Should Attorneys and Judges be Facebook Friends?  
A State by State Overview

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Utilizing Social Media in Modern Lawyering:  
Part I

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Lawyers and Judges as “Friends” on Facebook

ABA Model Code of Judicial Conduct

A judge...

- Rule 1.2 - shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety
- Rule 2.3 (A) - shall perform the duties of judicial office, including administrative duties, without bias or prejudice
- Rule 2.3(C) - shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment
- Rule 2.4(B) - shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s conduct or judgment
- Rule 2.9(A) - shall not initiate, permit, or consider ex parte communication . . . concerning a pending or impending matter
- Rule 2.10(A) - 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 before the court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing
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ABA Model Rules of Professional Conduct

- Rule 3.5(b) - A lawyer shall not: (b) communicate ex parte with [a judge] during the proceeding unless authorized to do so by law or court order

- Rule 8.4(f) - It is professional misconduct for a lawyer to: (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law
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ABA Advisory Opinion

ABA Formal Opinion 462 - “Judge’s Use of Electronic Social Networking Media” (February 21, 2013)

“Judicious use of ESM [Electronic Social Media] can benefit judges in both their personal and professional lives. . . . When used with proper care, judges’ use of ESM does not necessarily compromise their duties under the Model Code [of Judicial Conduct] any more than use of traditional and less public forums of social connection such as U.S. Mail, telephone, email or texting.”
Lawyers and Judges as “Friends” on Facebook

- **Current decisions – “Qualified Yes”:**
  - **California**
      - Judges and attorneys can be Facebook friends even if the attorney “may” appear before the judge, but “it is not permissible [for the judge] to interact with attorneys who have matters pending before the judge.”
  - **Massachusetts**
    - Massachusetts Committee on Judicial Ethics, Opinion No. 2011-6 (December 28, 2011)
      - “A judge’s ‘friending’ attorneys on social networking sites creates the impression that those attorneys are in a special position to influence the judge. Therefore, the Code [of Judicial Conduct] does not permit [a judge] to ‘friend’ any attorney who may appear before you.”
  - **Oklahoma**
    - Judicial Ethics Opinion 2011-3 (July 6, 2011)
      - Judge cannot be Facebook friends with attorneys, social workers, law enforcement officers, or others “who regularly appear or are likely to appear in their court.”
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- Current decisions - “Qualified Yes”:
  - Ohio
    - Ohio Board of Commissioners on Grievances and Discipline, Opinion 2010-7 (December 3, 2010)
  - Nothing in the Ohio Code of Judicial Conduct prohibits a judge from being friends - online or offline - with attorneys, even those who appear before the judge
  - Focuses on the nature of the Facebook friendship
    - “A judge should not foster social networking interactions with individuals or organizations if such communication will erode confidence in the independence of judicial decision making.”
    - “A judge should not make comments on a social networking site about any matters pending before the judge - not to a party, not to a counsel for a party, not to anyone.”
    - “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.”
    - “A judge should disqualify himself or herself from a proceeding when the judge’s social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party.”
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- Current decisions - “Qualified Yes”:
  - New York
      - Mere status of being a “Facebook friend” without more is insufficient to require recusal - *impropriety or appearance thereof based solely on being a “Facebook friend” is not reasonable.*
    - Cites to Opinion 08-176 (January 29, 2009) - there is nothing “inherently inappropriate” about a judge’s joining or making use of a social networking site, HOWEVER, the 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 . . . [and] must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to a level of a . . . Relationship requiring disclosure and/or recusal.”
    - Cites to Opinion 11-125 (October 27, 2011) - distinguishes “acquaintance” from “close personal relationship” - in the latter, judge must almost always recuse - case noted the fact sensitive nature of each individual situation
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- Current decisions - “Qualified Yes”:
  - South Carolina
    - Advisory Committee on Standards of Judicial Conduct, Opinion No. 17-2009 (October 2009)
      - “A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge’s position as a magistrate.”
      - Many sources extend this holding to include attorneys, but the opinion does not specifically address whether a judge can be Facebook friends with an attorney.
  - Kentucky
      - Follows NY opinion and believes 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.
  - Tennessee
    - Judicial Ethics Committee Advisory Opinion No. 12-01 (October 23, 2012)
      - “[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. . . . In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.”
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 ➤ Current decisions - “Qualified Yes”:

 ➤ Maryland

 ➤ Maryland Judicial Ethics Committee Opinion No. 2012-07 (June 12, 2012)

 ► Judges are not required to recuse in cases wherein he/she is [an offline] friend with an attorney - “The committee sees no reason to view or treat “Facebook friends” differently [than the same type of relationship offline].”

