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Social media and judicial ethics: Part 1

by Cynthia Gray

Preface

Social media are web-based services on which individuals share information, ideas, interests, activities, photos, and videos through virtual communities and networks using electronic devices. Types of social media include social and professional networking sites (such as Facebook and LinkedIn), review sites (such as Yelp and TripAdvisor), sites for sharing photos, images, and videos (such as Instagram, YouTube, Pinterest, and Snapchat), blogs, micro-blogs (such as Twitter and Tumblr), information web-sites that allow changes, contributions, or corrections (such as Wikipedia), question-and-answer sites (such as Quora), and discussion groups and threads (such as Reddit). In addition to individuals, businesses, schools, government agencies, public officials, political candidates, charities, and other organizations use social media to promote events, campaigns, and products and to communicate with their customers, supporters, users, and constituents.

On the one hand, social media “can mimic interpersonal communication,” connecting families, friends, acquaintances, and colleagues and allowing them to share messages, photos, comments, articles, and other information “in a tight-knit community limited by the user’s security preferences.” *U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>). On the other hand, the same service can be used “to broadcast to a broader audience with fewer restrictions.” Users may access other users’ sites to “comment on everything from the posting of a photograph, to a legal or political argument, or to the quality of a meal at a restaurant.” Different users use social media in different ways. On Facebook, for example:

Some users post regularly, while others post rarely or never. Some users limit their Facebook friends to family and close, personal friends, while others have many acquaintances among their Facebook friends. Some users accept the vast majority of friend requests they receive, while others screen them carefully. Some users regularly review the postings and profiles of their friends, while others do not.

Massachusetts Letter Opinion 2016-1 (<http://tinyurl.com/lx77u7n>).

195.7 million people in the United States used social media in 2016 (<http://tinyurl.com/mwtmx5h>), part of a world-wide phenomenon. “It is safe to assume many judges can be counted in these figures.” *California Judges’ Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hqo>). In an inquiry to the Utah judicial ethics advisory committee, for example, a judge described how, before and after he became a judge, he participated in various social media, including “Facebook, Google+, Twitter, Flickr, Panoramio, Food52,

“195.7 million people in the United States used social media in 2016, part of a world-wide phenomenon.”

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Garmin Connect, Earndit, Yelp, Food Spotting, Four Square, and others.” *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>).

Some judges have gotten in trouble for their conduct on social media, resulting in embarrassing headlines and/or judicial discipline sanctions. Others have asked for advice from judicial ethics advisory opinions about whether they may participate on social media and, if so, how their participation can maintain rather than undermine public confidence in the judiciary.

This issue of the *Judicial Conduct Reporter* is Part 1 of a two-part article analyzing the advisory opinions and discipline decisions on social media and judicial ethics. Part 1 includes a general introduction to the topic followed by a discussion of the social media issues related to judicial duties: “friending” attorneys, disqualification and disclosure, ex parte communications and independent investigations, and commenting on pending cases. Part 2, which will be the summer issue of the *Reporter*, will cover off-bench conduct: abuse of the prestige of office, disclosing non-public information, providing legal advice, charitable activities, including fund-raising, commenting on issues, political activity, and campaign conduct. Both parts will contain links to additional materials on the Center for Judicial Ethics website. The two parts and the supplemental materials will be combined in a comprehensive paper that will be posted on the Center’s web-site in late 2017.

Introduction to Part 1

This article describes the advice judicial ethics advisory committees have given judges regarding social media in general and the rules related to judicial duties in particular. Relevant caselaw is also used to illustrate the principles discussed.

In response to inquiries from judges, committees have allowed judges to join the millions of others using social media but have also emphasized that the code of judicial conduct applies on networks and warned judges to be very careful while socializing on-line. Opinions advise judges to implement the services’ privacy protections but to assume all social media activity may become public and be attributed to the judge. Judges have also been cautioned not to make any statements indicating bias or prejudice, not to allow such comments on their page, and not to “like” such comments by others. Further, the committees remind judges that the requirement that they maintain the dignity of the judicial office applies to every social media post and photo.

(Unless otherwise indicated, this article will use the terms for actions on social media that are used on Facebook, for example, “friend,” “like,” “follow,” and “post”, but its discussion also applies to analogous actions on other social media platforms.) With respect to making social connections on networks, some advisory committees prohibit judges from “friending” attorneys who may appear before them while others reject that bright line for a friend-by-friend analysis of appropriateness. Disqualification is

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not automatically required when a “friend” appears in a case, but such an appearance requires a judge to consider the nature and scope of the social media relationship and other relevant factors to determine whether the judge’s impartiality could reasonably be questioned. Further, committees recommend or even require disclosure of a social media relationship in a case involving a “friend.”

In addition, the opinions note there is no social media exception to the prohibitions on ex parte communications and independent investigations. Finally, the committees remind judges that all comments on pending cases are “public” when made on social media and suggest that a broad interpretation of the prohibition on public comments is the best way for judges to maintain public confidence in the judiciary.

A qualified “yes”

“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 2008-176* (<http://tinyurl.com/y9nghct>). “With the popularity of social media, judges may wish to use it for personal, campaign, or professional purposes.” *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>).

Citing its ubiquity, utility, and resemblance to other types of social activity, every judicial ethics opinion on the issue has advised that judges may participate in social media. For example, noting that a judge should not become isolated from his community, the California committee recognized that, “[i]n this day and age, that community exists and increasingly interacts in the realm of cyberspace” and a judge may “use technology to accomplish what is otherwise permissible under the Code.” *California Judges’ Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hgo>). The committee concluded that a “judge’s participation in an online social networking site does not per se cast reasonable doubt on the judge’s ability to act impartially, demean the judicial office, or interfere with the proper performance of the judge’s judicial duties anymore than any other type of social activity.”

Similarly, acknowledging that social media “has become an everyday part of worldwide culture,” the ABA committee stated that, “[s]ocial interactions of all kinds, including [electronic social media], can be beneficial to judges to prevent them from being thought of as isolated or out of touch” and can be a “valuable tool for public outreach” by judges. *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>). It explained that, “with proper care, judges’ use of [electronic social media] does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.”

