FORMAL
JUDICIAL ETHICS OPINION JE-119

January 20, 2010

JUDGES' MEMBERSHIP ON INTERNET-BASED SOCIAL NETWORKING SITES

The Ethics Committee of the Kentucky Judiciary has received an inquiry from a judge as to the propriety of his being a member of Facebook, an internet-based social networking site, and being "friends" with various persons who might appear before him in court.

MAY A KENTUCKY JUDGE OR JUSTICE, CONSISTENT WITH THE CODE OF JUDICIAL CONDUCT, PARTICIPATE IN AN INTERNET-BASED SOCIAL NETWORKING SITE, SUCH AS FACEBOOK, LINKEDIN, MYSPACE, OR TWITTER, AND BE "FRIENDS" WITH VARIOUS PERSONS WHO APPEAR BEFORE THE JUDGE IN COURT, SUCH AS ATTORNEYS, SOCIAL WORKERS, AND/OR LAW ENFORCEMENT OFFICIALS?

The Committee concludes that the current answer to the question is a "Qualified Yes".

Kentucky's Code of Judicial Conduct was adopted in 1999, and is based on the ABA's 1990 Model Code. Certainly, the Model Code was promulgated in the early days of the internet, and long before social-networking sites were developed.

Canon 2 of the Code of Judicial Conduct requires "[a] judge [to] avoid impropriety and the appearance of impropriety in all of the judge's activities." In addition, a judge shall not "convey or permit others to convey the impression that they are in a special position to influence the judge." Canon 2D.

Also pertinent to this analysis is Canon 4A:

A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

As noted by the Commentary to Canon 4A, "[c]omplete 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." In this Commonwealth, this commentary is particularly apropos since Kentucky judges stand for election on a periodic basis. Ky. Const. §§ 117, 119.

While the nomenclature of a social networking site may designate certain participants as "friends," the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge. Certainly, judges have many extra-judicial relationships, connections and interactions with any number of persons, lawyers or otherwise, who may have business before the judge and the court over which he or she presides. These relationships may range from mere familiarity, to acquaintance, to close, intimate friendship, to marriage. Not every one of these relationships necessitates a judge's recusal from a case. Recusal is generally required by Canon 3E(1) "in a proceeding in which the judge's impartiality might reasonably be questioned...." Thus, the intensity of a judge's relationships might be viewed on a continuum. On the one side is the judge's complete unfamiliarity with a lawyer, a witness or a litigant, except in a judicial setting. No recusal is required. On the other extreme is a judge's close personal relationship with a lawyer, a party or a witness, such as a family member or a spouse. Recusal is required under Canon 3E(1).[1] At some point between these two extremes, a judge and a participant in a case may have such a close social relationship that a judge should disclose the relationship to attorneys and parties in a case and, if need be, recuse. *See* Cynthia Gray, *Disqualification and Friendships with Attorneys*, JUDICIAL CONDUCT REPORTER, Fall 2009, at 1. *See also In re Adams*, 932 So.2d 1025 (Fla. 2006) (publically reprimanding judge who presided over cases involving attorney with whom he had an ongoing romantic relationship); *In re Bamberger*, Ky. Judicial Conduct Comm'n, (Feb. 24, 2006) KY. BENCH & BAR, May 2006, at 55 (publically reprimanding judge for presiding over a number of cases in which a close, personal friend served as trial consultant in the cases, including a class action case settled for over $200,000,000; the consultant ultimately received compensation of over $2,000,000 from that case).

While social networking sites may create a more public means of indicating a connection, the Committee's view is 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 who is the "friend". The Committee conceives such terms as "friend," "fan" and "follower" to be terms of art used by the site, not the ordinary sense of those words. Recent judicial ethics opinions in other states have reached conflicting results. *See* Fla. Jud. Ethics

---

[1] A judge's participation in cases involving a spouse or family member is prohibited under Canon 3E(1)(d). The Commentary to Canon 3E(1), however, emphasizes that the specific rules in section 3E(1) are not exhaustive.

Advisory Opinion 2009-20[2] (concluding that judges may not add lawyers who may appear before the judge as "friends" on a social networking site); *contra* N.Y. Judicial Ethics Advisory Opinion 08-176[3] (concluding that judges may belong to internet-based social network, but should exercise discretion and otherwise comply with Rules Governing Judicial Conduct); S.C. Advisory Committee Opinion 17-2009[4] (concluding that a judge may be a member of Facebook and be "friends" with law enforcement officers, so long as they do not discuss matters relating to the judge's position). The Florida committee found it significant that in order for a judge to list someone as a "friend," or for another person to list the judge as a "friend," the judge was required to consent to the listing. The New York committee, while not prohibiting participation, cautioned:

> The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (*i.e.*, other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

N.Y. Judicial Ethics Advisory Opinion 08-176.

