

A 'FRIEND' AT COURT?

How to deal with the intersection of judges and social media.

BY JOHN G. BROWNING

IN THE INCREASINGLY WIRED WORLD IN WHICH WE LIVE, IT COMES AS NO SHOCK THAT 72 PERCENT OF ALL ADULT AMERICANS HAVE A PRESENCE ON AT LEAST ONE SOCIAL NETWORKING SITE. But would you—and should you—

be surprised if you received a Facebook friend request from a judge or if you learned that an opposing counsel was Facebook friends with the judge? Should judges enjoy the benefits of social media, or is it more important to avoid any relationship that might compromise the appearance of impartiality or erode public confidence in the courts? Judges, lawyers, and judicial ethics authorities throughout the country have wrestled with these questions. This article will provide not only an overview of how Texas and other states have addressed these issues but also an examination of the fleeting nature of “friendship” in the digital age and the type of online miscues that judges have made.

First, let's remember that judges are human, too. In 2010, the Conference of Court Public Information Officers conducted a survey titled “New Media and the Courts: the Current Status and a Look at the Future.” Forty percent of the responding judges said that they used one or more social networking sites; not surprisingly, elected judges (66.7 percent) were far more likely to use social media than their appointed counterparts (8.8 percent).¹ And when it came to the use of social net-





working in their professional lives, these judges were clearly conflicted, with about half of the respondents either disagreeing or strongly disagreeing with the following statement: “Judges can use social media profile sites, such as Facebook, in their professional lives without compromising professional conduct codes of ethics.”² This concern is validated when one considers some of the following ethical missteps that judges have made online:

- In March 2014, Arkansas 20th Judicial Circuit Judge Mike Maggio admitted to making racist and other offensive remarks under the screen name “geauxjudge,” including leaking details of a sealed adoption proceeding involving Oscar-winning actress Charlize Theron. He dropped out of a race for a seat on the Arkansas Court of Appeals in the wake of the controversy, and Arkansas’s Judicial Discipline and Disability Commission launched an investigation.³
- Ennis Municipal Court Judge Lee Johnson ignited a firestorm of controversy by posting on his Facebook page about Heisman Trophy-winning Texas A&M quarterback Johnny Manziel getting a speeding ticket in his town in January 2013. The gloating by the Baylor grad prompted a second, apologetic Facebook post as well as a reprimand by the Ennis city manager.⁴
- Chief justice of the Georgia Superior Court for the Mountain Judicial Circuit, Ernest “Bucky” Woods III, retired from his bench in 2010 after revelations surfaced of his relationship with a young woman who appeared in his court on drug charges. Judge Woods contacted her on Facebook after seeing her in his court, and this led to loaning her money, visiting her apartment, and advising her on how to proceed in court appearances before him. Judge Woods also used a photo from the woman’s Facebook page as a basis for issuing a probation revocation against another drug defendant.⁵

- In perhaps the most infamous case of a judge misbehaving on social media, District Court Judge B. Carlton Terry Jr. received a public reprimand in April 2009 from the North Carolina Judicial Standards Commission for activities related to a Facebook “friendship” with an attorney appearing before him. Just before a child custody and support proceeding that lasted from Sept. 9 to Sept. 12, 2008, Judge Terry and attorney Charles A. Schieck (attorney for the ex-husband) became Facebook friends following an in-chambers meeting. A series of Facebook messages were then exchanged between the two while the proceeding went on, with Schieck commenting on everything from trial strategy (“How do I prove a negative?”) to how long the proceeding would last to just plain sucking up (“I have a wise Judge”). Just before he ruled, Judge Terry disclosed the Facebook exchanges to the ex-wife’s attorney (he also later disclosed having done some independent online research of the ex-wife’s website). Motions to vacate the ruling, to disqualify Judge Terry, and for a new trial quickly followed. In reprimanding him, the commission commented that Judge Terry demonstrated a disregard for “the principles of conduct embodied in the North Carolina Code of Judicial Conduct” and was “prejudicial to the administration of justice.”⁶

While examples like these may give observers pause where judges and online interactions are concerned, it’s important to remember that, as a number of courts have pointed out, Facebook “friendship” is hardly of the depth that would cause concern about impropriety. One court observed that “‘friendships’ on Facebook may be as fleeting as the flick of a delete button.”⁷ The Kentucky Supreme Court noted that “‘friendships’ on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community.”⁸ And a federal judge in California soundly rejected the notion of Facebook friendships as serious or long-lasting, stating “it’s no secret that the ‘friend’ label means less in cyberspace than it does in the neighborhood, or in the workplace, or on the schoolyard, or anywhere else that humans interact as real people.”⁹