“Citing its ubiquity, utility, and resemblance to other types of social activity, every judicial ethics opinion on the issue has advised that judges may participate in social media.”

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Noting that social media have become an important form of communication, the Utah committee concluded that, “[s]imilar to other public settings, judges should be permitted to enter.” *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). The committee explained:

The proliferation of social media creates new questions based primarily on the very public nature of the participant’s comments and activities. However, social media is ultimately an extension of public fora that already exist. In other words, the same principles that apply to judges in other public settings will apply to judges in the “virtual” setting. . . .

The committee stated that the “sheer number of relevant Code provisions” indicates “how the problems presented by social media are simply the same problems that have existed in other social and public settings.” See also *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>); *Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>); *Florida Advisory Opinion 2009-20* (<http://tinyurl.com/ylrw9zm>); *New York Advisory Opinion 2008-176* (<http://tinyurl.com/y9nghct>); *Oklahoma Advisory Opinion 2011-3* (<http://tinyurl.com/3qe89xy>); *South Carolina Advisory Opinion 17-2009* (<http://tinyurl.com/23vgs47>); *Tennessee Advisory Opinion 2012-1* (<http://tinyurl.com/dx3le5l>).

Caveats

When participating in social media, judges must keep in mind that the code of judicial conduct applies “with equal force to virtual actions and online comments” (*State v. Thomas*, 376 P.3d 184 (New Mexico 2016)) and “in cyberspace as well as to more traditional forms of communications” *In the Matter of Whitmarsh*, Determination (New York State Commission on Judicial Conduct December 28, 2016) (<http://tinyurl.com/hrd76e3>). The West Virginia code of judicial conduct includes a comment that emphasizes: “The same Rules of the Code of Judicial Conduct that govern a judicial officer’s ability to socialize and communicate in person, on paper, or over the telephone also apply to the Internet and social networking sites like Facebook.” *Comment 6, Rule 3.1, West Virginia Code of Judicial Conduct* (<http://tinyurl.com/kvnzg4f>). Accord *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>); *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>); *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>).

Thus, although all advisory committees that have addressed the issue have permitted judges to participate in social media, the opinions have included numerous caveats, warnings, and exhortations that judges be extremely cautious. For example:

- “[P]articipating in social networking sites and other [electronic social media] clearly is fraught with peril for Judicial Officials because of the risks of inappropriate contact with litigants, attorneys, and other persons unknown to the Judicial Officials and the ease of posting comments and opinions” *Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>).

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- “While judges are not prohibited from participating in online social networks, such as Facebook, Instagram, Snapchat, and the like, they should exercise restraint and caution in doing so.” *Comment 5, Rule 3.1, Idaho Code of Judicial Conduct* (<http://tinyurl.com/kamfkzm>).
- The code “requires a judge to be cautious concerning the judge’s Facebook communications, that is, to think before engaging in electronic speech.” *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>).
- “[W]hile the Commission does not think that judicial involvement in social media is per se unethical, it is conduct that exposes the judge to unnecessary danger of engaging in conduct that may be violative of the Code of Judicial Conduct.” *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>).
- “Because of the potential pitfalls and its evolving nature,” judges using social media should be “cautious,” “circumspect,” “mindful that many provisions of the Code of Judicial Conduct could be compromised,” “‘constantly monitor’ their use of social media,” and “be continually vigilant of their compliance with the requirements of the Code.” *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>).
- All judges using social networks must, “as a baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology.” *New York Advisory Opinion 2008-176* (<http://tinyurl.com/y9nghct>).
- As with all actions a judge takes, all interactions on a social networking site “must be done carefully,” requiring “constant vigil” and “prudence to comply with the code.” *Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>).
- “[W]hile 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.” *Tennessee Advisory Opinion 2012-1* (<http://tinyurl.com/dx3le5l>).

See also *Preamble, New Mexico Code of Judicial Conduct* (“Judges and judicial candidates are . . . encouraged to pay extra attention to issues surrounding emerging technology, including those regarding social media, and are urged to exercise extreme caution in its use so as not to violate the Code”).

Emphasizing that “[c]aution is essential when a judge goes onto an online social networking site,” the California committee directed judges to “carefully weigh whether the benefit of their participation is worth all the attendant risks.” *California Judges’ Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hqo>). Accord *Tennessee Advisory Opinion 2012-1* (<http://tinyurl.com/dx3le5l>). The Kentucky committee struggled with “whether the

answer should be a ‘Qualified Yes’ or ‘Qualified No,’” but concluded that, “[i]n the final analysis, the reality that Kentucky judges are elected and should not be isolated from the community in which they serve tipped the Committee’s decision” in favor of allowing participation in social networking sites. *Kentucky Advisory Opinion JE-119* (2010) (<http://tinyurl.com/ko8fqw2>). The committee did note that, “[i]n speaking with various judges around the state, the Committee became aware that several judges who had joined internet-based social networks subsequently either limited their participation or ended it altogether.” Judges have also closed their Facebook accounts after their social media conduct resulted in publicity and discipline proceedings. See *In the Matter of Allred*, Agreement and stipulation of the parties (Alabama Court of the Judiciary March 11, 2013) (<http://tinyurl.com/lqqjtdp>); *In the Matter of Archer*, Agreed upon aggravating and mitigating factors (Alabama Court of the Judiciary August 3, 2016) (<http://tinyurl.com/mrn8opu>).

Public or private

The features of social media — particularly its public character — pose special ethical challenges for judges. The New York State Commission on Judicial Conduct warned, for example, that, “the ease of electronic communication may encourage informality,” “foster an illusory sense of privacy,” and “enable too-hasty communications that, once posted, are surprisingly permanent.” *In the Matter of Whitmarsh*, Determination (New York State Commission on Judicial Conduct December 28, 2016) (<http://tinyurl.com/hrd76e3>).

