

# Facebook Gives New Meaning to Phrase 'Friend of the Court'

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Judges hold a revered position in our society. Singularly tasked with upholding public trust in the integrity of the legal system, judges are required to act in a manner that avoids impropriety and the appearance of impropriety. Consequently, their personal and professional activities are subjected to heightened scrutiny by members of the legal profession and the public at large.

Yet judges are also encouraged to be full-fledged members of their communities—which includes maintaining personal friendships and professional associations. For an increasing number of tech-savvy judges, such maintenance may entail participation in online social media.

So what happens when a sitting judge and a practicing attorney establish an online relationship by "friending" one another? Could this digital connection run afoul of real-world ethical rules?

A review of published opinions by the American Bar Association (ABA) and various state ethics committees reveals some discord in this respect: while the ABA and a majority of states (albeit a slim majority) grant judges qualified permission to actively participate in social networking sites—including having lawyers as online friends—other states expressly forbid such practices.

All of this may leave some lawyers asking judges: "Why can't we be friends"?

## **ABA FORMAL OPINION 462**

On February 21, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 462, titled Judge's Use of Electronic Social Networking Media. The ABA defined electronic social media (ESM) as referring to any Internet-based social networking site that "require[s] an individual to affirmatively join and accept or reject connection with a particular person."

The opinion gives judges wide latitude to engage in online behavior within the existing Model Code of Judicial Conduct. "A judge may participate in [ESM], but as with all social relationships and contacts, a judge must comply with the relevant provisions of the code ... and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impartiality," the ABA wrote. And although the ABA left open the possibility that judges can be online friends with attorneys, it reminded judges to not form any relationship that may "convey an impression that [particular] persons or organizations are in a position to influence the judge."

Accordingly, the ABA cautioned judges that ESM connections may "rise to the level of [a] social relationship or the perception of a relationship that requires disclosure or recusal." And, a judge who has an ESM connection with a lawyer with a pending or impending matter must evaluate whether to

disclose it prior to or at the initial appearance before the court. "In this regard, context is significant," the ABA said.

"Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. [But] if that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed," the ABA said.

Despite the permissive nature of Formal Opinion 462, the ABA reiterated that the "laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling."

## **FRIENDS WITH BENEFITS**

What is it about judges and lawyers as online friends that raises such concern?

According to various state ethics committees, when a judge creates an online connection with a lawyer, it places that individual in a "special class" of lawyers who are designated as that judge's "friend." As contrasted with lawyers who choose not to ask the judge to accept them as a "friend" (or who do not participate in social media), this former group appears to the public as being in a "special relationship" with the judge. This, in turn, can lead to the appearance of impropriety under the Model Code Rules.

## **FRIENDSHIP IN THE BALANCE.**

As shown, the ABA is not the final arbiter of permissible online conduct by judges — individual state ethics panels are.

According to the National Center for State Courts, nine states have issued ethics opinions on the use of ESM by judges, with mixed results.

For instance, Massachusetts (Opinion No. 2011-6) only allows judges to "friend" attorneys from whom they would recuse themselves if those same attorneys appeared before the court. In Florida (Opinion No. 2009-20) and Oklahoma (Opinion No. 2011-3), judges cannot add lawyers who may appear before them as "friends" — or permit such lawyers to add them as "friends."

Conversely, several states actually support the idea of judges participating in ESM, so long as they avoid ex parte communications about pending matters.

New York (Opinion No. 13-39), for example, has said the "mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned or that there is an appearance of impropriety based solely on having previously 'friended' certain individuals who are now involved in some manner in a pending action."

Ohio (Opinion No. 2010-7) also allows judges and lawyers to be online "friends" — so long as it is "done carefully" to ensure compliance with the code. Maryland (Opinion No. 2010-07) and Kentucky (Opinion No. JE-119) took a similar approach when advising judges using social networking sites to "proceed cautiously," or be "extremely cautious" on such sites, respectively.

In allowing judges to be Facebook friends with law enforcement officers and employees, South Carolina (Opinion 17-2009) expressed how "complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives." Permitting such use "allows the community to see how the judge communicates and gives [it] a better understanding of the judge," according to the opinion.

