Ethics and Social Media: Tools, Traps and Temptations

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ETHICS AND SOCIAL MEDIA:
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Few things have changed the practice of law in the past twenty years more than the explosion of technology. Hearings can be conducted, depositions can be taken remotely and research can be pursued and completed from a computer at home or office or with the use of another internet device. Pleadings can be filed, cases can be reviewed, titles and other public records can be explored and banking can be done by just using a phone.

In short, communications and investigations can be conducted from virtually anywhere.

The **Tools** include not just the hardware and software that connects the globe and allows easy access to sources of information but also the virtual communities that have come into existence in recent years. Attached is a listing of some of the virtual communities with more than 100 million active users which is led by Facebook with over 2 plus billion registered users, Facebook messenger which also has 2 plus billion registered users and also contains familiar names, Instagram, Twitter, Skype, Google, LinkedIn, Snapchat and Pinterest, all of these having been formed in the United States.

The **Traps** include the dangers of breaches of security and cybercrimes by opening a door to someone seeking to steal data, identity and eventually your assets.

The **Temptations** begin with the decision as to whether or not you trust someone who should not be trusted, or you forget the rules of ethics and civility and instead communicate impulsively, recklessly and unprofessionally. The speed of the communication can be one of the temptations and traps by creating the ability to innocently and compulsively communicate.

There appear to be generally three areas of the use of social media and the internet of potential concern in the practice of law in general and bankruptcy in particular:

- **Driving business**: As the practice of law changes, attorneys seek to reach out to new clients and may do so by use of websites, blogs and Facebook to maximize their likelihood of being discovered, recognized and retained. This can involve professional search engines and groups such as LinkedIn and Avvo.

- **Information access**: A second area _of use can be general accumulation of information which also includes the ability to investigate and conversely be investigated.

- **Self-Education**: A third area of use can be the expansion of an individual attorney's expertise.

This presentation will include a number of hypothetical scenarios originally offered by Judge Stephen Rhodes and used today with his permission. These illustrate dilemmas and "situations" as well as opportunities that can arise in the real world.

Statutory Oversite:

As part of the increase in both the desire of attorneys to increase and reinvent their law practices in the community with potential clients is the ever growing use of the internet to communication concerning a lawyer's services. In the state of Ohio, this was previously dealt with by the Ohio Code of Professional Responsibility until February 1, 2007 when that code was replaced by the Ohio Rules of Professional Conduct which remain in effect and have been amended as recently as March 15, 2016. The shift in the use of the word "responsibility' to 'conduct" appears in line with a movement on the part of the Ohio legislature and courts to identify what can be done rather than just warn the parties to be cautious.

Regarding advertising, included in these materials are copies of Rule 7.1: Communications Concerning a Lawyer's Services and Rule 7.2 Advertising and Recommendation of Professional Employment. Also included are comments and comparisons that are part of the official rules.

Rule 7.1 states: "A lawyer shall not make or use a false, misleading or non-verifiable communication about a lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading".

Two comments included with the Rule make it clear that the Rule means that the truth can still be misleading:

> "[1] This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.
>
> [2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."

Investigative Use:

Social media can and often is used as an investigative tool in many chapters 7, 13 or 11 cases to learn more about the debtors, creditors or principals of either than may be revealed in the schedules. The use and existence of social media accounts and sites has led to questions as to

whether possession a Facebook or other site is an asset that should be disclosed in bankruptcy filings and if it is potentially something that could be liquidated for the benefit of creditors.

More and more trustees, creditors, and attorneys for creditor's committees are searching Facebook sites or other social media sites with regard to information regarding debtors or other involved parties as part of their due diligence in carrying out their responsibilities in representing their clients. An argument can be made that debtor's attorneys should carefully craft their retention agreements to require the disclosure of certain social media sites or accounts that the debtors may have and that the attorney may wish to consider requiring access to the account as part of the terms of their representation. I believe that if the engagement letter is drafted and executed, that the content would be subject to privilege guidelines between the debtor and the attorney. Debtor's counsel should, perhaps now more than in the past, have concerns about being surprised as a meeting of creditors by things that a trustee or creditor may have known or discovered about the debtor that the debtor's attorney did not know. Retention agreements should also reference an obligation of candor and full disclosure.