Nevertheless, uncertainty over how to regard judges and Facebook friendships has been pervasive enough to prompt one American Bar Association Judicial Ethics Opinion, as well as judicial ethics opinions or decisions in 11 states to date. Whether a judge and a lawyer may be Facebook friends depends on the jurisdiction in which they practice. In February 2013, the ABA Standing Committee on Ethics and Professional Responsibility provided guidance to those jurisdictions that had yet to confront this issue with ABA Formal Opinion 462 on “Judges’ Use of Electronic Social Networking Media.”¹⁰ That opinion offers a practical, well-reasoned approach for judges’ activities on

social media, stating that it’s fine for judges to have such online connections and pointing out the many benefits that follow, including having a platform for political campaigns and maintaining accessibility to the public. However, it reminds judges to use caution and to be mindful that canons of judicial conduct apply to social media just as they do with more “traditional and less public forms of social connection.”¹¹ Formal Opinion 462 says that while judges may be Facebook friends with lawyers and others who might appear before them, they should take care to not convey an impression that such individuals are in a position to influence the judge. When it comes to disclosure, the opinion notes “context is significant” and a 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.”¹²

Most jurisdictions that have addressed the issue reached the same conclusion as their ABA counterparts: judges may have Facebook friendships and be active on social media but should at the same time be cautious in their use of technology. This is the position taken in New York,¹³ Kentucky,¹⁴ Maryland,¹⁵ Tennessee,¹⁶ and Ohio.¹⁷ South Carolina, looking at a more limited question, concluded that “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 magistrate.”¹⁸ Other states have concluded that while a judge may be active on social media and have Facebook friendships, a judge is prohibited from being Facebook friends with those who practice before him or her. Massachusetts takes this position,¹⁹ as does Oklahoma²⁰ (expanding it to also encompass law enforcement officers and social workers appearing in court) and California.²¹ California’s opinion gives a thoughtful analysis of the factors that a judge should consider in determining whether there might be concerns, including the nature of the site (a social media profile for an organization like an alumni group or bar association is less likely than an individual profile to convey any perception of special influence), the number of friends (the greater the number, the less likely it is that any one individual is in a position to influence the judge), and how the judge determines whom to friend (a judge who uniformly accepts all friend requests is less likely to create the impression that a certain lawyer holds sway than a judge who is more selective in his or her friending).

Florida is by far the most restrictive state when it comes to judges and social media. In a series of five judicial ethics opinions between 2009 and 2013, Florida has made it clear that judges are prohibited from being Facebook friends with lawyers who might appear before them, or even count such attorneys among their connections on LinkedIn or their followers on Twitter.²² Florida’s judicial ethics opinions on this subject attribute an importance to friend status that bears no resemblance to the term’s actual meaning in

an online context, a fact noted by a minority portion of the committee issuing these opinions. In subsequent cases involving efforts to recuse or disqualify a judge who is Facebook friends with one of the lawyers, Florida appellate courts have repeatedly pointed to the draconian approach taken by the state's Judicial Ethics Advisory Committee. In *Domville v. State*, it was held that a judge's Facebook friendship with one of the prosecutors was grounds for automatic disqualification.²³ In a more recent case involving a judge in a divorce proceeding who had sent an *ex parte* friend request to one of the parties but then reacted punitively when her request was not accepted, the appellate court ruled that the judge should have been disqualified since her actions on social media could "create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial."²⁴ However, the appellate court expressed "serious reservations" about Florida's strict approach, noting that "a Facebook friendship does not necessarily signify the existence of a close relationship. ... Requiring disqualification in such cases does not reflect the true nature of a Facebook friendship and casts a large net in an effort to catch a minnow."²⁵

Where does Texas stand? In *Youkers v. State*, the 5th Court of Appeals in Dallas dealt with a criminal defendant appealing his conviction for assaulting his girlfriend on the grounds that the trial judge lacked impartiality due to a Facebook friendship with the girlfriend's father, as well as an alleged *ex parte* communication.²⁶ The father, who became acquainted with the judge while running for elected office during the same campaign cycle, had indeed reached out to his friend via Facebook to seek leniency for the defendant. However, as the appeals court made clear, the trial judge responded properly, advising the father that his communication violated rules against *ex parte* contact, that there could be no further communications, and that the judge was informing the lawyers for both sides and placing a copy of the communication in the court file. In her opinion for the appeals court, then-Justice Mary Murphy observed that this was a case of first impression in Texas. Citing ABA Judicial Ethics Opinion 462 approvingly, she noted that there were many beneficial aspects of judges being active on social media, and further stated that being Facebook friends with someone was not necessarily representative of "the degree or intensity of a judge's relationship with that person."²⁷ In examining the record for further context, the court noted that there was nothing to indicate that the Facebook friendship between the judge and the girlfriend's father was anything but a fleeting acquaintance. Most important, the court pointed out that the judge fully complied with established protocol for handling *ex parte* communications. Justice Murphy observed that judges using social media should remain mindful of their ethical obligations, noting that while new technology may "create new venues for

communications, our analysis should not change because an *ex parte* communication occurs online or offline."²⁸