California (Opinion No. 66), however, took a middle ground: permitting judges to include lawyers who may appear before them in their online community, but instructing judges to refuse such connections if said lawyer has a case pending before the judge. In fact, California felt the latter scenario was precarious enough to require judges to actually "unfriend" such individuals.

## **CAN WE BE PALS IN PENNSYLVANIA?**

The Judicial Conduct Board of Pennsylvania has yet to issue an opinion on ESM use by judges. But there are at least two examples where Pennsylvania judges have been drawn into ethical conflicts based on their use of Facebook.

In 2011, Cumberland County Court of Common Pleas Judge Thomas Placey recused himself after learning he was Facebook friends with Barry Horn Jr., a criminal defendant in his courtroom. Horn's attorney said online postings suggested Placey would be biased in Horn's favor. Yet it was Horn who requested recusal. Without questioning Placey's impartiality, Horn said he did not want the judge put in an uncomfortable position; Placey "unfriended" Horn immediately thereafter.

Conversely, Philadelphia Municipal Court Judge Charles Hayden declined to recuse himself from a DUI case against Democratic state Representative Cherelle Parker (Case No. MC-51-CR-18485-2011). After Hayden suppressed the arresting officers' testimony and dismissed the charges, the attorney general (who stepped in after Philadelphia District Attorney Seth Williams recused himself because of a personal friendship with Parker) became aware Hayden and Parker were Facebook "friends." In refusing recusal, Hayden opined that "'Facebook friendship' without additional evidence is not sufficient for a judge to recuse himself." Parker's attorney told *The Philadelphia Inquirer* the two do not know each other offline. On appeal, the Philadelphia Court of Common Pleas reversed, ordering recusal. Petitions to the state Superior Court (24 EDM 2012) and Supreme Court (51 A.3d 383) were denied; Parker was convicted in January 2013.

## **IMPLICATIONS: TO FRIEND OR NOT TO FRIEND?**

Should judges rush to "defriend" every lawyer they know on Facebook? Probably not. But it may be worthwhile to consider the implications of ESM.

Without an explicit ethics opinion on the appropriateness of ESM, judges and lawyers in Pennsylvania can still consider the cases of Horn and Parker, cautionary advice from other state ethics panels, and the ABA's guidance.

In Formal Opinion 462, the ABA attempted to strike a balance between overly restricting the beneficial uses of ESM and traditional "appearance of impropriety" concerns implicit in judges deciding whom to accept as "friends."

For example, the ABA instructed judges to disclose on the record information regarding ESM connections that might reasonably be considered relevant to disqualification. Yet, it also reminded judges they need not search all their ESM connections absent specific knowledge of a connection that may rise to the level of an actual or perceived problematic relationship.

A critical takeaway from Formal Opinion 462 is ESM connections can rise to the level of real-world social connections requiring disclosure or recusal. As with other recent opinions dealing with the Internet, it is noteworthy that the ABA found "context" significant in evaluating the strength of such connections.

It is also unclear whether Pennsylvania courts would reconsider their seemingly strict stance on ESM-based recusal following the ABA's proclamation. Since Formal Opinion 462 was issued, at least one Texas state appellate court has cited it to hold that simply being Facebook friends with a

party was insufficient to indicate judicial bias, as "merely designating someone as a 'friend' on Facebook does not show the degree or intensity of a judge's relationship with a person," according to *Youkers v. Texas*, 400 S.W.3d 200 (Tex. App. 2013). Further context — such as the relationship's depth and the judge's handling of any ex parte communications — is required.

Concerns over judges' use of LinkedIn appear somewhat lessened. According to a December 31, 2009, article titled "Ethical Considerations of Using Social Networking Sites" by Adrienne Meiring, counsel to the Indiana Commission on Judicial Qualifications, judges do not have to remove attorneys from a LinkedIn group, even if they have a pending case, because LinkedIn "limits the ability to post anything more personal than [what] can be found on a resume or curriculum vitae."

Judges, like everyone else, have law school classmates and former colleagues with whom it would be perfectly natural to be associated via ESM. But based on the higher standards to which their actions are held, the ABA and state ethics panels remind judges to be sensitive to the implied appearance of such online relationships.

One thing is for certain: all of the recent attention surrounding judges' use of social media certainly gives new meaning to the phrase "friend of the court."

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