Social media and the growing use of the internet has become an easily accessible educational tool within practice groups in the field of bankruptcy. The National Association of Bankruptcy Trustees has maintained for a number of years an active national ListServ open to its members which allows trustees from all over the country to communicate with regard to questions of substantive law and procedure, the value of assets and the exchange of sample pleadings. The National Association of Consumer Bankruptcy Attorneys has also recently engaged in a new "Strictly Bankruptcy Issues" site to exchange data and create communication opportunities for its members across the country.

The Judiciary:

The ethics and limits of participation in social media groups by the Judiciary, their staff and other court personnel is now also the subject of social media concerns. Ohio Supreme Court Opinion 2010-7, portions of which are attached hereto issues the opinion that a judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge. The reverse conclusion, that a lawyer may be a "friend" to the judge also appears to be permissible.

The portions of the Opinion attached hereto also include on page 5 of the Opinion references to the status in 2010 of the positions taken by the Ethics Committee of the Kentucky Judiciary. Although this Opinion is now 6 years old, no more recent opinions have been issued in Ohio. Generally opinions clearly indicate that the term "friend" in the language of social media is clearly different than traditional understanding of the meaning of friendship as a close personal relationship.

Other areas that are still subject to strict limitations involve the communication and _____ contact by the public and attorneys with the court and court personnel and by court personnel with the public and with attorneys who practice before these courts. Included in these materials is a portion of the social media and social networking policy for the employees of the U.S. Bankruptcy Court of the Eastern District of Michigan which specifically addresses the types of relevant technologies and guidelines to be followed by court employees.

Social Media as a Judiciary tool:

Finally, included in the materials is an example of court's proactive use of social media through a copy the official Twitter account of the United States Bankruptcy Court for the Eastern District of Michigan which is used to distribute links to case opinions.

Permitted use rules and guidelines regarding social media are continually changing for both State and Federal Courts. Practitioners should be diligent in being aware of such changes in the rules and adhering to them in the course of their practice.

Rank	Name	Registered users	Active user accounts	Date launched	Country of origin	Date of active user stat.
1	Facebook	2+ billion[3]	1.65 billion[4]	February 2004	United States	March 2016
2	WhatsApp	1+ billion[5]	1 billion[5]	June 2011	United States	February 2016
-	Facebook Messenger	2+ billion[3]	900 million[6]	August 2011	United States	April 2016
3	Tencent QQ	1+ billion[7]	877 million[8]	February 1999	China	March 2016
4	WeChat	1+ billion[9]	762 million[8]	January 2011	China	March 2016
-	Tencent Qzone	1+ billion[7]	648 million[8]	May 2005	China	March 2016
5	Instagram	500+ million [10]	500 million [10]	October 2010	United States	June 2016
6	Twitter	1+ billion[11]	310 million [12]	March 2006	United States	March 2016
7	Skype	750 million[13]	300 million [14]	August 2003	Estonia	March 2014
8	Baidu Tieba	1 billion[15]	300 million [15]	December 2003	China	July 2014
9	Sina Weibo	503+ million [16]	261 million [17]	August 2009	China	March 2016
10	Viber	754 million[18]	249 million [18]	December 2010	Israel	June 2015
11	LINE	600 million[19]	218 million [20]	June 2011	Japan	March 2016
12	Google+	2+ billion[21]	212 million [22]	June 2011	United States	April 2015
13	YY	773 million[23]	122 million [24]	December 2010	China	June 2015
14	LinkedIn	433 million[25]	106 million [25]	May 2003	United States	March 2016
15	Snapchat	100+ million [26]	100+ million [26]	September 2011	United States	May 2015
16	BBM	190 million[27]	100 million [28]	February 2007	Canada	February 2015
17	Pinterest	100+ million [29]	100 million [29]	March 2010	United States	September 2015

VII. INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] Characterization of rates or fees chargeable by the lawyer or law firm such as "cut-rate," "lowest," "giveaway," "below cost," "discount," or "special" is misleading.