Similarly, the Massachusetts committee noted that a judge’s “[p]ostings, including comments on other’s posts, may be transmitted without the judge’s permission or knowledge to unintended recipients and may be taken out of context, relayed incorrectly, or saved indefinitely,” concluding that a judge must consider all “Facebook communications to be potentially public and, once made, wholly outside of the judge’s control.” *Massachusetts Advisory Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). *Accord New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>); *New York Advisory Opinion 2008-176* (<http://tinyurl.com/y9nghct>); *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>).

Further, the Utah committee emphasized that, “even if a Facebook page has restricted access, the page should be considered as potentially available to the public and therefore the same rules apply” that govern other public conduct by judges. *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). Although a judge can limit who has access to her social media account, she cannot control what those individuals do, innocently, inadvertently, or maliciously, to disseminate the judge’s posts beyond the intended, limited audience.

However, although eliminating the risks may be impossible, judges should attempt to reduce the dangers by using “privacy settings to protect their online presence,” while still considering “any statement posted online to be a public statement and take care to limit such actions accordingly.”

“The features of social media — particularly its public character — pose special ethical challenges for judges.”

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State v. Thomas, 376 P.3d 184 (New Mexico 2016). That caveat requires that a judge “not participate in an online social networking site without being familiar with that site’s privacy settings and how to modify them.” *California Judges’ Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hqo>). *Accord Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>).

The perils of participating on social media without becoming familiar with the policies and privacy settings have been illustrated in judicial discipline cases. A judge who was admonished for his Facebook comments about cases that anyone could read had believed that his account could be viewed only by approximately 80 family members, friends, and members of his church. *In the Matter of Bearse*, Public reprimand (Minnesota Board on Judicial Standards November 20, 2015) (<http://tinyurl.com/hzvhmln>). A judge who was admonished for criticizing on Facebook a felony complaint against a town council candidate had intended her post to be seen only by her 352 Facebook “friends,” apparently forgetting that she had set her privacy settings to “public” for an unrelated reason a few years earlier. *In the Matter of Whitmarsh*, Determination (New York State Commission on Judicial Conduct December 28, 2016) (<http://tinyurl.com/hrd76e3>).

Further, the Massachusetts committee warned that a judge who uses Facebook should “stay reasonably informed about changes to that social networking service and, as appropriate, reassess whether and how those developments might impact the judge’s permissible Facebook use.” *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). The ABA committee noted that, “if judges do not log onto their [social media] sites on a somewhat regular basis, they are at risk of not knowing the latest update in privacy settings or terms of service that affect how their personal information is shared,” adding that that risk can be eliminated by deactivating social media accounts. *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>). See also *Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>); *New York Advisory Opinion 2008-176* (<http://tinyurl.com/y9nghct>).

Disclosing judicial status

Several advisory committees have addressed the issue whether a judge may identify her professional status on social media and, the flipside of that question, whether a judge may hide her identity. For example, the Utah committee advised that “a judge may identify him or herself as a judge on Facebook” “in an appropriate context.” *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). The committee added that a judge may “post a photograph of the judge in his or her robes 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” and is “displayed in a context that does not undermine the integrity of the office.” The committee also stated that a judge may identify himself as a judge and identify the court on which he serves in a LinkedIn profile. See also *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>).

The Massachusetts committee also concluded that the code does not require a judge to conceal her judicial identity, stating a “judge’s appropriate

“The perils of participating on social media without becoming familiar with the policies and privacy settings have been illustrated in judicial discipline cases.”

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use of Facebook should not threaten the dignity of judicial office, constitute an abuse of the prestige of judicial office, or otherwise violate the Code.” *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). The committee noted that, “[i]t is reasonable to assume that a judge’s Facebook friends will be aware of the judge’s judicial office, and the Code governs a judge’s personal as well as professional life.” The opinion also stated, however, that a judge may “choose not to identify himself or herself as a judge on Facebook and may request that others do the same,” for “sound reasons apart from ethical considerations . . . such as the judge’s concerns over the personal safety of the judge or the judge’s family members.”

On the opposite issue, the Utah committee stated that a judge may use a screen name or pseudonym on social media and did not have to identify herself as a judge in order to prevent inappropriate ex parte communications. *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). However, it emphasized that a “judge should operate under the assumption that those who view the judge’s comments will know that the commenter is a judge and therefore the judge must be careful in his or her comments to ensure that the comments do not undermine public confidence in the judiciary.”

Similarly, the New Mexico committee advised that, although a judge may use social media “without disclosing the judge’s true name by using an alias or a pseudonym,” the judge’s actions are still subject to the code, and he “must not act in a manner that undermines the dignity of judicial office or would conflict with the Code, even if the judge’s identity may not be readily apparent.” *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>). The committee emphasized that a judge who decides to participate in social media “must take ownership of his or her use” and may not “hide behind an alias or pseudonym.” In addition, the committee stated, “a judge must not ask others, such as family members, friends, or staff, to post or share information for them that they otherwise would not be allowed to post.” See also *Judicial Discipline and Disability Commission v. Maggio*, 440 S.W.3d 333 (Arkansas 2014) (judge removed for, in addition to other misconduct, posting inappropriate gender, race, and sexually related statements under a pseudonym on a public on-line fan-site).

In contrast, a comment in the Idaho code suggests, not that a judge should not engage in inappropriate conduct under cover of an alias, but 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.” *Comment 5, Rule 3.1, Idaho Code of Judicial Conduct* (<http://tinyurl.com/kamfkzm>).

Expressions of bias or prejudice

Comment 3 to Rule 3.1 of the 2007 American Bar Association *Model Code of Judicial Conduct* (<http://tinyurl.com/k7ggp57>) states:

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.

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Tuesday plus
Throwback
Thursdays.

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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.

Thus, on social media, a judge must not make any statement indicating bias or prejudice based on race, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>). In addition, a judge must not endorse such posts by others through “some affirmative action (e.g., ‘liking,’ ‘following,’ commenting, or reposting).” *Massachusetts Advisory Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). (The Massachusetts committee noted, however, that “posts that generally reflect pride in [the judge’s] personal characteristics, background, and achievements” do not indicate personal bias or prejudice and are consistent with the code.)

