

# AMERICAN BAR ASSOCIATION

## Formal Opinion 462 Judge's Use of Electronic Social Networking Media

February 21, 2013

*A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.*<sup>1</sup>

In this opinion, the Committee discusses a judge's participation in electronic social networking. The Committee will use the term "electronic social media" ("ESM") to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons.<sup>2</sup>

### Judges and Electronic Social Media

In recent years, new and relatively easy-to-use technology and software have been introduced that allow users to share information about themselves and to post information on others' social networking sites. Such technology, which has become an everyday part of worldwide culture, is frequently updated, and different forms undoubtedly will emerge.

Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch. This opinion examines to what extent a judge's participation in ESM raises concerns under the Model Code of Judicial Conduct.

Upon assuming the bench, judges accept a duty to "respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."<sup>3</sup> Although judges are full-fledged members of their communities, nevertheless, they "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens...."<sup>4</sup> All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner "that promotes public confidence in the independence, integrity, and impartiality of the judiciary," and must "avoid impropriety and the appearance of impropriety."<sup>5</sup> This requires that the judge be sensitive to the appearance of relationships with others.

The Model Code requires judges to "maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives."<sup>6</sup> Thus judges must be very thoughtful in their interactions with others, particularly when using ESM. Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to

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<sup>1</sup> This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2012. The laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> This opinion does not address other activities such as blogging, participation on discussion boards or listserves, and interactive gaming.

<sup>3</sup> Model Code, Preamble [1].

<sup>4</sup> Model Code Rule 1.2 cmt. 2.

<sup>5</sup> Model Code Rule 1.2. *But see* Dahlia Lithwick and Graham Vyse, "Tweet Justice," SLATE (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to "de-friend" her from their ESM page when they're trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), *article available at* [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/04/tweet\\_justice.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html).

<sup>6</sup> Model Code, Preamble [2].

compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.<sup>7</sup>

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.<sup>8</sup>

A judge who participates in ESM should be mindful of relevant provisions of the Model Code. For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed. The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.

There also may be disclosure or disqualification concerns regarding judges participating on ESM sites used by lawyers and others who may appear before the judge.<sup>9</sup> These concerns have been addressed in judicial ethics advisory opinions in a number of states. The drafting committees have expressed a wide range of views as to whether a judge may “friend” lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.<sup>10</sup> A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.<sup>11</sup> In this regard, context is significant.<sup>12</sup> Simple

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<sup>7</sup> See Model Code Rule 1.2 cmt. 3. Cf. New York Jud. Eth. Adv. Op. 08-176 (2009) (judge who uses ESM should exercise appropriate degree of discretion in how to use the social network and should stay abreast of features and new developments that may impact judicial duties). Regarding new ESM website developments, it should be noted that if judges do not log onto their ESM 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. They can eliminate this risk by deactivating their accounts.

<sup>8</sup> Jeffrey Rosen, “The Web Means the End of Forgetting”, N.Y. TIMES MAGAZINE (July 21, 2010) *accessible at* <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all>.

<sup>9</sup> See, e.g., California Judges Ass’n Judicial Ethics Comm. Op. 66 (2010) (judges may not include in social network lawyers who have case pending before judge); Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (2009) (judge may not include lawyers who may appear before judge in social network or permit such lawyers to add judge to their social network circle); Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (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’” that should be disclosed and/or require recusal); Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline Op. 2010-7 (2010) (judge may have ESM relationship with lawyer who appears as counsel in case before judge as long as relationship comports with ethics rules); South Carolina Jud. Dep’t Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2009 (magistrate judge may have ESM relationship with lawyers as long as they do not discuss anything related to judge’s judicial position). See also John Schwartz, “For Judges on Facebook, Friendship Has Limits,” N.Y. TIMES, Dec. 11, 2009, at A25. Cf. Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-04 (2010) (judge’s judicial assistant may add lawyers who may appear before judge to social networking site as long as the activity is conducted entirely independent of judge and without reference to judge or judge’s office).

<sup>10</sup> See discussion in Geyh, Alfani, Lubet and Shaman, JUDICIAL CONDUCT AND ETHICS (5<sup>th</sup> Edition, forthcoming), Section 10.05E.

