

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

April 10, 2014

JESSICA BALLARD-BARNETT  
Indiana Court of Appeals  
[jessica.ballard@courts.in.gov](mailto:jessica.ballard@courts.in.gov)

**Utilizing Social Media in Modern Lawyering:  
Part I**

**Moderated by Andrea Ciobanu,  
CIOBANU LAW, PC  
[aciobanu@ciobanulaw.com](mailto:aciobanu@ciobanulaw.com)**

# 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

# Lawyers and Judges as “Friends” on Facebook

## ▶ 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

# Lawyers and Judges as “Friends” on Facebook

## ▶ 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

#### ▶ [California Judges Association Formal Opinion 66](#) - Online Social Networking (2011)

- ▶ 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.”

# Lawyers and Judges as “Friends” on Facebook

## ▶ 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.”

# Lawyers and Judges as “Friends” on Facebook

## ▶ Current decisions - “Qualified Yes”:

### ▶ New York

#### ▶ [Opinion 13-39](#) (May 28, 2013)

- ▶ 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

# Lawyers and Judges as “Friends” on Facebook

## ▶ 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

#### ▶ Formal Judicial Ethics Opinion JE-119 (January 20, 2010)

- ▶ 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.”

# Lawyers and Judges as “Friends” on Facebook

## ▶ 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

# Lawyers and Judges as “Friends” on Facebook

## ▶ 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. 4<sup>th</sup> 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. 5<sup>th</sup> 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 casts 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.”

# Lawyers and Judges as “Friends” on Facebook

## ▶ 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

# Lawyers and Judges as “Friends” on Facebook

## ▶ Current decisions:

### ▶ Judges “friends” with Litigants

#### ▶ *Youkers v. Texas*, 400 S.W.3d 200 (Tex. Crim. App. 2013)

▶ 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 Youkers 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)"  
[http://www.americanbar.org/publications/blt/2014/01/03\\_harvey.html](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:
    - ▶ Oregon - [Op. 2013-189](#)
    - ▶ 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!