of Court Public Information Officers (http://ccpio.org). Of the 284 state court judges who responded to that survey, 46.1% use social media sites, which is an increase from 40.2% in 2010. "There are multiple reasons why a judge might wish to be a part of a social network: reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family." *New York Advisory Opinion 08-176*. The survey results also indicate that judges who run for election are more likely to use social media profile sites than those who do not.

Judges' confidence that they can use social media without crossing ethical boundaries is also increasing, although many still have reservations. In the 2012 survey, asked to react to the statement, "Judicial officers can use social media profile sites, such as Facebook, in their *personal* lives without compromising professional conduct codes of ethics," 44.3% of the judges agreed or strongly agreed, up from 41.4% in 2010. Asked to respond to the statement, "Judicial officers can use social media profile sites, such as Facebook, in their *professional* lives without compromising professional conduct codes of ethics," 27.5% agreed or strongly agreed, up from 24% in 2010.

For assistance in meeting the ethical challenges of social media, judges have asked judicial ethics advisory committees for guidance. All of the committees that have issued opinions have advised that judges may use social media, for example, to post content on personal interests and pursuits (*Utah Advisory Opinion 12-1*), to post photos, videos, comments, and links to articles found elsewhere on the internet, and to "like" posts by others. *Massachusetts Advisory Opinion 2011-6*.

However, all of the opinions have also urged judges to proceed cautiously while socializing on the internet. Social networks pose particular ethical challenges because, although the "sites may have an aura of private, one-on-one conversation, they are much more public than off-line conversations, and statements once made in that medium may never go away." *Kentucky Advisory Opinion JE-119* (2010). Moreover, "it is not difficult to find many mainstream news reports regarding negative consequences and notoriety for social network users who used social networks haphazardly." *New York Advisory Opinion 08-176*.

The New York committee, for example, warned "all judges using social networks to, as a baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology." The Kentucky committee noted that, in speaking with judges around the state, it "became

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Recent advisory opinions

• A judge and members of her staff may not ask merchants to donate cash, gift cards, or merchandise for use as incentives for drug court participants or ask for discounts but may accept unsolicited donations or discounts; staff of a court's administrative office may seek such donations and discounts. *Nevada Opinion JE12-9.*

• A court may not allow the prosecution to use the court's address to receive mail regarding plea bargains. *New York Opinion 11-112.*

• A judge may not drive defendants to community service locations. *New York Opinion 11-153.*

• A judge is not required to report to the board of bar overseers that a lawyer is on a list of robo-signers compiled by a register of deeds. *Massachusetts Opinion 2012-2.*

• A judge should decline requests from his former clerk's law firm for a list of matters in which the clerk participated but may take other steps to help former clerks identify conflicts. *U.S. Opinion 109* (2012).

• After officiating at a wedding, a judge may attend the dinner that follows the ceremony as a guest of the wedding party. *Connecticut Emergency Staff Opinion 2012-17.*

• Because an engagement reflects a firm intention to become legally married in the near future, a judge has a familial relationship for purposes of disqualification with the deputy district attorney to whom his daughter is engaged. *Colorado Opinion 2012-7.*

• A judge may offer her private law library for free to members of a local bar association on a "first come, first serve basis" and need not disclose or disqualify herself when a recipient appears in a case. *New York Opinion 12-21.*

• A judge may, at regular lunch meetings of a bar association, solicit attorneys to volunteer as pro bono attorneys ad litem for children in dependency cases or request bar associations to convene special meetings for that purpose. *Florida Opinion 2012-26.*

• A judge may organize a social golf outing for the legal community and collect a fee to cover the costs of the event. *New York Opinion 12-23.*

• A judge should not purchase property that is the subject of a foreclosure proceeding over which he is presiding but, after the proceeding is concluded, may purchase the property from the foreclosure purchaser on the same terms available to the general public. *Colorado Opinion 2012-4.*

• A judge may provide a letter of recommendation directly to the chief public defender for an attorney who is applying for a supervisory position. *Connecticut Informal Opinion 2012-27.*

• A judge may write a letter of recommendation for a lawyer who appears before her and has applied to serve as a contract lawyer for the public defender. *New Mexico Opinion 12-6.*

• A judge who witnessed conduct relevant to a property crime committed at his home may give a statement or affidavit to the police for use in a warrant application and testify at any resulting criminal proceeding. *Connecticut Emergency Staff Opinion 2012-20.*

• A judge participating in a charity walkathon may not wear a shirt with a team name based on the name of a local attorney. Her husband may donate and solicit funds on behalf of himself and the team as long as the judge is not soliciting funds vicariously through him. *Florida Opinion 2012-29.*

• A judge may not accept an award at a charity luncheon when a silent auction will take place during the luncheon. *Florida Opinion 2012-30.*

• A judge may be interviewed for a videotape to be used for education and fund-raising by a non-profit organization that runs a diversion program for teen offenders. *Colorado Opinion 2012-3.*

• A judge who is retiring may be the guest of honor at a fund-raising dinner for an organization that concerns the law, the legal system, or the administration of justice, if the event will take place after he retires and he is not told before the event who will be attending. *Connecticut Informal Opinion 2012-22.*

• A judge may be a guest of honor at a local newspaper's non-fund-raising event and accept the newspaper's award for community leadership but may not accept an award for political leadership. *New York Opinion 12-112.*

• A judge may not receive an award from Mothers Against Drunk Driving at its annual community dinner. *Connecticut Informal Opinion 2012-25.*

• A criminal court judge may not be an honorary member of a local sheriff's association but may attend the association's annual dinner. *New York Opinion 12-88.*

• A judge may not be a guest on a live call-in radio show sponsored by a hospital to discuss the U.S. Supreme Court's Affordable Care Act decision. *Connecticut Emergency Staff Opinion 2012-23.*

• A judge may do color commentary on radio broadcasts of the state university home basketball games and be paid $200 a game. *Kansas Opinion JE-177* (2012).

