Why Everyone Should Understand Judicial Ethics
By Susan Kidd

Most lawyers probably don’t think much about judicial ethics ... unless it hits them in the face. Imagine the lawyers’ reaction when a California judge gave a defendant “the finger” as a reprimand for coming to court late; a Michigan judge used a coin flip in a custody dispute to determine where the children should spend the holidays; a Mississippi judge left the bench and initiated a physical confrontation with a handcuffed defendant; and a judge in North Carolina commented that battered women deserved to be hit and that the battered woman’s advocacy agency staff were “she-dogs.” In Florida, a judge displayed a handgun, loaded it and began questioning a witness and another Florida judge asked a lawyer, “Do you know what I think of your argument?” and then pushed a button on a device that simulated the sound of a toilet flushing. These examples sound humorously bizarre, but they are all disturbingly true.

Fortunately, this type of extreme behavior rarely occurs; still, troubling issues commonly arise. Every lawyer should have a basic understanding of judicial ethics because a judge’s conduct may have a significant impact on the outcome of his or her lawsuit. Using hypothetical scenarios, this article illustrates and analyzes some situations involving problematic behavior of judges: inappropriate use of social media, lack of judicial competence and questionable conduct of law clerks.

INAPPROPRIATE USE OF SOCIAL MEDIA
Scenario
Terry, an attorney with the State Department of Education, sees on Facebook that someone has tagged her and Judge Ellen Thompson in an old photo before Thompson was appointed to the bench. They were at a bar association event clowning around, and Thompson was drinking from a wine bottle.

- Does Judge Thompson’s Facebook page violate any judicial conduct rules?
- Is it permissible that lawyers who will potentially appear before Judge Thompson are her Facebook friends?

Rules and ABA Formal Opinion:
A judge’s activity on social media may implicate ABA Model Code of Judicial Conduct (MCJC) Rule 1.2, which states: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and avoid impropriety and the appearance of impropriety.”

Photos of Judge Thompson “partying” are apt to raise doubts about her integrity and propriety. However, ABA Formal Opinion 462, Judge’s Use of Electronic Social Networking Media (ESM), recognizes the reality of today’s society and discusses the possible benefits of judges’ use of ESM, such as preventing the judiciary from being perceived as isolated or out of touch. The opinion states:

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.” 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. . . .” 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” [in both their professional and personal lives]. …

… 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 compromise the independence, integrity, and impartiality of the judge as well as to undermine public confidence in the judiciary.8

Litigants before Judge Thompson may be concerned that if opposing counsel is a Facebook friend of the judge, she may be biased in favor of her friend. On this topic, ABA Formal Opinion 462 states:

… 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. … 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. 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. 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 relations prior to or at the initial appearance of the person before the court. In this regard, context is significant. Simple designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge’s relationship with a person.9

Analysis

Social media is ubiquitous. While today’s judges are not digital natives, they usually have a substantial digital footprint. In general, this is acceptable, and Judge Thompson does not have to necessarily delete her Facebook page.

However, it would be wise for the judge to proactively monitor her Facebook page. She should ask that the embarrassing photo be removed and make sure that she is untagged in the photo in the event that others post it. She should also consider changing her privacy settings. For example, while it is fine for anyone to see her public information, which includes her name, profile photo, etc., she may want to allow only herself and her friends to post to her timeline. When she or others post something, she can control who sees it by using the audience selector.
Furthermore, it would be prudent for Judge Thompson to announce and explain relevant ESM relationships to the lawyers and parties appearing before her. For example, the judge may say: “The defendant’s attorney is a Facebook friend of mine. However, we are bar association colleagues only and have no special relationship.” Such an on-the-record announcement gives all participants the opportunity to raise any concerns.

**Lack of Judicial Competence**

**Scenario**
Assistant County Attorney Pauline Walker tells her boss, County Attorney John Reynolds, that she observed some troubling events in Judge Channing’s courtroom. Judge Channing stumbled as he ascended to the bench, ordered the bailiff to remove a young woman who sneezed, and later seemed to be struggling to stay awake during testimony. The judge asked Walker the same question three times during the proceeding. Reynolds told Walker that others have reported troubling occurrences in that courtroom and he’s heard a lot of talk from courthouse staff. And Reynolds recently visited Judge Channing in his chambers regarding a courthouse security issue and the judge could not remember the DAs name even though they have known each other for 18 years.

- Assuming that this behavior continues, is there an ethical obligation to report Judge Channing?