The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically do not "convey or permit others to convey the impression that they are in a special position to influence the judge." Canon 2D. However, and like the New York committee, this Committee believes that judges should be mindful of "whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship'" which should be disclosed and/or require recusal. Canon 3E(1).

---

[2] http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html.
[3] http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm.
[4] http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009.

In addition to the foregoing, the Committee is compelled to note that, as with any public media, social networking sites are fraught with peril for judges, and that this opinion 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. Personal information, commentary and pictures are frequently part of such sites. Judges are required to establish, maintain and enforce high standards of conduct, and to personally observe those standards. Canon 1. In addition, judges "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2A. The Commentary to Canon 2A states:

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

Thus, pictures and commentary posted on sites which might be of questionable taste, but otherwise acceptable for members of the general public, may be inappropriate for judges. *See In re: Complaint of Judicial Misconduct*, 575 F.3d 279 (3rd Cir. 2009) (interpreting federal Judicial Conduct and Disability Act) (publically reprimanding judge who had maintained website containing sexually explicit and offensive materials). In its decision, the Third Circuit Court of Appeals noted "[a] judge's conduct may be judicially imprudent, even if it is legally defensible." 575 F.3d at 291.

Additional issues may arise in relation to Canon 3B. Judges are generally prohibited from engaging in any ex parte communications with attorneys and their clients. Canon 3B(7). The Commentary to this section explicitly states that "[a] judge must not independently investigate facts in a case and must consider only the evidence presented." In addition, a judge is disqualified from hearing a case in which the judge has "personal knowledge of disputed evidentiary facts[.]" Canon 3E(1)(a). A North Carolina judge was publically reprimanded for conducting independent research on a party appearing before him and for engaging in ex parte communications, through Facebook, with the other party's attorney. *Public Reprimand of B. Carlton Terry, Jr.*, N.C. Judicial Standards Comm'n Inquiry No. 08-234.[5] *See also* Richard Acello, *WEB 2.UH-OH; Judged by Facebook*, 95 A.B.A.J. 27 (Dec. 2009) (noting the commentary aspect of MySpace, Twitter and Facebook, and a judge's statement that he uses "sites to keep track of adjudicated offenders under his jurisdiction"). With respect to the judge quoted in the Acello article, this Committee questions whether his active monitoring of offenders under his jurisdiction would be appropriate under the Kentucky Code of Judicial Conduct, and

---

[5] http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

whether such conduct raises separation of powers concerns. As an example, the Oregon Supreme Court, interpreting its Code of Judicial Conduct, censured a judge who witnessed alleged probation violation, ordered offender into court the following week, and then presided over a probation violation hearing. *In re Baker*, 74 P.3d 1077 (Or. 2003).

While a proceeding is pending or impending in any court, judges are prohibited from making "any public comment that might reasonably be expected to affect its outcome or impair its fairness...." Canon 3B(9). Furthermore, full-time judges are prohibited from practicing law or giving legal advice. Canon 4G. Judges, therefore, must be careful that any comments they may make on a social networking site do not violate these prohibitions. While social networking 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. *See, e.g., Judicial Misconduct*, 575 F.3d at 293 (noting that "possession of controversial private material such as that at issue here carried with it the peril of unwanted disclosure"); *see also* Helen A.S. Popkin, *Twitter Gets You Fired in 140 Characters Or Less*, MSNBC.com (March 23, 2009)[6] (discussing dangers of postings on social networking sites).

The foregoing examples are meant to be illustrative only, and this Opinion should not be read as allowing other conduct on a social networking site by implication.

In conclusion, even a cursory reading of this opinion should make clear that the Committee struggled with this issue, and whether the answer should be a "Qualified Yes" or "Qualified No". In 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. In 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. Thus, the Committee believes that a Kentucky judge or justice's participation in social networking sites is permissible, but that the judge or justice should be **extremely cautious** that such participation does not otherwise result in violations of the Code of Judicial Conduct.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

---

[6] http://www.msnbc.msn.com/id/29796962/. Ms. Popkin hypothesizes "the cardinal rule of the Internet: Never post anything you wouldn't say to your mom, boss and significant other."

Sincerely,

Arnold Taylor, Chairman
The Ethics Committee of the Kentucky Judiciary

cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.