• A judge may receive a small stipend for acting as a sports referee. *New Mexico Opinion 12-5.*

• A judge may not serve as fire chief for a county fire district but may serve as a volunteer emergency medical technician. *Kansas Opinion JE-176* (2012).

• A judge may assist a local high school's mock trial team. *Connecticut Informal Opinion 2012-26.*

• A judge may authenticate a relative's signature on a foreign pension document. *New York Opinion 12-10.*

• A judge may serve on the board of a homeowners' association. *Nevada Opinion JE12-011.*

The Center for Judicial Ethics has links to the web-sites of judicial ethics committees at www.ajs.org/ethics/.

Recent cases

Behavior at holiday party

Adopting the recommendation of the Advisory Committee on Judicial Conduct, which the judge accepted, the New Jersey Supreme Court suspended a judge for four months without pay for inappropriately touching several women and making inappropriate remarks while attending a holiday party hosted by the probation association. *In the Matter of Jones*, 47 A.3d 736 (New Jersey 2012). The Court's order does not describe the misconduct; this summary is based on the Committee's presentment (www.judiciary.state.nj.us/pressrel/2012/pr120725b.htm).

In December 2010, the judge attended a "Holiday Happy Hour" at Christopher's Pub hosted by the county chapter of the state association of probation officers. At the party, the judge touched five female probation officers and one female pub employee without their consent. His touching was "offensive," "extensive and varied." He grabbed a female probation officer at her waist, "uncomfortably low," and kissed her on the cheek; he placed his arm on another officer's shoulders and swiped his hand down her chest; he held another female probation officer's hand by the pinky; he touched another officer's buttock; he hugged another for an "uncomfortably" long time as she left the party; and he pulled a cocktail waitress's hand out of her pocket, caressed it, and grabbed her wrist to study her tattoo.

In addition, the judge made several sexually suggestive remarks. He instructed a female probation officer to call him after normal business hours to discuss her career; told married female officers that he "had no use" for them; asked other probation officers if they were lesbians; and asked a waitress to turn around, presumably so he could gawk at her.

The judge admitted that he became intoxicated at the party and claimed his intoxication rendered him unable to recall the conduct for which he was charged, but conceded he could not "specifically rebuke any unintentional, but inadvertent, physical contact." Noting that "intoxication may serve to expose and reveal intent, rather than obscure it," the Committee stated it "need not reconcile Respondent's claim that he does not recall these several specific and graphic events due to the level of his intoxication that evening with his assertions that the conduct was unintentional and inadvertent" because "regardless of his intent, Respondent's conduct was deeply offensive and exceedingly improper."

The Committee also questioned the judge's decision to attend an event that was funded by a union and attended by probation officers who regularly appear before him.

> It should have been plainly obvious to Respondent that his attendance at that event would have been ill advised given the fact that he was invited to attend by a probation officer who appears regularly before him in the course of her official duties. Respondent's decision to attend the Holiday Party and fraternize with that probation officer, as well as others who appear before him in the course of their job duties, coupled with the fact that the event was hosted and paid for by a union of which Respondent is not a member, raises serious concerns about his judgment and creates the potential for a conflict of interest between Respondent and the Ocean County Probation Department. The risk that such conduct could create a conflict of interest or minimally the appearance of one is entirely unacceptable and contrary to the high standards of conduct espoused in the Code of Judicial Conduct and should be avoided in the future.

Abuse of power

The California Commission on Judicial Performance publicly admonished a judge for ordering an attorney to "spend every waking moment" working on a case and to remain in the courtroom for over an hour and a half. *Public Admonishment of Jacobson* (July 11, 2012) (http://cjp.ca.gov/res/docs/public_admon/Jacobson_PubAdm_7-11-12.pdf).

On October 13, 2010, at approximately 9 a.m., the judge heard a motion to continue the preliminary hearing scheduled for the following day in *People v. Barrientos*, in which the defendant was charged with the attempted murder of a police officer. Representing the defendant, Ann Beles argued that she could not be ready the next day because the district attorney had produced 1,100 pages of discovery. The judge said, "I'm ordering you to spend every waking moment between now and when we are next in court working on this case" and "I'm telling you to spend every waking moment working on it." The judge told Beles that she had had "plenty of time to read and absorb 1,100 pages of stuff," adding "I read about 2,000 pages a week." When the judge said, "Work all day today, work all night. Get up early tomorrow morning," Beles responded, "Your Honor, I don't need your advice on how to be competent." The judge then said, "That is contemptuous. That was disrespectful. Take a seat."

Beles took a seat in the courtroom, and the judge called a recess and went to chambers to gather his thoughts and review a checklist for adjudicating contempt. The judge then returned to the bench and called other cases.