Further, in the context of on-line social networks, a judge’s responsibility to avoid the appearance of bias includes not only refraining from making or liking inappropriate comments but also expunging such comments by others from the judge’s own page. *California Judges’ Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hqo>). The California committee explained:

In a traditional social setting, a judge normally has no obligation to respond to comments made by others, no matter how distasteful or offensive. That is because those comments are normally not attributable to the judge. However such comments on a judge’s personal page can become not only permanent but accessible to all of the judge’s friends. Leaving them on the page may create the impression that the judge has adopted the comments.

Therefore, the committee advised, “a judge is obligated to delete, hide from public view or otherwise repudiate demeaning or offensive comments made by others that appear on the judge’s social networking site.” The committee further emphasized that, “a judge has an obligation to be vigilant in checking his/her network page frequently in order to determine if someone has placed offensive posts there.” See also *Massachusetts Advisory Opinion 2016-1* (<http://tinyurl.com/lx77u7n>) (“a judge must not . . . authorize others to depict the judge or the judiciary in a manner that negatively impacts the integrity or impartiality of the judiciary”).

Going even further, the Missouri committee advised that a judge must make a reasonable effort to review, not just posts on the judge’s own pages, but also all posts by “friends” on other pages and to “sever or ‘unfriend’ anyone whose conduct or postings would place the judge in position of appearing to endorse . . . prohibited conduct.” *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>). (The opinion did acknowledge “the impossibility of policing all posts of all ‘friends’ or of all ‘friends of friends’ of the judge.”)

Other advisory committees, however, have stated that a judge does not have a responsibility to monitor all the comments of individuals or all the pages of entities with whom the judge is connected on-line to ensure that the judge is not associated with inappropriate material. The Massachusetts

“On social media, a judge must not make any statement indicating bias or prejudice based on race, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status.”

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committee concluded that a reasonable person would not consider a judge to have endorsed a Facebook friend's communication absent an affirmative indication of agreement, noting that "a Facebook user often has no knowledge concerning the communications made by Facebook friends." *Massachusetts Advisory Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). Therefore, the committee stated, a judge cannot "reasonably be expected to monitor all postings and comments on a Facebook page" of a friend or organization that the judge follows or likes. However, the committee added, if a judge becomes aware that a Facebook friend's communications or the contents of a page the judge likes or follows "negatively impact the integrity or impartiality of the judiciary," the judge must "unfriend" the person or stop "liking" or "following" that page. *See also Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>).

Summaries of cases in which judges were disciplined for biased social media posts are on the [Center for Judicial Ethics web-site](#).

Maintaining dignity

The preamble to the code of judicial conduct provides that a judge "should maintain the dignity of judicial office at all times." In addition, codes in many jurisdictions still have the language from Canon 4A(2) of the 1990 model code that required a judge to conduct "all of the judge's extra-judicial activities so that they do not . . . demean the judicial office."

In light of that responsibility, "[o]nline activities that would be permissible and appropriate for a member of the general public may be improper for a judge." *California Judges' Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hqo>). As an example, the California committee stated that, "[w]hile it may be acceptable for a college student to post photographs of himself or herself engaged in a drunken revelry, it is not appropriate for a judge to do so." Thus, the committee cautioned judges to be mindful of that requirement every time they consider adding a photo, video, link, or review to their social media sites.

Similarly, the Kentucky committee emphasized that its approval of judicial use of social media "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. . . . [P]ictures 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. . . ." *Kentucky Advisory Opinion JE-119* (2010) (<http://tinyurl.com/ko8fqw2>). *Accord Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>); *Massachusetts Advisory Opinion 2016-1* (<http://tinyurl.com/lx77u7n>); *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>); *Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>); *U.S. Advisory Opinion 112* (2014) (<http://tinyurl.com/br9h3hl>); *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjqp>).

Further, in its opinion on Twitter, the Massachusetts committee advised judges to avoid posts that detract from the dignity of the judiciary and the court system. *Massachusetts Advisory Opinion 2016-9* (<http://tinyurl.com/>

[gn6vwfc](#)). As an example, the committee noted that the inquiring judge had posted “excerpts from an examination in which a defendant used profanity when addressing [a] judge and another reporting that a defendant threw bottles of urine and feces at a judge following sentencing.” Disapproving such posts, the committee concluded that, “a reasonable person may perceive these posts to be needlessly offensive, or as making light of behavior by litigants who may have mental health problems.”

Friending

Different judicial ethics committees have given different advice about whether judges may connect on social networks with attorneys who are likely to appear before them in court.

Bright lines for attorneys

Adopting a bright line rule, the committees in Connecticut, Florida, Massachusetts, and Oklahoma have advised that judges should not add lawyers who may appear before them as “friends” on Facebook or permit those lawyers to add them as “friends.” See, e.g., *Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>).

Noting that a judge’s “friends” may see who the judge’s other “friends” are on a social network, the Florida committee concluded that the process of selecting some attorneys as “friends” and rejecting others and communicating those choices conveys, or permits others to convey, the impression that they are in a special position to influence the judge. *Florida Advisory Opinion 2009-20* (<http://tinyurl.com/y1rw9zm>). 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 concluded, 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. Noting that many persons who view a judge’s social media account will not be “familiar with the Code, its recusal provisions, and other requirements which seek to assure the judge’s impartiality,” the committee emphasized that the test “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 . . . as viewed by the recipient, conveys” that impression.

That advisory opinion, which received “widespread public attention and comment,” apparently disappointed some Florida judges, several of whom suggested ways they could avoid the perception problems identified by the committee. One judge proposed a policy of accepting as “friends” all lawyers who make a “friend” request or all persons the judge recognizes or with whom the judge shares “friends.” Another judge suggested placing a prominent disclaimer on his profile page stating that “friend” means that the person is only an acquaintance, not a “friend” in the traditional sense, or otherwise communicating that “the term ‘friend’ is, in the judge’s

“Different judicial ethics committees have given different advice about whether judges may connect on social networks with attorneys who are likely to appear before them in court.”

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opinion, a misnomer” and does not mean that the person is in any position to influence the judge’s decision in any case.

