

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2012-07

**Date of Issue:** June 12, 2012

■ Published Opinion    □ Unpublished Opinion    □ Unpublished Letter of Advice

### Judge Must Consider Limitations on Use of Social Networking Sites

**Issue:** What are the restrictions on the use of social networking sites by judges?

**Answer:** A judge must recognize that the use of social media networking sites may implicate several provisions of the Code of Judicial Conduct and, therefore, proceed cautiously.

**Facts:** A judge has requested guidance about restrictions on the use of social networking sites by judges. The request assumes that judges are not permitted to post anything on social networking sites pertaining to court matters, and that judges cannot engage in any activities on such sites otherwise prohibited by the Maryland Code of Judicial Conduct. Setting forth the scope of the inquiry, the question submitted to the Committee thus states: “In other words, this request does not pertain to what can or cannot be posted on social media, but simply whether the mere fact of a social connection creates a conflict.”

**Discussion:** While participation on Internet-based social networks, such as Facebook,<sup>1</sup> has become ubiquitous, allowing people to remain in virtually constant communication, the Maryland Code of Judicial Conduct (Md. Rule 16-813) does not directly address involvement by Maryland judges. In broad terms, however, the Code does admonish members of the Judiciary to “avoid conduct that would create in reasonable minds a perception of impropriety.” Rule 1.2(b). That admonition is applicable “to both the professional and personal conduct” of judges, who “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other persons.” Rule 1.2. Comments [1] and [2].

Facebook is used by millions of people worldwide. After joining this networking site, participants create personal profile pages containing various types of information about themselves, and then send “friend requests” to others, through a process known as “friending.”<sup>2</sup> Typically, “Facebook friends” are people who knew one another before joining the site, have mutual acquaintances and/or common interests. By becoming “friends,” they are able to see photos, videos and other information posted by or about one other on their respective Facebook pages. Many people post their thoughts, views and opinions on almost any subject, as well as details of their daily lives. Moreover,

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<sup>1</sup> Other social media networking sites include: Twitter, LinkedIn and MySpace. For illustrative purposes, the Committee will refer only to Facebook.

<sup>2</sup> Facebook participants can also “unfriend” others, by removing them from a list of friends or contacts. See *generally* [Florida Judicial Ethics Advisory Committee Opinion 2010-6].

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2012-07

**Date of Issue:** June 12, 2012

■ Published Opinion    □ Unpublished Opinion    □ Unpublished Letter of Advice

Page 2 of 6

unless specific privacy settings are used to limit those with whom information is shared, others in the network can view that information. Thus, information posted by a judge on a social networking site can be quickly and widely disseminated, and possibly beyond its intended audience.

Judicial Ethics Committees in several states have addressed the ethical propriety of a judge's involvement on social networking sites, with divergent results. The Florida Supreme Court Judicial Ethics Advisory Committee has prohibited judges from adding lawyers who may appear before them as "friends" on networking sites, such as Facebook. [Florida Judicial Ethics Advisory Committee Opinion 2009-20.]<sup>3</sup> The Massachusetts Judicial Ethics Committee and the Oklahoma Judicial Ethics Advisory Panel have opined that judges may have Facebook accounts. The Oklahoma Advisory Panel concluded that a judge may have a social networking account that includes as "friends" "any person who does not regularly appear or [is] unlikely to appear in the Judge's court as long as he does not use the network in a manner that would otherwise violate the Code of Judicial Conduct." [Oklahoma Judicial Ethics Opinion 2011-3]. For its part, the Massachusetts Judicial Ethics Committee stated: "The Committee is of the opinion that the Code prohibits judges from associating in any way on social networking sites with attorneys who may appear before them. Stated another way, in terms of a bright-line test, judges may only 'friend' attorneys as to whom they would recuse themselves when those attorneys appeared before them." [Massachusetts Judicial Ethics Committee Opinion 2011-6].