At 11:05 a.m., the judge ordered Beles to return at 2 p.m., explaining he was holding the hearing in the afternoon, when fewer people would be present, out of consideration to Beles. Beles apologized for her remark, saying it was "improper and too informal."

At the contempt hearing that afternoon, Beles again apologized but did not concede that her remark was contemptuous or that the judge had the authority "to order

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Judicial deliberative privilege

Quashing in part a subpoena issued to a judge in an investigation by the Commission on Judicial Conduct, the Massachusetts Supreme Judicial Court formally recognized a judicial deliberative privilege. *In the Matter of the Enforcement of a Subpoena*, 972 N.E.2d 1022 (Massachusetts 2012). The Court defined the privilege as absolute and stated it protected "a judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic materials" and "confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases."

In December 2010, a district attorney filed a complaint with the Commission alleging that, in 24 categories of decisions, a judge had repeatedly exhibited "disregard for the law, lack of impartiality, and bias against the Commonwealth." A subpoena was issued asking the judge to produce "any notes, notebooks, bench books, diaries, memoranda, recordation or other written recollections" in over 40 cases. The judge filed a motion to quash. The Court noted that the special counsel appointed by the Commission argued that delving into the judge's mental processes was necessary because proving bias was "'notoriously elusive' and 'difficult.'"

The Court acknowledged that "holding judges accountable for acts of bias in contravention of the Code of Judicial Conduct is essential." It also affirmed that "the repeated and intentional failure to follow the plain requirements of the rules and regulations of the Commonwealth, or the rulings of this court, is a proper subject of judicial investigation and discipline."

However, the Court concluded that enforcement "must be accomplished without violating the protection afforded the deliberative processes of judges fundamental to ensuring that they may act without fear or favor in exercising their constitutional responsibility to be both impartial and independent." The Court emphasized that, although the Commission is a judicial body, the complaint against the judge was initiated by a district attorney, who is "uniquely able to exert the pressure that may arise from the probing of deliberative materials."

The Court attributed the scarcity of "express authorities" creating a deliberative privilege to the universal recognition of "its existence and validity." It concluded "the need to protect judicial deliberations has been implicit in our view of the nature of the judicial enterprise since the founding" and "deeply rooted in our common-law and constitutional jurisprudence and in the precedents of the United States Supreme Court and the courts of our sister States." The Court explained that judges have long been barred from testifying about their decisions to ensure the finality of judgments and the integrity and quality of judicial decision-making, which "benefits from the free and honest development of a judge's own thinking and candid communications among judges and between judges and the courts' staff."

The Court stated that a deliberative privilege protects "judicial independence and the free and impartial judging of disputes among parties regardless of how powerful or powerless they might be (or how popular or unpopular their causes) . . . ."

> The threat that any of the many such decisions a judge must make—very frequently unpopular with one party or another—might lead to a requirement that the judge detail his internal thought processes weeks, months, or years after the fact would amount to an enormous looming burden that could not help but serve as an "external influence or pressure," inconsistent with the value we have placed on conscientious, intelligent, and independent decision-making. Even the most steadfast jurist would be led to consider picking his or her way through some of the decisions of the day by way of a route less likely to disturb the interests of those with the greatest ability to bring about such an intrusive examination.

Stating the deliberative privilege was narrowly tailored, the Court rejected special counsel's argument that the privilege will "overly impede" the Commission's investigations. The Court explained that the "Commission can access all court records and recorded proceedings" and review "errors and abuses of discretion . . . identified and corrected in published appellate decisions." The Court also stated that the privilege did not protect "a judge from repeating what was said on the record as to the reason for his or her decision," did not exclude inquiries into "a judge's memory of nondeliberative events" or whether a judge was subjected to improper extraneous influences or ex parte communications, and did not cover when "a judge is a witness to or was personally involved in a circumstance that later becomes the focus of a legal proceeding." ★

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aware that several judges who had joined internet-based social networks subsequently either limited their participation or ended it altogether." *Kentucky Advisory Opinion JE-119* (2010). The Tennessee committee concluded:

> While judges may participate in social media, they must do so with caution and with the expectation that their use of the media likely will be scrutinized [for] various reasons by others. . . . [J]udges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made. In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.

Tennessee Advisory Opinion 12-1.

Bright lines and peril

The advisory opinions focus on Facebook, although the principles would apply to other sites insofar as the features are comparable. Facebook, the most popular site in the United States, calls a user's personal profile page the "wall," allows users to "like" pages and posts for other individuals and organizations, and allows users to "friend" other individuals, which results in more access to each other's information.

Judicial ethics advisory opinions are split on whether judges may "friend" attorneys on social networks who appear before them in court.

The Florida committee advised judges not to add lawyers who may appear before them as "friends" on Facebook or permit those lawyers to add them as "friends." *Florida Advisory Opinion 2009-20*. Noting that a judge's "friends" may see who the judge's other "friends" are on a social network, the committee concluded that the process of selecting some attorneys as "friends" (and rejecting others) and communicating whom the judge has chosen to others conveys or permits others to convey the impression that they are in a special position to influence the judge. The committee acknowledged that "simply because a lawyer is listed as a 'friend' on a social networking site" does not mean that the "lawyer is, in fact, in a special position to influence the judge." However, the committee stated, the identification in a public forum of a lawyer who may appear before the judge as a "friend" conveys "the impression of influence" and, therefore, is not permitted by the code of judicial conduct. *See also Domville v. State*, 2012 WL 3826764 (Florida 4th District Court of Appeal September 5, 2012) (relying on *Florida Advisory Opinion 2009-20* to hold that a criminal defendant's allegation that a judge is a Facebook friend of the prosecutor assigned to his case would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial).