[5] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

Comparison to former Ohio Code of Professional Responsibility

Rule 7.1 corresponds to DR 2-101. Rule 7.1 does not contain the prohibitions found in DR 2-101 on client testimonials or self-laudatory claims. However, the rule does retain the DR 2-101 prohibition on unverifiable claims.

In addition, Rule 7.1 contains none of the other directives found in DR 2-101(B), the definition of misleading found in DR 2-101(C) (see comment [2] of Rule 7.1), or the directives found in DR 2-101(D), (E), and (G).

For DR 2-101(F) and DR 2-101(H) see Rule 7.3.

Comparison to ABA Model Rules of Professional Conduct

Rule 7.1 is similar to Model Rule 7.1 except for the inclusion of a prohibition on the use of nonverifiable communications about the lawyer or the lawyer's services.

RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through *written*, recorded, or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay any of the following:

(1) the *reasonable* costs of advertisements or communications permitted by this rule;

(2) the usual charges of a legal service plan;

(3) the usual charges for a nonprofit or lawyer referral service that complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio;

(4) for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or *law firm* responsible for its content.

(d) A lawyer shall not seek employment in connection with a matter in which the lawyer or *law firm* does not intend to participate actively in the representation, but that the lawyer or *law firm* intends to refer to other counsel. This provision shall not apply to organizations listed in Rules 7.2(b)(2) or (3) or if the advertisement is in furtherance of a transaction permitted by Rule 1.17.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability;

names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, advertising going beyond specified facts about a lawyer, or "undignified" advertising. Television, the Internet, and other forms of electronic communication are among the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television, Internet, or other forms of electronic advertising would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as provided by these rules, lawyers are not permitted to give anything of value to another for recommending the lawyer's services or channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. A reciprocal referral agreement between lawyers, or between a lawyer and a nonlawyer, is prohibited. *Cf.* Rule 1.5.

[5A] Division (b)(1) allows a lawyer to pay for advertising and communications permitted by this rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, including Internet-based client leads, provided the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5 and 5.4, and the lead generator's communications are consistent with Rule 7.1. To comply with Rule 7.1, a lawyer shall not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Rules 5.3 and 8.4(a).

[6] A lawyer may pay the usual charges of a legal service plan or a nonprofit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in

the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a nonprofit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved pursuant to Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Relative to fee sharing, see Rule 5.4(a)(5).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 7.2(a) directs attention to Rules 7.1 and 7.3, each of which includes or deletes language from the advertising and solicitation rules contained in DR 2-101 through DR 2-104.

The following are provisions of DR 2-101 that have not been included in Rule 7.1, 7.2, or 7.3:

- The specific reference to types of fees or descriptions, such as "give-away" or "below cost" found in DR 2-101(A)(5), although Rule 7.1, Comment [4] specifically indicates that these characterizations are misleading;
- Specific references to media types and words, as set forth in DR 2-101(B)(1) and (2);
- Specific reference that brochures or pamphlets can be disclosed to "others" as set forth in DR 2-101(B)(3);
- The list of items that were permissible for inclusion in advertising, contained in DR 2-101(D).