The California Judicial Ethics Committee held that just as judges are permitted to join social and civic organizations that include attorneys who may appear before them, the same considerations apply to interacting with lawyers on online social networking sites. "Accordingly, a *per se* prohibition of social networking with lawyers who may appear before a judge is not mandated by the Canons." The Ethics Committee further opined, however, that although it did not believe a *per se* prohibition was mandated, "it is important to stress that a judge's interactions with attorneys who may appear before the judge will very often create appearances that would violate the Canons." The Committee thus identified several factors to be considered in determining whether it would be permissible to interact with attorneys on social networking sites. Those factors included: 1) The nature of the social networking site (The more personal the nature of the page, the greater the likelihood that including an attorney would create the appearance that the

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<sup>3</sup> For an article discussing this opinion, see John Schwartz, *For Judges on Facebook, Friendship Has Limits*, *N.Y. Times.com*, Dec. 11, 2009. *Cf.* [Florida Judicial Ethics Advisory Committee Opinion 2010-5] (Candidate for judicial office may add lawyers who may appear before the candidate, if elected judge, as "friends" on a social networking site, and permit such lawyers to add the candidate as their "friend.").

**Maryland Judicial Ethics Committee**

**Opinion Request Number:** 2012-07

**Date of Issue:** June 12, 2012

■ Published Opinion    □ Unpublished Opinion    □ Unpublished Letter of Advice

Page 3 of 6

attorney would be in a special position to influence the judge, or cast doubt on the judge's ability to act impartially). 2) The number of "friends" on the page. (The greater the number of "friends" on the judge's page, the less likely one could reasonably perceive that any individual participant is in a position to influence the judge). 3) The judge's practice in determining whom to include. (As with the number of people on the page, the more inclusive the page, the less likely it is to create the impression that any individual member is in a special position to influence the judge). 4) How regularly the attorney appears before the judge. (If the likelihood that the attorney actually will appear before the judge is low, the more likely it is that the interaction would be permissible). [California Judicial Ethics Committee Opinion 66].

Judicial Ethics Committees in New York, Kentucky, Ohio and South Carolina have issued opinions allowing judges to participate in social networking sites. These Committees found no ethical prohibition or requirement for mandatory recusal or disclosure.<sup>4</sup> Those states that have not prohibited the activity, have nonetheless, all emphasized the need for the exercise of caution by any judge who elects to participate on social networking sites.

Several of Maryland's judicial ethics rules are implicated by the judge's inquiry. Rule 1.2(a) requires that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Comment [3] to Rule 1.2 explains: "Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary." Rule 1.3 states that "[a] judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

Rule 2.4, in turn, provides, in pertinent part:

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<sup>4</sup> The New York Judicial Ethics Committee cautioned, however, that a judge "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 ... 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." [New York Judicial Ethics Committee Opinion 08-176]. The Kentucky Judicial Ethics Committee quoted, with approval, the New York Judicial Ethics Committee's cautionary statement and further observed: "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.'" [Kentucky Judicial Ethics Committee Opinion JE-119]. *See also* [Ohio Judicial Ethics Committee Opinion 2010-7] and [South Carolina Advisory Committee on Standards of Judicial Conduct Opinion No. 17-2009].

**Maryland Judicial Ethics Committee**

**Opinion Request Number:** 2012-07

**Date of Issue:** June 12, 2012

■ Published Opinion    □ Unpublished Opinion    □ Unpublished Letter of Advice

Page 4 of 6

(b) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(c) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

Rule 3.1 states, in part:

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. When engaging in extrajudicial activities, a judge shall not:

(a) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(b) participate in activities that will lead to the frequent disqualification of the judge;

(c) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality[.]

There is thus a concern that being designated as a "friend" of a judge on a social networking site might be perceived as indicating both that the person is in a position to influence the judge, and may have ex parte communications with the judge via that medium.<sup>5</sup>

The Committee, nevertheless, notes that there is no rule prohibiting judges from having what traditionally has been thought of as "friends," be they attorneys or laypersons. Indeed, in order to become a District Court, Circuit Court, or appellate court judge in this state, one must be a member in good standing of the Maryland State Bar. In the vast majority of cases, members of the Bar become judges after years of working in the legal profession and establishing personal relationships with others in that profession. Attorneys are neither obligated nor expected to retire to a hermitage upon becoming a judge. While they must be circumspect in all of their activities, and sensitive to the

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<sup>5</sup> Rule 2.9 states that, with specified exceptions, "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge out of the presence of the parties or their lawyers, concerning a pending or impending matter[.]"