The advisory opinion apparently disappointed some Florida judges, several of whom suggested ways they could avoid the perception problems identified by the committee. One judge proposed placing on her profile page a prominent disclaimer stating that "friend" means that the person is only an acquaintance of the judge, not a "friend" in the traditional sense. A second judge proposed adopting a policy of accepting all lawyers who request as "friends" and communicating that "the term 'friend' is, in the judge's opinion, a misnomer."

After "thoroughly and thoughtfully" reconsidering the issue, however, the Florida committee rejected those suggestions and affirmed its original opinion. *Florida Advisory Opinion 2010-6*. (Three members of the committee dissented.) The committee stated that a disclaimer would not effectively dispel an otherwise impermissible message and rejected the concept that "a judge can engage in unethical conduct so long as the judge announces at the time that the judge perceives the conduct to be ethical." A judge's commitment to accept as a "friend" all attorneys who ask does not eliminate the problem, the committee stated, because social media are unique and create "a select and exclusive community," a special class of lawyers who have requested this status, leaving out "lawyers who do not participate in social networking sites or who choose not to ask the judge to accept them as the judge's 'friend' . . . ." Finally, caselaw holding that friendships do not require disqualification, the committee stated, does not necessarily mean that "accepting lawyers as Facebook 'friends' is permissible . . . ."

The Oklahoma advisory committee agreed with the Florida committee, emphasizing that whether "friending" "would mean that the party was actually in a special position is immaterial as it would or could convey that impression." *Oklahoma Advisory Opinion 2011-3.* The committee concluded that "public trust in the impartiality and fairness of the judicial system is so important that it is imperative to err on the side of caution where the situation is 'fraught with peril.'"

Similarly, the Massachusetts committee noted that the situation was one that "requires a judge to 'accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen.'" *Massachusetts Advisory Opinion 2011-6.* The committee acknowledged that social networking sites have "made the word 'friend' into a term of art," but concluded that re-definition does not negate the impression that attorneys "friended" by a judge are in a special position to influence the judge. Therefore, the committee adopted "a bright-line test" that prohibits "judges from associating in any way on social networking web sites with attorneys who may appear before them."

Roses and Rolodexes

Judicial ethics advisory committees in California, Kentucky, Maryland, New York, Ohio, and Utah have chosen not to

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draw a bright line, requiring instead that judges engage in a fact-specific inquiry before determining whether to connect with lawyers on a social networking site.

According to these less restrictive opinions, the distinctive meaning of "friend" on social networks counteracts the appearance problem emphasized in the more restrictive opinions. For example, the Ohio advisory committee opined: "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." *Ohio Advisory Opinion 2010-7*. The Kentucky committee agreed that "the designation of a 'friend' on a social networking site does not, in and of itself, indicate the degree or intensity of a judge's relationship with the person," adding it "conceives such terms as 'friend,' 'fan,' and 'follower' to be terms of art used by the site, not the ordinary sense of those words." *Kentucky Advisory Opinion JE-119* (2010).

Similarly, the Utah advisory committee stated:

> The designation of someone as a "friend" on a website such as Facebook does not indicate that the person is a friend under the usual understanding of the term. Many Facebook users have hundreds and even thousands of "friends." Whether someone is truly a friend depends on the frequency and the substance of contact, and not on an appellation created by a website for users to identify those who are known to the user.

Utah Informal Advisory Opinion 12-1. Given "that the internet and social media are regularly used by the majority of individuals in the country," the committee explained, its analysis reflected "the vantage point of the reasonable person" who understands "what it means to be a 'friend' ... or to post comments or material on a website."

Other opinions also reason that, even under a more traditional definition of "friend," judges may be friends off-line with lawyers who appear before them in court, and there is "no reason to view or treat 'Facebook friends' differently." *Maryland Advisory Opinion 2012-7.* The Maryland committee noted that most judges "become judges after years working in the legal profession and establishing personal relationships with others in that profession" and are not "obligated nor expected to retire to a hermitage upon becoming a judge." Stating that connecting with an attorney through a social network is in some ways "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," the New York advisory committee noted that a judge "generally may socialize in person with attorneys who appear in the judge's court," and that there is nothing "per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page." *New York Advisory Opinion 08-176*.

Similarly, rather than "set out a per se rule barring all interactions" on social networks with attorneys who may appear before the judge, the California advisory committee emphasized that the nature of the interaction "should govern the analysis, not the medium in which it takes place . . . ." *California Advisory Opinion 66* (2010). The committee identified four factors a judge should consider: (1) the nature of the social networking page; (2) the number of "friends" on the page; (3) the judge's practice in deciding whom to "friend;" and (4) how regularly the attorney appears before the judge.

The committee explained that, the more personal the page, the fewer the number of "friends" on the page, the more exclusive the judge is when deciding whom to add, and the more frequently the attorney appears before the judge, the more likely "friending" the attorney would create the impression that the attorney is in a special position to influence the judge. Conversely, the committee considered the less personal the page, the greater the number of "friends," and the more inclusive the judge is in choosing whom to "friend," the more likely "friending" an attorney is permissible, particularly if the attorney is unlikely to actually appear before the judge.