However, after “thoroughly and thoughtfully” reconsidering the issue, the Florida committee rejected those suggestions and affirmed its original opinion. *Florida Advisory Opinion 2010-6* (<http://tinyurl.com/n38kjmw>). (Three of the 12 members dissented.) In response to the first suggestion, the committee stated that accepting as “friends” all attorneys who ask did not eliminate the problem because it would still create a “class of special lawyers” who have requested friendship status, leaving out “lawyers who do not participate in social networking sites or who choose not to ask”

The committee also noted that “there can be no assurance that persons viewing the page” would read a disclaimer, however “prominent and permanent.” Even if it was read, the committee concluded, a disclaimer would fail “to cure any impermissible impression that the judge’s attorney ‘friends’ are in a special position to influence the judge.” Finally, the committee rejected the idea 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.”

Agreeing with the Florida opinion, the Oklahoma advisory committee emphasized 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* (<http://tinyurl.com/3qe89xy>). 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.’”

The Massachusetts committee also concluded that a judge may not make a friend request to or accept a friend request from any lawyer reasonably likely to appear before the judge. *Massachusetts Advisory Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). The committee acknowledged that the “issue of a judge’s being a Facebook friend with lawyers is complex, particularly as the degree to which Facebook friendship signifies genuine personal friendship varies widely.” However, it noted that, “[e]ven the most casual of Facebook friends may, for example, acquire personal information about the judge (e.g., celebration of a family event, a vacation destination) that could be used to convey the impression that the Facebook friend has special knowledge about and access to the judge.” Thus, the committee directed judges to review their Facebook friends and “unfriend” lawyers who are reasonably likely to appear before them. (The committee noted that “jurisdictions in which judges stand for election often permit a degree of interaction with lawyers that is not permitted in Massachusetts.”)

The Missouri committee did not definitively direct judges not to “friend” attorneys who appear before them, but it did suggest that, “under a best practices 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.” *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>).

“Adopting a bright line, [some] committees ... have advised that judges should not add lawyers who appear before them as ‘friends’ on Facebook....”

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Fact-specific inquiry

Choosing not to draw a bright line, the judicial ethics advisory committees in California, Kentucky, Maryland, New Mexico, New York, Ohio, and Utah concluded that whether a judge may connect on social media with a lawyer who appears before her depends on an analysis of the nature and scope of the specific relationship.

According to these more permissive opinions, the distinctive meaning of “friend” on social networks dispels the appearance problem identified in the more restrictive opinions. For example, the Ohio advisory committee noted that “a social network ‘friend’ may or may not be a friend in the traditional sense of the word.” *Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>). Similarly, the Utah committee explained:

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 2012-1 (<http://tinyurl.com/mywqho5>). Given “that the internet and social media are regularly used by the majority of individuals in the country,” the Utah committee concluded, the reasonable person understands “what it means to be a ‘friend’” on social media. (For the same reasons, the Utah committee advised that a judge may follow an attorney on Twitter even if that attorney might appear before the judge.)

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 that terms such as “friend,” “fan,” and “follower” are “terms of art used by the site, not the ordinary sense of those words.” *Kentucky Advisory Opinion JE-119* (2010) (<http://tinyurl.com/ko8fqw2>). Similarly, the New Mexico committee explained that, “[g]iven 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.” *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>).

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 Opinion Request 2012-7* (<http://tinyurl.com/lxlrbon>). The Maryland committee noted that most judges became “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

“According to these more permissive opinions, the distinctive meaning of ‘friend’ on social networks dispels the appearance problem identified in the more restrictive opinions.”

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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 2008-176* (<http://tinyurl.com/y9nghct>).

Similarly, the California advisory committee stated that the nature of the interaction "should govern the analysis, not the medium in which it takes place" and declined to "set out a per se rule barring all interactions" on social networks with attorneys who may appear before a judge. *California Judges' Association Advisory Opinion 66* (2010) (<http://tinyurl.com/kgk4hgo>). The committee did caution that the "potential that a judge may receive improper ex parte communications is much greater when the judge is interacting with attorneys who may appear in the judge's court."

The California committee identified four factors a judge should consider when deciding whether to "friend" an attorney: (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. *See also New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>). 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, and, therefore, the judge should not form the connection. Conversely, the committee stated, "friending" an attorney would more likely be appropriate if the page is less personal, the judge has more "friends" on the page, and the judge is more inclusive when choosing whom to "friend," 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 former law school classmate who is not a close friend and who occasionally appears before the judge should not be friended by 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 only uses to communicate about those 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 actually appearing in a case before the judge. The Florida committee, however, criticized that 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* (<http://tinyurl.com/7d7lys9>).

"The California committee identified four factors a judge should consider when deciding whether to 'friend' an attorney"

LinkedIn

After the Florida committee advised that judges should not “friend” attorneys who will appear before them, a judge asked whether the same restriction would apply to a “connection” on the professional networking site LinkedIn. The judge argued that “Facebook, where family and other personal relationships are fostered” is distinguishable from a professional networking site such as LinkedIn. The judge contended that, “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.”

The Florida committee, however, was not persuaded there was a “meaningful distinction” between the Facebook selection and communication process and the LinkedIn selection and communication process and, therefore, advised that a judge may not add lawyers who may appear before the judge as “connections” on LinkedIn or permit such lawyers to add the judge as their “connection” on that site. *Florida Advisory Opinion 2012-12* (<http://tinyurl.com/7d7lys9>). The Massachusetts committee also extended its bright line rule on Facebook friendships with attorneys to prohibit a judge from accepting LinkedIn requests from attorneys who appear before her and to require the judge to disconnect from LinkedIn connections she may have with attorneys who appear before her. *Massachusetts Letter Opinion 2016-8* (<http://tinyurl.com/zvd9299>).