In an age in which "friending" has become a verb and connections are formed with the speed of a search engine, and in which digital intimacy has become the norm, it is appropriate to regard the issue of judges' use of social media with a description derived from Facebook itself: "It's complicated." While a judge's misuse of social networking platforms can certainly violate canons of ethics and negatively impact public perception of the judiciary, so can other, more traditional relationships or communications involving judges. As existing rules of judicial ethics continue to be applied to scenarios involving technology never envisioned when those rules were created, some tension will no doubt continue to exist where technology and the law intersect. Yet even though judges should proceed with caution, they should still proceed. **TBJ**

NOTES

1. Christopher J. Davey et al., *New Media Comm. of the Conference of Court Public Information Officers, New Media and the Courts: The Current Status and a Look at the Future*, CCPIO (2010), available at <http://ccpio.org/wp-content/uploads/2012/06/2010-ccpio-report.pdf>.
2. *Id.*
3. Debra Cassens Weiss, *Controversial 'gauxjudge' Commenter Admits He is a Judge, Drops Out of Appellate Race*, ABA Journal (Mar. 7, 2014, 8:13 a.m.), http://www.abajournal.com/news/article/controversial_gauxjudge_commenter_admits_he_is_a_judge_drops_out_of_appella.
4. Sean Lester, *Judge, Baylor Graduate, Makes Johnny Manziel Speeding Ticket Public on Facebook*, SportsDayDFW (Jan. 17, 2013, 3:49 p.m.), <http://collegesports.blog.dallasnews.com/2013/01/judge-baylor-graduate-makes-johnny-manziel-speeding-ticket-public-on-facebook.html>.
5. Kathryn Hayes Tucker, *Ga Judge Steps Down Following Questions About Facebook Relationship with Defendant*, Law.com (Jan. 7, 2010), http://www.alm.law.com/jsp/article.jsp?id=1202437652986&Ga_Judge_Steps_Down_Following_Questions_About_Facebook_Relationship_With_Defendant&slreturn=20140321140103.
6. Public Reprimand: B. Carlton Terry, Inquiry No. 08-234 (N.C. Jud. Standards Commission, Apr. 1, 2009).
7. *Quigley Corp. v. Karkus*, 2009 WL 1383280 (E.D. Pa. May 15, 2009).
8. *Sluss v. Kentucky*, 381 S.W.3d 215, 220-222 (Ky. 2012).
9. *Williams v. Scribd Inc.*, 2010 U.S. Dist. Lexis 90496, at 16 (S.D. Cal. June 23, 2012).
10. ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 462 (2013).
11. *Id.*
12. *Id.*
13. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).
14. Ethics Comm. of the Ky. Judiciary, Formal Ethics Op. JE-119 (2010).
15. Md. Judicial Ethics Comm., Published Op. 2012-07 (2012).
16. Tenn. Judicial Ethics Comm., Op. 12-01 (2012).
17. Ohio Bd. of Comm'rs on Grievances and Disputes, Op. 2010-07 (2010).
18. S.C. Judicial Dep't Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009).
19. Mass. Comm. on Judicial Ethics, Op. 2011-06 (2011).
20. Okla. Judicial Ethics Advisory Panel, No. 2011-3 (2011).
21. Cal. Judges Association Ethics Comm., Op. 66 (2010).
22. See Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009); Fla. Judicial Ethics Advisory Comm., Op. 2010-04 (2010); Fla. Judicial Ethics Advisory Comm., Op. 2010-06 (2010); Fla. Judicial Ethics Advisory Comm., Op. 2012-12 (2012); Fla. Judicial Ethics Advisory Comm., Op. 2013-14 (2013).
23. *Domville v. State*, 103 So. 3d 184 (Fla. 4th Dist. Ct. Appeals 2012), *rev. denied*, *State v. Domville*, 110 So. 3d 441 (Fla. 2013).
24. *Chace v. Loisel*, 2014 WL 258620 (Fla. Ct. Appl. Jan. 24, 2014).
25. *Id.*
26. *Youkers v. State*, 400 S.W.3d 200 (Tex. App.—Dallas 2013, no writ).
27. *Id.* at 205-06.
28. *Id.* at 206.



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