As examples, the California committee applied those factors to two situations. First, it stated, a judge should not include a former law school classmate, who is not a close friend and who occasionally appears before the judge, on a social networking site that the judge uses to up-date family and friends about her extra-judicial activities and that she shares only with her extended family, old friends, and a few colleagues. In contrast, it stated, a judge who is on the executive committee of a section of the local bar association and a member of the local Inn of Court may include attorneys who appear before him on a social networking site he uses only to communicate about the organizations and to discuss issues related to the legal community and profession.

Although the California committee stated that a judge may interact on a social networking site with an attorney who *may* appear before the judge, the committee also advised that a judge should "unfriend" a lawyer who *is appearing* in a case before the judge. The Florida committee criticized this approach because it requires a judge to constantly approve, delete, and re-approve lawyers "as 'friends' or 'connections' as their cases are assigned to, and thereafter concluded or removed from, a judge." *Florida Advisory Opinion 2012-12.*

Disqualification

In response to the question, "if a judge and a lawyer are Facebook friends, is the judge required to disqualify from the lawyer's cases?," the California committee said "yes," (*California Advisory Opinion 66* (2010)), but the Kentucky, New York, and Utah committees answered "maybe." The New York committee noted that "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" than that of an off-line acquaintance. *New York Advisory Opinion 08-176*. The committee stated that a judge must consider whether any on-line connections, alone or in combination with other facts, rise to the level of a close social relationship requiring disclosure and/or disqualification. The Kentucky committee concurred. *Kentucky Advisory Opinion JE-119* (2010). Similarly, emphasizing the importance of the frequency and substance of the contacts, the Utah committee stated that "disqualification is not automatically required simply because a judge and a lawyer are 'friends' on Facebook," but that "being 'friends' is one factor to consider when deciding whether recusal is necessary." *Utah Advisory Opinion 12-1*.

Other friends

Although the Florida committee stated that a judge could not "friend" attorneys who may appear before the judge, the committee emphasized that a judge could "friend" non-lawyers and lawyers who do not practice in the judge's area or court or are on the judge's recusal list so their cases are not assigned to the judge. *Florida Advisory Opinion 2009-20*. The committee also stated that a judge who is a member of a voluntary bar association may communicate on the organization's Facebook page with lawyers about the organization and other non-legal matters. *Florida Advisory Opinion 2010-6*. Finally, the committee advised that a judge's campaign committee may establish a social networking page that allows persons, including lawyers who may appear before the judge, to list themselves as "fans" or supporters of the judge's candidacy. *Florida Advisory Opinion 2009-20*.

Although "friending" attorneys has resulted in the most questions, a few opinions have addressed a judge's social network relationships with other categories of individuals. The Oklahoma committee, for example, advised that a judge may not "friend" law enforcement officers (*Oklahoma Advisory Opinion 2011-3*), while the South Carolina committee stated that a judge may be Facebook friends with law enforcement officers as long as they do not discuss anything related to the judge's position. *South Carolina Advisory Opinion 17-2009*.

Other examples:

- A judge may not "friend" social workers or others who regularly appear in court in an adversarial role. *Oklahoma Advisory Opinion 2011-3.*
- A judge may "friend" court employees. *Oklahoma Advisory Opinion 2011-3; South Carolina Advisory Opinion 17-2009*.
- A judge may "follow" or "like" law firms. *Utah Advisory Opinion 12-1.*
- A judge may be "friends" with individuals who are candidates for political office, but not on a Facebook page

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Beyond Facebook

After the Florida judicial ethics committee directed judges not to "friend" on Facebook attorneys who may appear before them, a judge asked the committee whether that advice applied to the site LinkedIn. The judge noted that LinkedIn is used for professional networking, unlike Facebook, "where family and other personal relationships are fostered." Therefore, the judge argued, "a judge's connection on LinkedIn with lawyers who may appear before the judge does not reasonably convey the impression to the public that a personal relationship of any kind necessarily exists between them."

Rejecting that distinction, the committee emphasized that it is a judge's selection of "friends" or "connections" and the communication of those choices to others that conveys or permits others to convey the impression that they are in a special position to influence the judge. *Florida Advisory Opinion 2012-12*. Therefore, because LinkedIn and Facebook have a similar selection process, the committee concluded, the same restriction applies.

The ethics committees that, unlike Florida, permit judge-attorney friendships on Facebook, even when the attorney appears before the judge, presumably would also approve similar connections on LinkedIn. The Utah judicial ethics committee stated that a judge may maintain a profile on LinkedIn that identifies himself or herself as a judge and identifies the court on which the judge serves and may join law-related or other LinkedIn groups. *Utah Advisory Opinion 12-1.*

With respect to the "recommend" feature of LinkedIn, the Utah committee stated that a judge may "recommend" someone either at the judge's initiation or at the individual's request unless the recommendation will be received directly by a person or entity that regularly appears before the judge. The committee also stated that, if the judge recommends an attorney on LinkedIn, recusal is not automatically required when that attorney appears unless the judge is recommending the attorney based on the judge's interactions with the attorney in court. Further, the committee advised that a judge may ask another person on LinkedIn "to recommend the judge if the judge is seeking another judicial position," but, "if the judge is seeking a position outside of the judiciary, such as at a law firm upon the judge's retirement, then the judge should not seek a recommendation while still occupying the judicial office."