Other friends

Although it directed judges not to be social media “friends” with attorneys who appear before them, the Florida committee explained that a judge could “friend” “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.” *Florida Advisory Opinion 2009-20* (<http://tinyurl.com/ylrw9zm>). The committee also stated that a judge was not required to “de-friend” lawyers who participate in the same social media groups as the judge, for example, for a voluntary bar association, a group of parents of high school students in a particular club, or persons studying a particular subject, even if the lawyers appear before the judge. The distinction, according to the committee, is that the judge did not play a role in selecting the lawyers who appear on the group’s web-site, and, therefore, the impression created is not that the lawyer is in a special position to influence the judge, but that “the judge and the lawyer both have children in the band, or are both interested in the study of a particular subject.” *Florida Advisory Opinion 2009-20* (<http://tinyurl.com/ylrw9zm>); *Florida Advisory Opinion 2010-6* (<http://tinyurl.com/n38kjmw>).

Several committees have advised that a judge may be social media friends with court employees. *Connecticut Informal Opinion 2013-6* (<http://>

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in Austin, Texas

tinyurl.com/cmwds7t); *South Carolina Advisory Opinion 17-2009* (<http://tinyurl.com/23vgs47>).

Opinions differ on the issue of on-line friendships between judges and law enforcement officers or similar participants in judicial proceedings. The Kentucky committee stated that a judge may participate in a social networking site with various persons who appear before the judge in court, such as social workers, and/or law enforcement officials. *Kentucky Advisory Opinion JE-119* (2010) (<http://tinyurl.com/ko8fqw2>). See also *South Carolina Advisory Opinion 17-2009* (<http://tinyurl.com/23vgs47>) (a magistrate may be social media “friends” with law enforcement officers as long as they do not discuss anything related to her position as magistrate). In contrast, the Connecticut, Massachusetts, and Oklahoma committees stated that a judge should not become a social networking “friend” with persons who regularly appear before the judge in an adversarial role, such as law enforcement personnel, social workers, expert witness, or parties. *Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>); *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>); *Oklahoma Advisory Opinion 2011-3* (<http://tinyurl.com/3qe89xy>).

Disqualification

Factors to consider

Judicial ethics committees have advised that disqualification is not necessarily required when an attorney with whom a judge has an on-line connection appears in a case, but that that connection is one factor a judge should consider in deciding whether her impartiality might reasonably be questioned. For example, the Arizona committee stated that there is no “per se disqualification requirement in cases where a litigant or lawyer is a ‘friend’ or has a similar status with a judge through social or electronic networks” but that there may be “facts and circumstances” related to the social media relationship that might disqualify the judge. *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>). The committee cautioned that, “[i]f social or electronic media associations will necessitate frequent disqualification, the judge must consider whether continuing that relationship is appropriate.” See also *Maryland Opinion Request 2012-7* (<http://tinyurl.com/lxlrbon>); *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>); *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/z7fapll>); *New York Advisory Opinion 2013-39* (<http://tinyurl.com/mkac3o4>); *Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>); *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). Even the Massachusetts committee, which has advised judges not to “friend” attorneys who may appear before them, stated that disqualification may not be required if “[d]espite a judge’s best efforts, . . . unexpectedly, a lawyer whom the judge knows to be a Facebook friend appears before the judge.” *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). But see *California*

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Judges' Association Advisory Opinion 66 (2010) (<http://tinyurl.com/kgk4hgo>) (if a judge approved a connection to a lawyer on a social media site because he believed it was highly unlikely the attorney would ever appear before him, the judge should disqualify himself if that lawyer does appear).

That rule has also been applied when the judge's connection is not with an attorney but with someone who has a different role in a case. See *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>) (a judge must consider whether disqualification is required when an organization that the judge has liked or follows on Facebook appears as a litigant); *New York Advisory Opinion 2013-39* (<http://tinyurl.com/mkac3o4>) ("the mere status of being a 'Facebook friend,' without more," with the parents or guardians of certain minors who allegedly were affected by the conduct of a defendant in a criminal case "is an insufficient basis to require recusal"); *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>) ("[l]iking an event, activity, or entity does not automatically require the judge's recusal").

Because disqualification is not automatically required, a judge must consider whether an on-line connection — alone or in combination with other factors — raises a reasonable question about the judge's impartiality whenever a person with whom a judge has a social media connection appears in a case. The relevant factors for making that determination include:

- The frequency of the judge's social media contacts and communications with the individual;
- The substance of the judge's social media contacts and communications with the individual;
- The scope of the social media friendship;
- The nature of the social networking page (for example, whether it is more personal or professional);
- The number of "friends" the judge has on the page;
- The judge's practice in deciding whom to "friend" (in other words, whether the judge is very exclusive or more inclusive when deciding whom to add); and
- Whether the judge and the friend have frequent, personal contacts in real life, not just on-line.

Thus, if the judge's social media page primarily has posts about personal activities, the connections are mainly family and personal friends, the judge and his social media "friend" comment on each other's posts, the judge is very selective when adding to his "friend" list, and the judge and the "friend" and their families socialize in real life, the judge's impartiality is more likely to be reasonably questioned, and disqualification is more likely to be required when that "friend" appears in a case. In contrast, if the page is focused more on court business and professional activities, the judge has more "friends" on the page, those friends are primarily professional acquaintances, the judge allows everyone to follow the page, and the

"Judicial ethics committees have advised that disqualification is not necessarily required when an attorney with whom a judge has an on-line connection appears in a case"

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judge and the “friend” only interact in court or at bar meetings, the judge’s impartiality is not likely to be questioned, and disqualification is not likely to be required.

The Arizona committee noted that, if disqualification is required based on a social media connection, simply “de-friending” a lawyer or litigant is not sufficient to eliminate the necessity of disqualification because the “fact that the judge was just recently associated with the lawyer or litigant poses the same ethical issues as an ongoing relationship.” *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>).

There is a summary of caselaw on disqualification and social media relationships on the [Center for Judicial Ethics web-site](#).

Disclosure

Comment 5 to Rule 2.11 of the model code provides: “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.” In *In the Matter Concerning Ferguson*, Public admonishment (California Commission on Judicial Performance May 31, 2017) (<http://tinyurl.com/y8yztthr>), the California Commission on Judicial Performance publicly admonished a judge for being Facebook friends with attorneys who were appearing regularly before him without disclosing the relationship, in addition to other misconduct. The Commission noted that *California Judges Association Ethics Opinion 66* (2010) (<http://tinyurl.com/kgk4hqo>) provides the following guidance to judges:

While it may be permissible for a judge to interact on a social network site with an attorney who may appear before the judge, it is not permissible to interact with attorneys who have matters pending before the judge. When a judge learns that an attorney who is a member of that judge’s online social networking community has a case pending before the judge the online interaction with that attorney must cease (i.e. the attorney should be “unfriended”) and the fact this was done should be disclosed Regardless of the nature of the social networking page, maintaining online contacts while a case is pending creates appearance issues that cannot be overcome through disclosure of the contacts.

