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Why Can't We Be (Facebook) Friends? You Be The Judge

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Social media has become a part of most lawyers' personal and professional lives. The same is true for many judges. However, it is still not clear when, if at all, it is appropriate for a judge to be "friends" with a lawyer on social media, particularly when that lawyer appears regularly before the judge. While it is certainly true that, as some courts and ethics committees have observed, social media is fraught with peril for judges, no uniform rule has emerged on the issue. Some jurisdictions prohibit judges from being "friends" with any lawyer who appears regularly before them, while others do not prohibit the practice unless the social media "friendship" also implicates one of the canons of the Code of Judicial Conduct. The latter seems to be the better approach, but it has not been universally adopted and it is not clear that it ever will be.

In a recent case, Chace v. Loisel, a Florida judge presiding over a matrimonial matter sent a Facebook friend request to the petitioner while the case was pending. On the advice of counsel, the petitioner ignored the request. The judge eventually entered a "disproportionally excessive alimony award" against the petitioner. Following entry of final judgment, the petitioner filed a formal complaint against the judge, alleging that he retaliated against her for ignoring the Facebook request. When the respondent moved for clarification of certain provisions in the final judgment, the petitioner also moved to disqualify the judge. The judge denied the petitioner's motion, holding that it was legally insufficient on its face, and the petitioner appealed.

The appellate court reversed, holding that the judge's ex parte communication with the petitioner presented a legally sufficient basis for disqualification. However, this decision was based on the ex parte nature of the communication, not the fact that it occurred on social media. On that point, the court went further and criticized an earlier Florida trial court decision that held that a judge's existing Facebook friendship with the prosecutor of an underlying criminal case justified disqualifying that judge from that case. The appellate court noted that it had "serious reservations" about the trial court's rationale in that case. Specifically, the appellate court observed:

The word "friend" on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger. A Facebook friendship does not

necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and any other friendship a judge might have.

Accordingly, the Chace court held that, following this precedent would require disqualification in every case involving even a casual acquaintance of a judge, a result that did not "reflect the true nature of a Facebook friendship and cast[ ] a large net in an effort to catch a minnow." Ultimately, it was the ex parte communications with petitioner that rendered the judge's conduct inappropriate, not the fact that those inappropriate communications took place on Facebook.

The approach adopted by the Florida court in Chace is similar to the one adopted by the American Bar Association and in several states. In ABA Formal Opinion 462, the ABA opined that a judge can participate in social networking but must comply with the Code of Judicial Conduct when doing so. For example, a judge must not form relationships on social media that convey an impression that any person or organization is in a position to influence the judge, and must avoid making comments that could be construed as ex parte communications about pending matters. However, the ABA determined that "[s]imple designation as a [social media] connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person," and therefore is not, without more, inappropriate.

Similarly, in New York, the Advisory Committee on Judicial Ethics concluded: "there is nothing inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize ... with attorneys who appear in the judge's court, subject to the Rules Governing Judicial Conduct." Therefore, like the Chace court, the committee framed the question as "not whether a judge can use a social network, but, rather, how he/she does so." In arriving at this conclusion, however, the committee noted that "social networking sites are fraught with peril for judges," and used an analogy to "old fashioned" forms of social networking to try to persuade judges to proceed with caution:

In some ways, [connecting with a lawyer through a social networking site] is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

In a later opinion the committee reiterated its conclusion that "the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal," and there was no "appearance of impropriety based solely on [a judge] having previously 'friended' certain individuals who [were later] involved in some manner in a pending action" (emphasis in original).

Several other states have adopted a similar approach. E.g. Ethics Committee of the Kentucky Judiciary Opinion JE-119 (January 2010) ("The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically do not 'convey or permit others to convey the impression that they are in a special position to influence the judge."); Maryland Judicial Ethics Committee Opinion 2012-07 (June 2012) (holding that "the mere fact of a social connection does not create a conflict" and observing: "The Committee [ ] notes that there is no rule prohibiting judges from having what traditionally has been thought of as 'friends,' be they attorneys or laypersons ... Attorneys are neither obligated nor expected to retire to a hermitage upon becoming a judge."); Ohio Board of Commissioners on Grievances and Discipline Opinion 2010-7 ("A judge may be a 'friend' on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any

other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct.").

Other states have taken a different approach, and have imposed more restrictive rules on judges using social media. For example, Oklahoma judges can "hold a social networking account that includes as 'friends' any person who does not regularly appear or is unlikely to appear in the Judge's court," but cannot do the same with "social workers, law enforcement officers, or others who regularly appear in court in an adversarial role." The Oklahoma Judicial Ethics Advisory Panel concluded that being "friends" on social media with individuals who regularly appear in front of a judge violates the judicial canon that "prohibits a judge from conveying an impression, or allow[ing] others to convey the impression, that a person is in a special position to influence the judge." Whether the individual with whom the judge is "friends" on social media actually could influence the judge is irrelevant. It is enough that simply being "friends" conveys to the public the impression that the individual could do so.