Comparison to ABA Model Rules of Professional Conduct

Rule 7.2(b)(3) is modified to remove a reference to a qualified legal referral service and substitute a reference to the lawyer referral service provisions contained in Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Rule 7.2 does not include Model Rule 7.2(b)(4) and thus prohibits reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional. Rule 7.2(d) is added to incorporate the prohibition contained in DR 2-101(A)(2) relative to soliciting employment where the lawyer does not intend to participate in the matter but instead will refer the matter to other counsel.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2010-7
Issued December 3, 2010

SYLLABUS: 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. A judge who uses a social networking site should follow these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), 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. To comply with Jud. Cond. Rule 2.9(C), a judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), 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. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, a judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.

OPINION: This opinion addresses a question regarding a judge and a lawyer being "friends" on a social networking site.

> May a judge be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge?

Introduction

A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily. A social network "friend" may or may not be a friend in the traditional sense of the word.

Anyone who sets up a profile page on a social networking site can request to become a "friend" (or similar designation) of any of the millions of users on the site. There are hundreds of millions of "friends" on social networking sites.

A "friend" of a "friend" can become a "friend" of a "friend" and so on. Consequently, some "friends" do not know each other except for their presence on the social network.

Being a "friend" opens the opportunity for social interaction on the network. A "friend" can interact with another "friend" by posting status updates on newsfeeds and walls, by sharing photographs, by sending messages, or by chatting online. And, unless privacy controls are used, interaction with one friend can be viewed by all friends in the network.

Inevitably, a judge who uses a social network site will be asked to "friend" other users, some of whom may be lawyers, some of whom may represent clients in the court on which the judge serves. Thus, judges seek guidance as to appropriate ethical boundaries, in particular as to being "friends" with lawyers on a social networking site.

Ohio Code of Judicial Conduct

There is no rule in the Ohio Code of Judicial Conduct that prohibits a judge from being friends, online or otherwise, with lawyers—even those who appear before the judge.

Social interaction between a judge and a lawyer is not prohibited. Yet, a judge's actions and interactions must at all times promote confidence in the judiciary. A judge must avoid impropriety or the appearance of impropriety, must not engage in *ex parte* communication, must not investigate matters before the judge, must not make improper public statements on pending or impending cases, and must disqualify from cases when the judge has personal bias or prejudice concerning a party or a party's lawyer or when the judge has personal knowledge of facts in dispute.

Canon 1 states that "[a] judge shall uphold and promote the *independence*, *integrity*, and *impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of *impropriety*. [As explained in the Scope section of the Code at [2], "[t]he canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a rule, the canons provide important guidance in interpreting the rules."]

Jud. Cond. Rule 1.2 echoes Canon 1. Jud. Cond. Rule 1.2 requires that "[a] judge 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*."

Canon 2 states that "[a] judge shall perform the duties of judicial office *impartially*, competently, and diligently."

Jud. Cond. Rule 2.4(C) requires that "[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."

Jud. Cond. Rule 2.9(A) requires, with exceptions not applicable herein, that "[a] judge shall not initiate, receive, permit, or consider *ex parte* communications." Pursuant to the Terminology section of the Code an "'[*e*]*x parte* communication' means a communication, concerning a *pending or impending matter*, between counsel or an unrepresented party and the court when opposing counsel or an unrepresented party is not present or any other communication made to the judge outside the presence of the parties or their lawyers." "'Impending' references a matter or proceeding that is imminent or expected to occur in the near future." "'Pending' references a matter or proceeding that has commenced. A matter continues to be pending through any appellate process until final disposition."

Jud. Cond. Rule 2.9(C) requires that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."

Jud. Cond. Rule 2.10 requires that "[a] judge 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* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."

Jud. Cond. Rule 2.11(A)(1) requires that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned, including but not limited to the following circumstances: The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding."

Jud. Cond. Rule. 3.10 requires that "[a] judge shall not practice law."

Upholding these required virtues may be challenging for a social networking judge. Social interaction on a network occurs rapidly and is widely disseminated.

Other states

Outside Ohio, a judge has received discipline for social networking misconduct. In Ohio, thus far, there has been no discipline of judges for social networking misconduct.