 ► Enumerated factors for consideration to determine whether it would be possible to interact with attorneys on social networking sites (consistent with California opinion):

 1. 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 attorney was in a position to influence the judge or cast doubt on the judge’s ability to act impartially

 2. Number of “friends” on the page - the greater the number of “friends,” the less likely one could reasonably perceive that any individual participant is in a position to influence the judge

 3. Judge’s practice in determining whom to “friend” - the more inclusive the page, the less likely appearance of impropriety

 4. How regularly the attorney appears before the judge - if likelihood that attorney would appear before judge is low, the more likely “friending” the judge would be permissible
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- Current decisions:
  - Florida Split on the Issue?
    - **JEAC Op. 2009-20** (November 17, 2009)
      - Judicial Ethics Committee of the Florida Bar released ethics opinion indicating a judge is not permitted to be Facebook friends with an attorney who may appear before him or her
    - **Domville v. State**, 103 So.3d 184 (Fla. 4th DCA 2012)
      - Judge is required to recuse himself from a case in which the prosecutor is a Facebook friend
      - Even if there existed no special influence, the Facebook friendship could “create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial[.]”
    - **Chace v. Loisel**, 2014 WL 258620 (Fla. 5th DCA January 24, 2014)
      - Judge attempted to “friend” Chace (not an attorney); she rejected the judge’s request, and claimed her rejection resulted in retaliation
      - Noted, in re **Domville**, that if judges and attorneys are acquaintances, recusal should not be required; but if the judge and attorney have a close relationship, judge should recuse or be subject to motion to disqualify
      - “Requiring disqualification in such cases [such as Domville] does not reflect the true nature of a Facebook friendship and cases a large net in an effort to catch a minnow.”
      - “In our viewing, the ‘friending’ of a party in a pending case raises far more concern than a judge’s Facebook friendship with a lawyer.”
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- Current decisions:
  - Timing might be an issue?
    - North Carolina
      - North Carolina Judicial Standards Commission Inquiry No. 08-234
        - Judge B. Carlton Terry, Jr. publically reprimanded for “friending” defendant’s attorney in a divorce case and then discussing the case on Facebook
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- Current decisions:
  - Judges “friends” with Litigants
      - Facebook “friendship” between victim’s father and presiding trial judge insufficient to show bias as basis for recusal
      - In addition, judge told father that message requesting leniency for Younkers was inappropriate ex parte communication, notified both parties of communication, and put a copy of communication and judge’s response in case file
  - Georgia Judge Ernest “Bucky” Woods retired after questions surfaced about his Facebook relationship with a defendant in a case over which he presided
    - Judge Woods initiated relationship, discussed legal strategy on Facebook
Additional Considerations when Using Social Media

- False Facebook or Twitter Accounts
  - Publicly viewable social media information of opposing party, etc. is OK; however, it is likely a violation of the Rules of Professional Responsibility to gain access to the non-public information on a person’s social media account through “subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias” - this includes actions of the attorney and/or an agent of the attorney
  - “10 Tips for Avoiding Ethical Lapses When Using Social Media”
    http://www.americanbar.org/publications/blt/2014/01/03_harvey.html

- Consider MRPC 3.4, 4.1, 4.3, 4.4, 8.4

- State Advisory Opinions:
  - Kentucky - Op. KBA E-434
  - New York - Op. 843
Additional Considerations when Using Social Media

- Online Criticism of the Judiciary
  - Illinois lawyer Kristine Peshek suspended for two months in Illinois and Wisconsin for comments made on her personal blog regarding a judge:
    - Referred to a judge as being a “total asshole” and referred to a judge as “Judge Clueless”
    - In addition, commented regularly regarding defendants in pending cases, giving personal details about the case and defendant

- Comments Regarding Pending Cases
  - Florida public defender Anya Cintron Stern fired after posting a picture of her the pair of leopard-print underwear a client’s family selected for him to wear at trial - the picture caused a mistrial
Final Thoughts

- Discipline in re: judge and attorney Facebook seems to be focused on judges, not attorneys
- Most advisory opinions suggest use of caution when using Facebook or other social media
- Always be mindful of the Rules of Professional Conduct and Code of Judicial Conduct when conducting yourself online
- You are never truly anonymous online!