The Committee explained:

The need for disclosure arises from the peculiar nature of online social networking sites, where evidence of the connection between the lawyer and the judge is widespread but the nature of the connection may not be readily apparent. Assuming that including the lawyer was permissible, disclosure should be sufficient to dispel any concerns that the attorney is in a special position to influence the judge or that the judge would not be impartial.

(The committee added that disclosure was necessary even if the only on-line connection is that the judge and the attorney are both members of a social networking site utilized by members of a bar association organization.)

Similarly, the Massachusetts committee stated that, even if a judge decides disqualification is not required when a social media friend appears

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in a case, the judge should still disclose on the record the existence and nature of the Facebook friendship and “unfriend” the lawyer. *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>). The committee also advised that a judge should disclose if a lawyer appearing before the judge is a former Facebook friend.

Other judicial ethics committees have given less clear-cut advice, indicating only that disclosure may be a good practice when an attorney with whom a judge is friends on-line appears in a case. For example, the New York committee recommended that a judge make a record, such as a memorandum to the file, for the basis for her conclusion that disqualification was not required by her Facebook relationship to a person involved in a case. *New York Advisory Opinion 2013-39* (<http://tinyurl.com/mkac3o4>). However, the committee stated, the practice was not mandatory, although it “may be of practical assistance . . . if similar circumstances arise in the future or if anyone later questions” her decision not to disqualify. See also *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>) (a judge should disclose “depending on the facts and circumstances of a given case”); *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>) (disclosure of a social media relationship “may” be appropriate).

LinkedIn and disqualification

The Massachusetts committee stated that, if, despite a judge’s best efforts not to connect with lawyers who appear before the judge, a lawyer whom the judge knows to be a LinkedIn connection appears in a case, the judge should consider the existence and nature of the LinkedIn connection, including “whether, while the judge was a practicing attorney, the judge had posted a recommendation or endorsement on the profile page of this lawyer,” as one factor in determining whether disqualification is required. *Massachusetts Letter Opinion 2016-8* (<http://tinyurl.com/zvd9299>). Further, even if the judge concludes disqualification is unwarranted, the committee advised, a judge “should disconnect from the lawyer on LinkedIn and disclose on the record the existence and nature of the LinkedIn connection.” Finally, the committee stated, “[i]f a judge knows that a lawyer appearing before the judge is a former LinkedIn connection, the judge should consider the nature of that past connection to determine whether disclosure is warranted.

Further, the Utah committee explained that, “recommending someone on LinkedIn is different from liking someone on Facebook because of the stronger statement it makes about the skills of the individual,” and, therefore, disqualification was required if the judge recommended an attorney on LinkedIn based on the judge’s interactions with the attorney in court. *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). However, the committee created an exception for the judge’s former law clerk because that recommendation would be based on the judge’s working relationship with the former clerk, not on court performance, and disqualification would not be necessary.

Ex parte communications

Although other users may try to discuss their cases with a judge on social media, judges may not engage in ex parte communications on-line any more than they can face-to-face and should “take steps to guard against such communications” (*Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>)) and avoid comments and interactions that may be interpreted as ex parte communications. *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjpk>). See also *Massachusetts Letter Opinion 2016-1* (<http://tinyurl.com/lx77u7n>); *New York Advisory Opinion 2008-176* (<http://tinyurl.com/y9nghct>). Noting “a judge must be wary of inviting or engaging in social media dialogue with lawyers, litigants, witnesses or others who may be involved in pending litigation,” the New York Commission cautioned, “[p]articularly where pseudonyms are used, the judge may not know that a person who responds to his/her posting may be involved in a case before the judge or a judicial colleague.” *New York State Commission on Judicial Conduct 2016 Annual Report* (<http://tinyurl.com/n3xu3hj>). Although there are exceptions to the prohibition on ex parte communications, the Ohio committee advised that “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.” *Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>).

If a judge is unable to avoid an ex parte communication on social media, the judge must disclose the communication to the other parties and provide an opportunity to respond. *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>); *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>); *Ohio Advisory Opinion 2010-7* (<http://tinyurl.com/kmwjgzx>); *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>). In addition, the Utah committee stated that, if a judge were to begin receiving ex parte communications from an attorney the judge follows on Twitter, “the judge could no longer follow that particular attorney.” *Utah Informal Advisory Opinion 2012-1* (<http://tinyurl.com/mywqho5>).

In the first case in which a judge was disciplined for conduct on social media, a judge was publicly reprimanded for ex parte communications on Facebook with counsel for a party in a matter being tried before him, in addition to other misconduct. *Public Reprimand of Terry* (North Carolina Judicial Standards Commission April 1, 2009) (<http://tinyurl.com/l2brh3e>). There are summaries of cases in which judges were disciplined for ex parte communications on social media on the [Center for Judicial Ethics web-site](#).

Independent investigations

As a corollary to the prohibition on ex parte communications, Rule 2.9(C) prohibits judges from independently investigating the facts of a case, and comment 6 to that rule explains that prohibition “extends to information available in all mediums, including electronic.” Thus, the Arizona

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committee directed judges to “scrupulously avoid researching facts, litigants, or lawyers involved in matters pending before them through electronic or social media.” *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>). Similarly, the Ohio committee stated:

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. . . . The ease of finding information on a social networking site should not lure the judge into investigative activities in cases before the judge.