Finally, the Utah committee stated that a judge may follow an attorney on Twitter even if that attorney might appear before the judge but, if the judge begins receiving ex parte communications, the judge should no longer follow that attorney.

designed to promote an individual's candidacy. *Utah Advisory Opinion 12-1.*

• A judge may be "friends" with elected officials. *Utah Advisory Opinion 12-1.*

Ex parte communications

The ease of communicating on social networks should not cause judges to lower their guard against initiating or receiving ex parte communications about a case. If a judge receives an ex parte communication through a social networking site, the judge should reveal it on the record to the parties and their attorneys. *Ohio Advisory Opinion 2010-7.*

Further, to implement the code's ban on judges' conducting independent factual investigations, a judge should not "view a party's or witness' page on a social networking site" or "use social networking sites to obtain information regarding the matter before the judge." *Ohio Advisory Opinion 2010-7*. Similarly, judges have been warned against actively monitoring offenders via social networks. *Kentucky Advisory Opinion JE-119* (2010). *See also In the Matter of Friedenthal*, Decision and Order (California Commission on Judicial Performance April 3, 2012) (http://cjp.ca.gov/res/docs/public_admon/Friedenthal_DO_4-3-12.pdf) (judge admonished for viewing family court litigants' posts on an on-line forum concerning court matters and on a MySpace page, in addition to other misconduct).

A judge was publicly reprimanded for ex parte communications on Facebook with counsel for a party in a matter being tried before him and for relying on information he gathered by viewing a party's web-site. *Public Reprimand of Terry* (North Carolina Judicial Standards Commission April 1, 2009) (www.nccourts.org/Courts/CRS/Councils/JudicialStandards/ PublicReprimands.asp). On the first day of a four-day hearing on child custody and child support issues, while in the judge's chambers, the judge and the attorney for the father spoke about Facebook. The attorney for the mother was present but stated she did not know what Facebook was. The judge and the father's attorney designated themselves as "friends" on their Facebook accounts.

During an in-chambers meeting the next day, the father's attorney asked the judge if he thought the father was having an affair. The judge stated he believed the allegations were true due to evidence introduced by the mother's attorney, but that it did not make any difference in the custody dispute. The father's attorney stated, "I will have to see if I can prove a negative."

That evening, the judge saw that the father's attorney had posted "how do I prove a negative?" The judge posted on his Facebook page that he had "two good parents to choose from" and "Terry feels that he will be back in court," referring to the case not being settled. The father's attorney then posted, "I have a wise Judge."

During a break the next day, the judge told the mother's attorney about the Facebook exchanges. Later that day, the judge wrote on his account, "he was in his last day of trial." The father's attorney then wrote, "I hope I'm in my last day of trial." The judge responded, "you are in your last day of trial."

The judge had also used Google to find information about the mother's photography business and viewed her site approximately four times. In the proceedings, he recited an edited version of a poem he found on the site because, he told an investigator, it gave him "hope for the kids and showed [the mother] was not as bitter as he first thought."

Constant vigil

Advisory committees have provided judges with other guidelines, acknowledging that complying with the code of judicial conduct while using social networks "will require a judge's constant vigil." *Ohio Advisory Opinion 2010-7*. The Kentucky committee emphasized that the permission it granted judges to participate in social networks "should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public." *Kentucky Advisory Opinion JE-119* (2010).

One overarching requirement several committees stress is that a judge should "be aware of the contents of his or her social networking page" and "be familiar with the social networking site policies and privacy controls" (*Ohio Advisory Opinion 2010-7*), including how to modify privacy controls. *California Advisory Opinion 66* (2010). That requirement is continuing, and judges should stay "abreast of new features of, and changes to, any social networks they use." *New York Advisory Opinion 08-176*. *See also California Advisory Opinion 66* (2010) ("although not strictly an ethical concern," judges should be mindful of "the significant security concerns" raised by participation on social networks).

One canon necessarily implicated by the flood of communications inherent in social networking is the prohibition on improper public comments on pending or impending cases. The California committee noted that, because posts are not private, any comments a judge makes on a Facebook page are public within the meaning of the code prohibition. *California Advisory Opinion 66* (2010). Further, a judge must not permit others connected to a judge on a social network to comment on a case pending before the judge. *Massachusetts Advisory Opinion 2011-6*.

Further, judges must maintain dignity in every comment, photograph, and other information shared on social networks. *Ohio Advisory Opinion 2010-7*. Therefore, judges may not post pictures and commentary that may be of "questionable taste," even if it would be acceptable for the general public (*Kentucky Advisory Opinion JE-119* (2010)), and should be mindful of that duty "when posting photos and videos onto their pages, adding links to other Internet sites, and indicating favorable or unfavorable reviews of

products." *California Advisory Opinion 66* (2010).

Not only must judges not act in a way that negatively impacts the integrity and impartiality of the judiciary, judges must not permit others to depict them in that manner on a social network. *Massachusetts Advisory Opinion 2011-6*. Therefore, a judge must "delete, hide from public view or otherwise repudiate demeaning or offensive comments made by others that appear on the judge's social networking site" and "be vigilant in checking his/her network page frequently in order to determine if someone has placed offensive posts there." *California Advisory Opinion 66* (2010).