**Rules**
MCJC Rule 2.5 states that “a justice shall perform judicial and administrative duties competently and diligently.” ABA Model Rule of Professional Conduct 8.3(b) states that a lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raise a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

**Analysis**
Judge Channing’s behavior causes concern about his abilities, but it’s difficult to discern the cause. The judge could be experiencing impairment for numerous reasons, including dementia, substance abuse or improper medication dosage. Regardless, it’s a serious matter if a judge is unable to perform judicial duties competently and diligently.

Lawyers should carefully consider whether they may be ethically implicated if they fail to report a judge’s troubling actions and/or behaviors. Lawyers who have observed Judge Channing’s behavior may have an ethical obligation to report under Model Rule 8.3(b), especially if his behavior continues.

**Questionable Conduct of Law Clerks**

**Scenario**
Judge Jenkins and his new law clerk, Anita Clark, have just finished hearing closing arguments in Jones v. Everest Construction involving the collapse of a pedestrian walkway. The judge takes the case under advisement. He discusses the case with Anita, who started her job that day. Anita tells the judge that she’s been following the two-week-long trial in the news. She adds that it seems that the quality of the concrete is a key factor in the case. The judge asks Anita how she knows so much about construction engineering. She explains that her brother is an...
engineering professor and that they have been discussing the case. The judge tells Anita to review the proposed findings of fact and conclusions of law from both parties and draft the opinion in favor of the plaintiff. Anita asks the judge if she can research load bearing beams on the internet and the judge says yes. After the opinion is handed down, the judge is widely criticized. Megan Melton, one of the judge’s favorite former clerks, now a reporter, calls and offers the judge an opportunity to tell his side of the story.

- Did it violate the Judicial Code when Judge Jenkins asked Anita to write the draft opinion even though she had discussed substantive aspects of the case with her brother?
- Is it a violation of the Judicial Code to perform online research?
- May Judge Jenkins grant an interview to Megan after he hands down the opinion?

**Rules**

Law clerks provide significant assistance and support to judges and judges have a corresponding ethical obligation to ensure that their clerks comply with the same rules that they must follow. MCJC Rule 2.9 prohibits ex parte communications and Judge Jenkins is required by MCJC Rule 2.12 to ensure that his staff complies with the judicial conduct rules. As the comment to MCJC Rule 2.12 states, “[a] judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code if undertaken by the judge.”

Additionally, MCJC Rule 2.10 prohibits judicial statements on pending and impending cases. The Annotated Model Code of Judicial Conduct states that “the requirement that judges abstain from public comment regarding a pending proceeding continues through any appellate process and until final disposition.”

**Analysis**

Because Anita had engaged in ex parte communications with her brother, an engineering professor, it was probably not permissible for the judge to ask Anita to draft the opinion.

With regard to the online research, the Model Judicial Code does not contain a clear-cut answer to this question. It is usually considered permissible to perform some online research to gain a better understanding of general concepts. However, it may be very difficult for a law clerk to know where to draw that line. The judge should have given her more direction.

At the conclusion of any trial, a judge may feel strongly that the media is distorting his or her opinion. However, a judge may only speak in general terms about the issues raised in a case. Judge Jenkins must not discuss Jones until the time for appeal has expired or any appeal has concluded. Discussing the case in detail with a former law clerk turned reporter would violate MCJC Rule 2.10.

**Conclusion**

Understanding the ethics rules is important for the entire legal community. Public lawyers have frequent contact with judges and often are in a unique position to see a judge’s day-to-day interactions. These interactions are made more complicated when the lawyer has a personal relationship with the judge. In those situations, lawyers and judges should be especially careful to respect the rules. New lawyers, including law clerks, should understand the intersection of the ethics rules for lawyers and judges as this knowledge will help them navigate
the legal system and perform their duties more ethically. Knowing the ethics rules for both lawyers and judges will provide an overall benefit to the administration of justice.

Susan Kidd is the division’s director. She is a former assistant county attorney.

Endnotes

2 In re Brown, 662 N. W.2d 733 (Mich. 2003).
5 In re Fleet, 610 So. 2d 1282 (Fla. 1992).
6 In re Schapiro, 845 So. 2d 170 (Fla. 2003).
7 On Facebook, when a person tags a photo of another person, a link is created to that person’s profile. The post that is tagged may also be added to that person’s timeline. Anyone who sees that post with the tagged person can click on the person’s name to go to that person’s profile. What is Tagging and How Does it Work?, FACEBOOK, www.facebook.com/help/124970597582337 (last visited Dec. 1, 2015).
9 Id.