In several states, advisory opinions have been issued offering advice to judges as to "friend" issues. In Ohio, thus far, there are no advisory opinions providing ethical guidance.

In Kentucky, the Ethics Committee of the Kentucky Judiciary answered a "Qualified Yes" to the question: "May a Kentucky judge or justice, consistent with the Code of Judicial Conduct, participate in an internet-based social networking site, such as Facebook, LinkedIn, Myspace or Twitter, and be 'friends' with various persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials?" Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Op. JE-119 (2010).

While Ohio's Code of Judicial Conduct is not identical to the Kentucky Code of Judicial Conduct, the advice offered by the Kentucky committee is instructive. The Kentucky committee noted that "[w]hile the nomenclature of a social networking site may designate certain participants as 'friends,' the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge." Id. The Kentucky committee's consensus "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.' Canon 2D." Id. The Kentucky committee stated that like New York, Judicial Ethics Advisory Opinion 08-176, it believes that judges should be mindful of whether on-line connections, alone or with other facts, rise to a close social relationship that should be disclosed and/or required recusal pursuant to Canon 3E(1). Id.

The Kentucky committee noted that the opinion should not be construed as a statement that judges may participate in social networking sites in the same manner as members of the general public. The committee cited Canon 1 (requiring judges to establish, maintain and enforce high standards of conduct, and to personally observe those standards) and Canon 2(A) (requiring judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). The committee stated "pictures and commentary posted on sites which might be of questionable taste, but otherwise acceptable for members of the general public, may be inappropriate for judges." The committee cited Canon 3(E)(1)(a) (disqualifying a judge when a judge has personal knowledge of disputed evidentiary facts); Canon 3B(7) (prohibiting a judge from engaging in *ex parte* communication with attorneys and their clients); and the Commentary to 3B(7) (stating that a judge must not independently investigate facts in a case and must consider only evidence presented). The committee cited Canon 3(B)(9) (prohibiting public comments, while a proceeding is pending or impending in any court, that might reasonably be expected to affect a proceeding's outcome or impair its fairness), and cited Canon 4(G) (prohibiting a judge from practicing law or giving legal advice). The committee noted that judges must be careful that any comments they make on a social networking site do not violate these rules.

make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter *pending* or *impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." Avoidance of any pending or impending case related comments is advised.

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. Not all social relationships, online or otherwise, require a judge's disqualification. For example, see *In re Disqualification of Bressler* (1997), 81 Ohio St.3d 1215, "the mere existence of a friendship between a judge and an attorney or between a judge and a party will not disqualify the judge from cases involving that attorney or party." There is no bright-line rule to determine when a social relationship is a disqualifying factor. As required by Jud. Cond. Rule 2.11, a judge shall disqualify when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding." As explained in Comment [1] to Jud. Cond. Rule 2.11, "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of division (A)(1) to (6) apply." Further, as noted in Comment [5], "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

A judge may not give legal advice to others on a social networking site. As required by Jud. Cond. Rule 3.10, a judge is prohibited from practicing law. Giving legal advice to another on a social network site implicates the practice of law.

A judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.

Conclusion

In conclusion, the Board advises as follows. 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. A judge who uses a social networking site should follow these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), 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. To comply with Jud. Cond. Rule 2.9(C), a judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information

regarding the matter before the judge. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), 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. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, a judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.

SOCIAL MEDIA AND SOCIAL NETWORKING POLICY
for
Employees of the U.S. Bankruptcy Court, Eastern District of Michigan

1. AUTHORITY

This social media and social networking policy applies to all employees of the United States Bankruptcy Court, Eastern District of Michigan. The purpose of this policy is to provide guidance to employees regarding the use of emerging technologies. This policy should be read in conjunction with the Code of Conduct for Judicial Employees, the Court's Internet Usage Policy, the Court's E-Mail Policy and the Personal Use of Government Office Equipment Policy.