The extent to which judges may appear in judicial character on a social network has not been resolved. The Massachusetts committee advised judges not to identify themselves as judges on Facebook and similar sites or permit others to do so. *Massachusetts Advisory Opinion 2011-6.* The California committee stated that judges must not post any material that could be construed as advancing the interests of themselves or others. *California Advisory Opinion 66* (2010).

In contrast, the Utah committee stated that a judge may identify himself or herself as a judge on Facebook and may post a photograph of the judge in robes as long as it was taken in a "setting where wearing the robe would otherwise be appropriate, such as in the judge's chambers" and is "displayed in a context that does not undermine the integrity of the office." *Utah Advisory Opinion 12-1.* Similarly, the committee advised that "a judge may 'like' events, companies, institutions, etc. on Facebook," without triggering recusal.

Because the conduct is prohibited by the code of judicial conduct off-line, committees have also advised that a judge may not on a social network:

- give legal advice (*Kentucky Advisory Opinion JE-119* (2010); *New York Advisory Opinion 08-176*; *Ohio Advisory Opinion 2010-7*);
- join Facebook groups for organizations that practice invidious discrimination (*Ohio Advisory Opinion 2010-7*); or
- foster interactions with individuals or organizations that would erode confidence in the independence of judicial decision making (*Ohio Advisory Opinion 2010-7*).

Finally, any restrictions on a judge's political conduct also apply on social networks. Therefore, a judge may not:

- link to political organizations (*California Advisory Opinion 66* (2010));
- endorse or oppose candidates for non-judicial office (*Massachusetts Advisory Opinion 2011-6*), including "friending" a candidate on a page specifically designed to promote a candidacy or making statements that might create an appearance of endorsement (*Utah Advisory Opinion 12-1*); or
- post improper comments on proposed legislation (*California Advisory Opinion 66* (2010)). ★

Relevant rules

The advisory opinions on judges and social networking cite a number of provisions of the code of judicial conduct. The most frequently cited provisions are below, in the version from the 2007 American Bar Association *Model Code of Judicial Conduct.*

Rule 1.2
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.

Rule 1.2, Comment [2]
A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

Rule 2.4(C)
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.

Rule 2.9(A)
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 . . . .

Rule 2.9, Comment 6
The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

Rule 2.10(A)
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.

Rule 2.11(A)
A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.

Rule 3.1(C)
A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not . . . participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality . . . .

Rule 3.1, Comment [3]
Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination.

[her] to do certain things." The judge accepted her apology and did not find her in contempt.

The Commission determined that requiring Beles "to remain in the courtroom pending a contempt hearing that was to take place at a later unspecified time was tantamount to punishing her for contempt without a hearing." The Commission noted "the paradox in detaining Ms. Beles in the courtroom for over an hour and half after having ordered her to spend every waking moment working on the case." In addition, the Commission found that the judge abused his authority by ordering Beles to "spend every waking moment" working on the case. Finally, the Commission stated that his remarks appearing to question her work ethic and to suggest she was not adequately prepared were demeaning and discourteous, particularly because they were made in the presence of her client.

The Commission noted that it had given the judge an advisory letter in 2010 for similar misconduct.

Pistols

Accepting an agreed statement of facts, the New York State Commission on Judicial Conduct censured a judge for approving his own application for a pistol permit and accidentally discharging a gun in his chambers. *In the Matter of Sgueglia*, Determination (August 10, 2012) (www.cjc.ny.gov/Determinations/S/Sgueglia.Vincent.2012.08.10.DET.pdf).

The judge is the sole licensing officer in the county for state weapon permits because no other judge of a court of record has an office in the county. In 2005, the judge completed an application for a permit to carry concealed pistols. After its investigation, the sheriff's department recommended approval and, as it does with all applications, returned it to the judge. The judge approved his application.

Noting that "approving a pistol permit involves the exercise of discretion" and is not ministerial, the Commission concluded that the judge clearly violated the fundamental precept that "a judge may not exercise his or her decision-making authority for the judge's personal benefit" even if his application would likely have been approved by any other licensing officer. The Commission suggested that the judge should have consulted court officials or sought an advisory opinion about how he could properly obtain a permit.

After being threatened by several individuals, the judge, who sits in family and surrogate court, began regularly carrying a firearm to court for his personal safely; he kept it in a drawer in his chambers. On January 21, 2010, the judge brought to court a revolver that he knew had a faulty mechanism for cocking the firearm and rotating the cylinder.

During a break in court proceedings and while alone in his chambers, the judge tried to repair the mechanism, pointing the revolver at a concrete wall. The revolver accidentally discharged. The judge had not checked if the gun was loaded and believed it was unloaded. The sheriff's department investigated; prosecution was not recommended or initiated.

The Commission concluded:

> Handling a gun in his chambers showed a lack of good judgment and a notable disregard for the safety of others. Every year, the accidental discharge of firearms is responsible for hundreds of fatalities and thousands of injuries in the United States.
>
> Respondent should have recognized that his chambers was not an appropriate location for him to have been repairing a weapon that has the capacity for causing serious physical harm or death to himself or another. Thus, he is responsible even for the "accidental" discharge of the gun, which, as stipulated, was contrary to a local ordinance prohibiting the discharge of a firearm within village limits; the ordinance does not distinguish between intentional and accidental discharge.