The Florida Judicial Ethics Advisory Committee came to the same conclusion (although the Chace court ultimately refused to follow it). It explained that the selection process — accepting some "friend" requests but rejecting others — could convey an impression that an individual is in a position to influence a judge. If a judge accepted a lawyer's "friend" request, the public might perceive that the lawyer held a position of influence with the judge that others, whose "friend" requests were rejected, might not. Moreover, the Florida Ethics Advisory Committee believed that this impression would still exist even if a judge accepted all "friend" requests that were received from lawyers who appeared before the judge:

The judge's commitment to accept as a "friend" all attorneys who ask to become a "friend" still violates Canon 2B because (1) it still creates a class of special lawyers who have requested this status and (2) these lawyers as a group, in contrast to other lawyers who do not participate in social networking sites or who choose not to ask the judge to accept them as the judge's "friend," would appear to the public to be in a special relationship with the judge.

Because of the inherent "selectivity and exclusivity" of the "process of selection," the Florida Ethics Advisory Committee held that judges should not be social media "friends" with lawyers who regularly appear before them. Other jurisdictions have come to the same conclusion. E.g. Massachusetts CJE Opinion No. 2011-6 ("The Committee is of the opinion that the Code prohibits judges from associating in any way on social networking sites with attorneys who may appear before them.").

Finally, California has staked out a more nuanced middle-ground between the two approaches described above. The California Judges Association ruled that there is no "per se prohibition of social networking with lawyers who may appear before a judge," but cautioned that, depending on the nature of a judge's social networking interactions, the judge could nonetheless create the impression that a lawyer occupies a position of special influence with the judge, which would be inappropriate. The association identified several factors that California judges should consider when determining whether their social networking crosses this line, including the nature of the social networking site (the more personal, the greater the likelihood that a "friend" would be in a special position to influence the judge) and the judge's practice in deciding which lawyers to accept as "friends" (the more inclusive the judge is the less likely it would be that he could create the impression that one lawyer would be in a special position as compared to the others). The association then provided one example each of what would be permissible and impermissible. These examples suggest that it would not be appropriate for a California judge to have "friends" on a more personal networking site — where a judge "updates family and friends about her/his extrajudicial activities" and includes "such items as vacation photos, updates on the judge's children, and

the judge's thoughts about books, movies and restaurants" — as opposed to one that is more professional — where a judge communicates with his contacts on issues relevant to the legal profession. Essentially, in California, social networking like Facebook would be problematic for judges, while professional networking like LinkedIn would not. Finally, the California Judges Association held that a judge should not interact with a lawyer who has a matter pending before the judge, and should actually "unfriend" any lawyer with such a matter.

Social networking is still relatively new so it is not surprising that there are differing opinions about its ethical implications for judges. It is somewhat surprising, however, that the various states that have confronted the issue, and particularly those that prohibit connections between judges and attorneys who appear before them, treat social network "friends" differently than real-life friends. They do this not because there is a closer bond between the former than the latter. In fact, if judges are like the rest of us then the opposite is probably true. As the Chace court observed, "a number of words or phrases could more aptly describe [social network 'friends'], including acquaintance and, sometimes, virtual stranger." Instead, the problematic part of a social media friendship in some jurisdictions is the public nature of that relationship. As a result, somewhat ironically, these jurisdictions impose greater restrictions on a judge's less intimate, but more public, social media "friendships" than they do on that same judge's more intimate, but less public, real-life friendships.

This seems backwards, and the approach adopted by the Chace court and jurisdictions like New York, Kentucky, Maryland, and Ohio seems to be the better one going forward. In these jurisdictions, ethical issues surrounding social media relationships between judges and the lawyers that appear before them are evaluated the same way issues surrounding real-life relationships are: ex parte communications are wrong, whether made through social media or through old fashioned methods like the telephone; judges should avoid commenting publicly on pending cases; close friendships between a judge and a lawyer appearing before the judge should be disclosed. The Code of Judicial Conduct can continue to effectively regulate judges regardless of whether an alleged infraction occurs on a social networking site or in person.

Finally, this issue is likely to become more prevalent as the next generation of judges ascend to the bench. Most judges today were not active on social media when they practiced. This will not be true of the next generation. Social media in all of its many forms — Facebook, Twitter, blogs, Instagram, etc. — is now a part of a lawyer's personal and professional life. When a lawyer becomes a judge he is not required to ignore or shun his real-life friends, and, for the same reasons, it is unlikely that the lawyer would be willing to "un-friend" all of the lawyers with whom he may have spent years cultivating (or simply collecting) "friendships" on social media. Accordingly, it seems likely that the rules about judges, lawyers and social media are likely to continue to evolve in the coming years.

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