This policy is approved by the Judges and administered by the Clerk of Court. The absence of, or lack of, explicit reference to a specific site does not limit the extent of the application of this policy. Where no policy or guideline exist, employees should use good judgment and take the most prudent action possible. Employees should consult with their manager or supervisor if uncertain. Law clerks and judicial assistants should request guidance from the Judge.

2. RELEVANT TECHNOLOGIES

This policy applies to any employee's use of any social media, networking, or dating website on the internet, and includes (but is not limited to) the following specific technologies:

- Classmates
- Digg
- Facebook
- Flickr
- LinkedIn
- LiveJournal
- MySpace
- Personal Blogs
- Personal Websites
- Twitter
- Yahoo! Groups
- YouTube

A more complete list is available at:
http://en.wikipedia.org/wiki/List_of_social_networking_websites

- Maintain a relationship with anyone who is an attorney, trustee or party in a case in the Court. (e.g. "Friend" in Facebook)
- "Recommend" or in any other way affiliate or support any party in a case in the Court. (e.g. "Like" function or "Group" in Facebook or "Digg" on websites)
- Post anything, including writings, photos or videos that might detract from the dignity, integrity or independence of the federal judiciary, or impair its ability to carry out its mission.
- Post anything relating to any lawyer or law firm that has appeared in our Court.
- Post anything relating to any case in our Court.

5. GUIDELINES

Beyond the specific prohibitions in Part 4 above, employees must respect the following guidelines:

Think before you post.

Internet postings–whether text, photos, videos, or audio–remain accessible long after they are forgotten by the user. Remember that nothing is "private" on the Internet despite people's best efforts to keep things private. Do not post anything on the Internet that you would not want to read on the front page of the local newspaper.

Speak for yourself, not your institution.

Remember that you are a representative of the Court and should conduct yourself in a way that avoids bringing embarrassment upon yourself or the Court. Carefully think through the implications of what you post.

Users often believe that their postings are private because of a social networking website's privacy features or that their comments are untraceable because they were made under a screen name. This information may not be private and could cause damage to your reputation and the Court's if it becomes public. As such, Court employees should abide by a simple rule:

If you are not speaking to someone directly or over a secure landline, you must assume that anything you say or write is available for public consumption.

Home Moments

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Official Twitter account for US Bankruptcy Court, Eastern District of Michigan. Content is for informational purposes, no legal advice provided on this site.

Eastern District of Michigan
mieb.uscourts.gov
Joined August 2011

USBC MI Eastern @miebnews · Jun 30
mieb.uscourts.gov/apps/courtOpin... - Opinion Awarding Damages to Plaintiff

USBC MI Eastern @miebnews · Jun 27
mieb.uscourts.gov/apps/courtOpin... - ORDER DENYING DEFENDANT'S MOTION TO REDUCE GARNISHMENT

USBC MI Eastern @miebnews · Jun 24
mieb.uscourts.gov/apps/courtOpin... - Order Requiring Debtor to Amend Disclosure Statement

USBC MI Eastern @miebnews · Jun 23
mieb.uscourts.gov/apps/courtOpin... - Order Requiring Debtors to Amend Disclosure Statement

USBC MI Eastern @miebnews · Jun 23
mieb.uscourts.gov/apps/courtOpin... - Opinion Granting Debtor's Motion to Compel Chapter 13 Trustee t...

USBC MI Eastern @miebnews · Jun 21
mieb.uscourts.gov/apps/courtOpin... - ORDER REQUIRING DEBTOR TO AMEND DISCLOSURE STATEMENT

USBC MI Eastern @miebnews · Jun 21
mieb.uscourts.gov/apps/courtOpin... - Default Judgment

USBC MI Eastern @miebnews · Jun 21
mieb.uscourts.gov/apps/courtOpin... - Order Denying Request for Temporary Restraining Order

USBC MI Eastern @miebnews · Jun 17
mieb.uscourts.gov/apps/courtOpin... - ORDER DENYING DEBTOR'S MOTION TO EXTEND THE AUTOMATIC STAY

USBC MI Eastern @miebnews · Jun 13
mieb.uscourts.gov/apps/courtOpin... - ORDER DISAPPROVING REAFFIRMATION AGREEMENT BETWEEN DEBTOR PAMEL...