"Serious problems there, Dude"

The Texas State Commission on Judicial Conduct publicly reprimanded a court of appeals judge for using his position and authority to pressure juvenile detention employees to release a friend's daughter earlier than provided by county policy and attempting to enlist the assistance of other influential public officials. *Public Reprimand of Sharp* (August 30, 2012) (www.scjc.state.tx.us/pdf/actions/FY2012-PUBSANC.pdf).

On January 17, 2012, at approximately 8 p.m., a family friend called the judge and told him that her 15-year-old daughter had been arrested for shoplifting and the county juvenile detention center staff had stated that, pursuant to standard policy, she would not be released until a judge could hear her case the following morning. The friend asked the judge for assistance so that her daughter would not have to spend the night at the facility.

In several telephone calls, the judge spoke to two officers on duty and the assistant director of the juvenile probation department, identified himself as a Justice of the First Court of Appeals, stated that he was calling on behalf of his friend's daughter, and sought information on how to secure her early release. The judge was advised that county policy required the juvenile to remain in detention until the next morning. "Not satisfied" with that response, the judge repeatedly asked what could be done to secure the juvenile's early release, even offering to drive to the facility to sign the orders himself that night.

During his conversation with the assistant director, the judge stated, "your county is going to be sued for hundreds

of thousands of dollars for this. You'll have picked the wrong little girl that has friends in high places to mess with." The judge also stated to the assistant director, "you guys are a bunch of back woods hillbillies that use screwed up methods in dealing with children and I can promise you this, things are about to change in Brazoria County."

In a voicemail message, the judge advised a local district judge that he hoped the district judge would "make a call" to release a friend's daughter being detained in juvenile detention. The judge also sent a text message to the district judge.

In a voicemail message left for a county commissioner, the judge identified himself as "Justice Jim Sharp in Houston," advised the commissioner that his friend's daughter was being held in juvenile detention, asked, "what can we do to get that girl out tonight?," expressed his opinion that there was "no sense" in having the juvenile spend the night in jail, and stated "I need your help. You will probably know who to call to make the keys go open." The judge also sent a text message, stating: "If I were Brazoria Co. commissioner, I'd be on [the] look out for some serious lawsuits arising from your juvie [sic] facilities. . . . You don't release 15 yrs olds accused of simple shoplifting (bra and jeans) to their parents on the request of an Appeals Ct Justice? Serious problems there, Dude. Call me pronto, please. Justice Jim Sharp."

In messages to the district judge and county commissioner, the judge called a juvenile detention officer the "most arrogant little prick [he] had ever talked to in [his] life," and said that, if he had spoken to the officer in person and had a baseball bat, "that son of a bitch would have been cracked upside the head. Fucking little cocksucker." He also stated that "Brazoria County Juvie Folks are [not] just arrogant but ignorant. When an Appeals Court Justice calls and identifies himself and then they refer to me as 'Mr.' Sharp, it bespeaks a fundamental misunderstanding of respect and pecking order!" and "some county paycheck functionary . . . call[ing] me 'rude' also is totally unacceptable and that stupid asshole need find [a] new job that never has him communicating with appellate court justices. Had I been there personally, it would have been damn ugly for him."

The judge acknowledged that he was aware that the juvenile detention staff was following the county's policy but stated he believed that the policy was unlawful. However, the Commission noted, the judge also acknowledged that he had only attempted to secure the release of his friend's daughter and did not inquire if other juveniles were also being detained unlawfully.

Ex parte custody change

With the judge's consent, the Indiana Commission on Judicial Qualifications publicly admonished a judge for granting an ex parte motion for custody filed by a child's maternal grandparents without prior notice to the father. *Public Admonition of Johnston* (July 5, 2012) (www.in.gov/judiciary/jud-qual/files/jud-qual-admon-johnston-2012-07-05.pdf).

On August 2, 2011, a child's maternal grandparents, by counsel, filed a motion asking for custody because the child's mother had died. The motion included an unsigned form that inaccurately suggested that the father had consented. There was no other indication in the pleading that the father had been served with the motion. The motion did not indicate when the mother had died, provide a death certificate, or state where the child currently was residing. The maternal grandparents live in Kenya.

The grandparents, their counsel, and the child's uncle appeared for a hearing on August 4; the father was not present. Instead of ensuring that the father had notice of the motion and hearing, the judge proceeded. The maternal grandfather testified that, since the mother's death, the child had been living with the child's uncle, who resides in Indiana. There was no indication why the child could not continue living with the uncle until the father received notice and could participate in a hearing. The grandfather also made representations about the father's wishes regarding custody that later proved to be untrue.

When she questioned the grandparents' counsel about the consent form, the judge learned that the father had not signed the form. Rather than trying to contact the father or setting another hearing, the judge granted custody of the child to the maternal grandparents and allowed them to take the child to Kenya. The judge did not set a subsequent hearing within 10 days, as required under court rule.

After the father learned about the order, he immediately hired counsel and filed a motion to correct error and set aside the August 4 order. An evidentiary hearing was not scheduled until October 11 and was not completed until January 11, 2012. At that time, custody of the child was granted to the father.

The Commission stated:

> The Commission recognizes that when child custody is at issue, judicial officers may be confronted with parties, and their attorneys, desperately seeking urgent judicial intervention. Such occasions call upon all judges and lawyers to proceed with heightened awareness of and high regard for the importance for a parent's right to be heard. In the absence of a true emergency that presents a risk of irreparable injury to a child, such right must be scrupulously honored and protected. ★

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