Ohio Advisory Opinion 2010-7 (<http://tinyurl.com/kmwjgzx>). Noting news reports of a judge who said he searches a defendant’s MySpace or Facebook accounts before sentencing, the Kentucky committee questioned “whether his active monitoring of offenders under his jurisdiction would be appropriate under the Kentucky Code of Judicial Conduct, and whether such conduct raises separation of powers concerns.” *Kentucky Advisory Opinion JE-119* (2010) (<http://tinyurl.com/ko8fqw2>). See also *Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>); *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjkg>).

Public comments on pending cases

Rule 2.10(A) of the model code of judicial conduct provides 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” That rule applies to a judge’s activity on social media. See, e.g., *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>); *Missouri Advisory Opinion 186* (2015) (<http://tinyurl.com/gwm3246>). Although the rule prohibits only comments that “might reasonably be expected to affect the outcome or impair the fairness of a matter,” some judicial ethics committees omit that qualification in their discussion, appearing to suggest that a judge should avoid any comment about a pending or impending matter in any court regardless of the potential effect. See *ABA Formal Opinion 462* (2013) (<http://tinyurl.com/b3shjkg>) (“a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10”); *Connecticut Informal Opinion 2013-6* (<http://tinyurl.com/cmwds7t>) (a “Judicial Official should not make comments about any matters pending or impending before any court in accordance with Rule 2.10”).

The New Mexico committee noted that the prohibition on public comments applies even when a judge is using social media “to disseminate information to the public concerning the judiciary.” *New Mexico Advisory Opinion Concerning Social Media* (2016) (<http://tinyurl.com/lra5ykb>). Although there is an exception that allows a judge to inform the public about court procedures in connection with a pending case, the committee emphasized that, when providing such information, a judge should not “express an

“In the first case in which a judge was disciplined for conduct on social media, a judge was publicly reprimanded for ex parte communications on Facebook with counsel for a party in a matter being tried before him, in addition to other misconduct.”

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opinion that may have bearing on the judge's impartiality or fairness or that may be related to the merits of any pending or impending case."

To avoid posts that a reasonable person may regard as an improper comment on a pending case or an expression of personal bias, the Massachusetts committee warned a judge to avoid "a close temporal proximity" between a post and a specific incident when using Twitter to provide practice tips to trial lawyers. *Massachusetts Advisory Opinion 2016-9* (<http://tinyurl.com/gn6vwfc>). Such tips are appropriate, the committee stated, but only if they do not reflect the judge's "reaction, whether complimentary or critical to in-court behavior of any readily identifiable person," are "perceived to be purely educational," and do not constitute legal advice.

Public comments on pending cases are inappropriate even if the judge does not expressly mention the name of the case. See *In the Matter of Johns*, 793 S.E.2d 296 (South Carolina 2016). Further, "liking" others' comments on a case constitutes an improper public comment by a judge. See *In the Matter of Whitmarsh*, Determination (New York State Commission on Judicial Conduct December 28, 2016) (<http://tinyurl.com/hrd76e3>). A judge should not post comments on social media that "go beyond mere factual statements of events occurring in the courtroom," call attention to "certain facts or evidence," "add the judge's subjective interpretation of these events at or near the time of their occurrence," or "reveal his or her thought processes in making any judgment." *In re Slaughter*, 480 S.W.3d 842 (Texas Special Court of Review 2015).

There are summaries of cases in which judges have been disciplined for publicly commenting on pending cases on social media on the [Center for Judicial Ethics web-site](#).

Non-public comments

Non-public statements about cases are only prohibited by Rule 2.10(A) if they "might substantially interfere with a fair trial or hearing," but advisory committees make clear that exception does not apply on social media where nothing can reasonably be considered "non-public." The Arizona committee, for example, stated that, for purposes of the rule, "it is prudent to assume that even postings intended only for friends and family may be more broadly disseminated through social and electronic media." *Arizona Advisory Opinion 2014-1* (<http://tinyurl.com/k5ug3j2>). The California judges' association committee explained:

One cannot assume that comments made on a social networking site are private. Posts on a Facebook page are not private. They appear on the "walls" of other Facebook members the user has "friended." If a user comments on a friend's post, that comment is visible not only to the friend, but to any of the friend's friends. As a result, any comments a judge makes on a social networking site should be treated as public comments within the meaning of [Rule 2.10(A)]. . . .

California Judges' Association Advisory Opinion 66 (2010) (<http://tinyurl.com/7bozntm>). Similarly, when discussing the prohibition on public

"Public comments on pending cases are inappropriate even if the judge does not expressly mention the name of the case. . . . Further, 'liking' others' improper comments on a case constitutes an improper public comment by a judge."

(continued)

comments, the Kentucky committee stated, “[w]hile social networking sites may have an aura of private, one-on-one conversation, they are much more public than offline conversations, and statements once made in that medium may never go away.” *Kentucky Advisory Opinion JE-119* (2010) (<http://tinyurl.com/ko8fqw2>).

25th National College on Judicial Conduct and Ethics

[Registration is now open for the 25th National College on Judicial Conduct and Ethics.](#) The College will be held **Wednesday October 4 through Friday October 6, 2017** in Austin, Texas at the Omni Austin Hotel Downtown. **The College registration fee is \$400 through July 31, but \$425 beginning August 1.** The room rate is \$219 for single or double occupancy, which includes breakfast.

The College provides a forum for judicial conduct commission members and staff, judges, judicial ethics advisory committees, and others to discuss professional standards for judges and current issues in judicial discipline. There is a complete description of sessions and moderators on-line. The session topics are:

PLENARY SESSION

Social Media and Judges: Bright Lines and Best Practices

BREAK-OUT SESSIONS

- Disqualification
- The Curious Judge: Independent Factual Investigations
- Judicial Discipline and Technology
- Ethical Guidelines for Members of Judicial Conduct Commissions
- Judicial Impairments
- Best Practices for Judicial Ethics Advisory Committees
- Pro Se Litigants and Judicial Ethics
- Fines, Fees, and Judicial Ethics
- Determining the Appropriate Sanction
- The Role of Public Members
- Introduction to Judicial Ethics and Discipline for New Members of Judicial Conduct Commissions

There is a link from the College registration site to the hotel reservation site. If you have any questions about registration, contact Alisa Kim at akim@ncsc.org or (303) 308-4340.