USBC MI Eastern @miebnews · Jun 7
mieb.uscourts.gov/apps/courtOpin... - ORDER DENYING DEFENDANT'S MOTION FOR INSTALLMENT PAYMENTS

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ETHICS AND SOCIAL MEDIA
TOOLS, TRAPS AND TEMPTATIONS

2016 Midwest Regional Bankruptcy Seminar

ABI

1. THE CASE OF THE ASSISTANT'S FACEBOOK PAGE PART 1

One day, Attorney Tom gets a call from Attorney Andy complaining that Tom's assistant, Tammy, wrote an entry on her Facebook page stating:

"Oh that Attorney Andy! He messed up yet another case! That's like the 10th one this year! Why do clients keep hiring him? He ought to be ***disbarred***!!!"

Should Tom be concerned about this?

If so, what should Tom do?

Does it matter whether Tom agrees with Tammy?

Can Tom insist that Tammy give him access to her Facebook page to investigate Andy's statements?

What if Tom is a trustee?

2. The Case of the Assistant's Facebook Page Part 2

One day, Tom gets a call from Andy stating that Tammy has posted pictures and a video of herself on her Facebook page and that Tom needs to see them because he won't like them.

Should Tom be concerned about this?

If so, what should Tom do?

Can Tom insist that Tammy give him access to her Facebook page to investigate Andy's statements?

What if Tom is a trustee?

3. The Case of the Attorney's Facebook Friend Request

One day, Bankruptcy Judge Jones sees on his Facebook page a request from Attorney Arnold to "friend" him. Arnold has many cases assigned to Judge Jones.

What should Judge Jones do?

4. The Case of the Judge's Facebook Friend Request

One day, Attorney Arnold gets a request from Judge Jones on his Facebook page to "friend" him. Arnold has many cases assigned to Judge Jones.

What should Arnold do?

5. The Case of the Secret Facebook Investigation Part 1

Tom represents Debtor Dan's sister, Sally, in her attempt to have Dan's debt to her declared nondischargeable. Tom can't find any grounds for that, but Sally did report that in his bankruptcy papers, Dan failed to disclose his $25,000 gun collection and that pictures of it are on Dan's Facebook page. Sally further reports that Dan has since "defriended" her and so she no longer has access to his Facebook page.

Tom's assistant, Tammy, then suggests that she could attempt to "friend" Dan on Facebook, and if he accepts, she could then look for the pictures on his site.

Should Tom accept Tammy's suggestion?

6. The Case of the Secret Facebook Investigation Part 2

Assume instead that Tammy took the initiative and friended Dan on Facebook without discussing it with Tom, found the pictures of the gun collection, printed them and showed the pictures to Tom.

Can Tom use the pictures in objecting to Dan's discharge?

Should Tom discipline Tammy or give her a raise?

Should Tom ignore Tammy's pictures and instead seek a court order for discovery of Dan's Facebook page?

What if Dan deletes his Facebook page by the time Tom gets his order?

7. The Case of the Uninvestigated Facebook Page

Dorothy is meeting with Art, her attorney, to prepare the schedules for her bankruptcy case. Dorothy mentions to Art that she has a Facebook page but Art does not investigate it further or include it in the schedules.

Is Dorothy required to disclose her Facebook page in her schedules?

Did Art violate:

(a) 11 USC §526(a)(2)?
(b) 11 USC §707(b)(4)(C)(i)?
(c) 11 USC §707(b)(4)(D)?
(d) F.R.Bankr.P. 9011(b)(3)?