<sup>11</sup> California Judges Assn. Judicial Ethics Comm. Op. 66 (need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent). See also New York Jud. Eth. Adv. Op. 08-176 (judge must consider whether any online connections, alone or in combination with other facts, rise to level of close social relationship requiring disclosure and/or recusal); Ohio Opinion 2010-7 (same).

<sup>12</sup> Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-06 (2010) (judge who is member of voluntary bar association not required to drop lawyers who are also members of that organization from organization’s ESM site; members use the site to communicate among themselves about organization and other non-legal matters). See also Raymond McKoski,

designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person.<sup>13</sup>

Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.<sup>14</sup> The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally.<sup>15</sup> A judge should disclose on the record information 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 the disqualification.<sup>16</sup> For example, a judge may decide to disclose that the judge and a party, a party's lawyer or a witness have an ESM connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge's ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.

### Judges' Use of Electronic Social Media in Election Campaigns

Canon 4 of the Model Code permits a judge or judicial candidate to, with certain enumerated exceptions, engage in political or campaign activity. Comment [1] to Rule 4.1 states that, although the Rule imposes "narrowly tailored restrictions" on judges' political activities, "to the greatest extent possible," judges and judicial candidates must "be free and appear to be free from political influence and political pressure."

Rule 4.1(A)(8) prohibits a judge from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4. The Code does not address or restrict a judge's or campaign committee's method of communication. In jurisdictions where judges are elected, ESM has become a campaign tool to raise campaign funds and to provide information about the candidate.<sup>17</sup> Websites and ESM promoting the candidacy of a judge or judicial candidate may be

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"Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from 'Big Judge Davis'," 99 KY. L.J. 259, 291 (2010-11) (nineteenth century judge universally recognized as impartial despite off-bench alliances, especially with Abraham Lincoln); Schwartz, *supra* note 9 ("Judges do not drop out of society when they become judges.... The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.") (quoting New York University Prof. Stephen Gillers).

<sup>13</sup> See Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (designation as an ESM follower does not, in and of itself, indicate the degree or intensity of judge's relationship with the person).

<sup>14</sup> See, e.g., New York Judicial Ethics Advisory Opinion 08-176, *supra* n. 8. See also Ashby Jones, "Why You Shouldn't Take It Hard If a Judge Rejects Your Friend Request," WALL ST. J. LAW BLOG (Dec. 9, 2009) ("'friending' may be more than say an exchange of business cards but it is well short of any true friendship"); Jennifer Ellis, "Should Judges Recuse Themselves Because of a Facebook Friendship?" (Nov. 2011) (state attorney general requested that judge reverse decision to suppress evidence and recuse himself because he and defendant were ESM, but not actual, friends), available at <http://www.jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/>.

<sup>15</sup> See Jeremy M. Miller, "Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)," 33 PEPPERDINE L. REV. 575, 578 (2012) ("Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge").

<sup>16</sup> Rule 2.11 cmt. 5.

<sup>17</sup> In a recent survey, for judges who stood for political election, 60.3% used social media sites. 2012 CCPIO New Media and Courts Survey: A Report of the New Media Committee of the Conference of Court Public Information Officers (July 31, 2012), available at <http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/>.

established and maintained by campaign committees to obtain public statements of support for the judge's campaign so long as these sites are not started or maintained by the judge or judicial candidate personally.<sup>18</sup>

Sitting judges and judicial candidates are expressly prohibited from “publicly endorsing or opposing a candidate for any public office.”<sup>19</sup> Some ESM sites allow users to indicate approval by applying “like” labels to shared messages, photos, and other content. Judges should be aware that clicking such buttons on others' political campaign ESM sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office.<sup>20</sup> On the other hand, it is unlikely to raise an ethics issue for a judge if someone “likes” or becomes a “fan” of the judge through the judge's ESM political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.

Judges may privately express their views on judicial or other candidates for political office, but must take appropriate steps to ensure that their views do not become public.<sup>21</sup> This may require managing privacy settings on ESM sites by restricting the circle of those having access to the judge's ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

## Conclusion

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM 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.

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<sup>18</sup> Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-28 (July 23, 2010).

<sup>19</sup> Model Code Rule 4.1(A)(3).

<sup>20</sup> See “Kansas judge causes stir with Facebook ‘like,’” The Associated Press, July 29, 2012, *available at* [http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas\\_judge\\_causes\\_stir\\_with\\_facebook\\_like\\_.html](http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook_like_.html).

<sup>21</sup> See Nevada Comm'n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) (“In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.”).

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