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2012-07

**Date of Issue:** June 12, 2012

Published Opinion     Unpublished Opinion     Unpublished Letter of Advice  
Page 5 of 6

impressions such activities may create,<sup>6</sup> judges may and do continue to socialize with attorneys and others.

The mere existence of a friendship between a judge and an attorney does not, in and of itself, disqualify the judge from cases involving that attorney. Rule 2.11 sets forth specific circumstances in which a judge “shall disqualify himself or herself” because “the judge’s impartiality might reasonably be questioned[.]” A personal friendship with one of the attorneys is not among the enumerated circumstances. The list set forth in the Rule, however, is not meant to be exhaustive. Comment [4] to Rule 2.11(c) states: “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.” A personal relationship with any of the attorneys or parties might be included in such information. The Committee sees no reason to view or treat “Facebook friends” differently.<sup>7</sup>

The requesting judge states: “This request assumes that a Judge is not permitted to post anything on a social media site which pertains to Courthouse matters, and that a judge cannot engage in any activity on a social media site which is otherwise prohibited by the Maryland Code of Judicial Conduct. In other words, this request does not pertain to what can or cannot be posted on social media, but simply whether the mere fact of a social connection creates a conflict.” The Committee recognizes that there are many reasons why a judge would want to participate in a social networking site such as Facebook (*e.g.*, to communicate with family members, college and law school classmates, etc.). Accordingly, it is the Committee’s position that “the mere fact of a social connection” does not create a conflict. As the California Judicial Ethics Committee aptly observed, “[i]t is the *nature* of the [social] interaction that should govern the analysis, not the *medium* in which it takes place.” (Emphasis added). We reiterate, however, the admonition of our counterparts in Kentucky and Oklahoma,<sup>8</sup> that “social

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<sup>6</sup> C-102 of the Preamble to the Code of Judicial Conduct states: “Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.”

<sup>7</sup> For a discussion of judges’ personal relationships, see Cynthia Gray, *The Too Friendly Judge? Social Networks and the Bench*, *Judicature*, May-June 2010 and Cynthia Gray, *Disqualification and Friendships with Attorneys*, *Judicial Conduct Reporter*, Fall 2009.

<sup>8</sup> The New York Judicial Ethics Committee similarly stated that “the Committee urges all judges using social networks to, as a baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology[.]” [New York Judicial Ethics Committee Opinion 08-176] The California Judicial Ethics Committee suggested, “notwithstanding the explosion of participation in online social networking sites, judges should carefully weigh whether the benefit of their participation is worth all the attendant risks.” [California Judicial Ethics Committee Opinion 66].

**Maryland Judicial Ethics Committee**

**Opinion Request Number:** 2012-07

**Date of Issue:** June 12, 2012

Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

Page 6 of 6

networking sites are fraught with peril for judges.”<sup>9</sup> The ethical perils involve, not whether a judge can participate on a social networking site, but rather, although not the focus of this request, the manner in which the judge does so.

**Application:** The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct of the requestor described in this opinion, to the extent of the requestor’s compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this opinion.

Additionally, this opinion should not be considered to be binding indefinitely. The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If you engage in a continuing course of conduct, you should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.

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<sup>9</sup> A judge has been publicly reprimanded for social networking misconduct. See *Public Reprimand of Terry*, North Carolina Judicial Standards Comm’n, Inquiry No. 08-234, April 1, 2009 (Concluding that the judge failed to observe appropriate standards of conduct to ensure the preservation of the integrity and independence of the judiciary, failed to respect and comply with the law, failed to act in a manner that promoted public confidence in the integrity and impartiality of the judiciary, engaged in ex parte communication with counsel and conducted ex parte online research). In addition, a Georgia judge resigned after questions were raised about his Facebook contact with a defendant. See Debra Cassens Weiss, *ABA Journal.com.*, Jan. 7, 2010.