8. The Case of the Undisclosed Facebook Page

Dorothy is meeting with Art, her attorney, to prepare the schedules for her bankruptcy case. Dorothy mentions that she has a Facebook page, but refuses Art's request to see it. She also refuses to say whether the page shows any of her property as well as Art's advice to disclose the Facebook page in her schedules.

Should Art:

(a) Terminate the representation?

(b) Advise her (again) of the consequences of concealing assets?

(c) Advise her that he is obligated to disclose her Facebook page to the trustee, whether she agrees or not, and that the trustee may ask the Court to order her to disclose it?

9. The Case of the Deleted Facebook Page Part 1

At Debtor Dean's meeting of creditors, the following exchange with Trustee Tim is recorded:

Q: Do you have a Facebook page?

A: Not anymore.

Q: When did you delete it?

A: Last week after I saw my attorney, Andrea.

Q: Why?

A: She gave me a paper telling me to.

Q: May I see the paper?

Here is what the paper says:

9. The Case of the Deleted Facebook Page Part 1

NOTICE TO DEBTORS REGARDING FACEBOOK

YOU ARE ADVISED THAT IF YOU STILL HAVE A FACEBOOK PAGE AT THE TIME OF YOUR MEETING OF CREDITORS, YOUR TRUSTEE MIGHT REQUEST ACCESS IT IN ORDER TO INVESTIGATE YOUR ASSETS AND INCOME.

IF ANY ASSETS ARE FOUND THERE AND ARE UNDISCLOSED, YOU MAY LOSE YOUR DISCHARGE, AND THOSE ASSETS.

ALSO, DO NOT, UNDER ANY CIRCUMSTANCES, ACCEPT A "FRIEND" REQUEST FROM SOMEONE YOU DO NOT KNOW, BECAUSE IT MIGHT BE YOUR TRUSTEE TRYING TO GET ACCESS TO YOUR PAGE!

Is Andrea:

(a) *Advising the illegal destruction of evidence?*
(b) *Aiding and abetting bankruptcy fraud?*
(c) *Violating 11 U.S.C. § 527(c)?*
(d) *Providing sound and important legal advice to his clients?*

What should Tim do?

10. The Case of the Deleted Facebook Page Part 2

Tim's questioning of Dean continues:

Q: Did Andrea see your Facebook page?

A: Yes

Q: How?

A: I showed it to her.

Q: Did your Facebook page have pictures of your property or recent vacations?

A: Uh, I'm not sure.

Does the attorney-client privilege prohibit Andrea from testifying about her examination of Dean's Facebook page?

If so, should Andrea advice Dean to assert the privilege?

11. The Case of the Aggressive Blogger

Noted consumer lawyer Don Discharge maintains a blog. On the blog he routinely posts that he will "make sure you pass the means test." Also, he posts that he can get you out a jam if the UST is opposing your discharge. He invites visitors to send him questions and interact with him in "real-time" communication about their financial problems.

What issues are presented in this scenario?

What duties does Don owe individuals who communicate with him through the blog?

Is Don having prohibited contact with represented parties?

When does the attorney-client relationship commence?

12. The Case of the Tweets

In a large chapter 11 case, attorney Alex represents an official committee of unsecured creditors, of which Harry, a hedge fund manager, is a member. At a recent meeting of the committee, the debtor presented information regarding its ongoing sale process. Alex learns that during that meeting, Harry sent tweets regarding the proposed sale price and whether the sale will generate a dividend to unsecured noteholders.

What should Alex do?

13. THE CASE OF THE "CONNECTIONS"

As part of his marketing plan, attorney Allan is "connected" on LinkedIn with several employees in the credit departments of companies that distribute medical supplies to hospitals. He is also "friends" with several others on Facebook.

Allan is about to file chapter 11 case for a local hospital. Some of his LinkedIn connections and Facebook friends work for creditors of his hospital client on his client's accounts. Others do not.

Is Allan required to disclose these LinkedIn connections and Facebook friends?