

JUDICIAL ETHICS COMMITTEE
ADVISORY OPINION NO. 12-01

October 23, 2012

The Judicial Ethics Committee has been asked to provide an ethics opinion as to whether judges may utilize social media such as Facebook, Twitter, LinkedIn, and MySpace and, if so, the extent to which they may participate. As we will explain, while the Code of Judicial Conduct allows judges to do so, it must be done cautiously. For the purposes of this opinion, we shall utilize Facebook to refer to social media, for it is one of the most widely-used sites and appears to operate in a fashion similar to others.

Maryland Judicial Ethics Committee Opinion No. 2012-07 explains the services offered by Facebook:

Facebook is used by millions of people worldwide. After joining this networking site, participants create personal profile pages containing various types of information about themselves, and then send “friend requests” to others, through a process known as “friending.” Typically, “Facebook friends” are people who knew one another before joining the site, have mutual acquaintances and/or common interests. By becoming “friends,” they are able to see photos, videos and other information posted by or about one [an]other on their respective Facebook pages. Many people post their thoughts, views and opinions on almost any subject, as well as details of their daily lives. Moreover, unless specific privacy settings are used to limit those with whom information is shared, others in the network can view that information. Thus, information posted by a judge on a social networking site can be quickly and widely disseminated, and possibly beyond its intended audience.

Several provisions of the Code of Judicial Conduct are relevant to this question.

Tennessee Supreme Court Rule 10, Canon 1, Rule 1.2 requires that “judge[s] shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” Comments to this rule provide, in pertinent part, Comment [1], that it applies to “both the professional and personal conduct of a judge”; Comment [2], that “[a] judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens”; Comment [3], “[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary”; and Comment [5], that a judge must avoid “conduct [that] would create in reasonable minds a perception that the judge violated [the Code of Judicial Conduct] or engaged in other conduct that reflects adversely on the judge’s honesty,

impartiality, temperament, or fitness to serve as a judge.”

Rule 1.3 provides that “[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”

Canon 2, Rule 2.4(B) and (C) provides, in part, that “[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment”; and 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.”

Rule 2.9(A) provides that “[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter[.]”

Rule 2.11 sets out the procedures for disqualification in situations where the judge has a conflict or there is an appearance that this is the case. Of particular relevance to a judge’s use of social media are subsections (A)(1) and (A)(5), providing that the impartiality of a judge might be reasonably questioned if it appears 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”; or, the judge “has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” Additionally, a judge’s use of social media may require that the judge “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.” Rule 2.11, Comment [5].

Canon 3, Rule 3.1 sets out the extent to which judges may participate in non-judicial activities:

A judge may engage in personal or extrajudicial activities, except as prohibited by law or this Code. However, when engaging in such activities, a judge shall not:

(A) participate in activities that will interfere with the proper and timely performance of the judge’s judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality[.]

Judicial ethics committees of several states have addressed this question, with the majority concluding that judges may utilize social networking sites, but must do so with caution. See Maryland Judicial Ethics Committee Opinion No. 2012-07 (“While they must be circumspect in all of their activities, and sensitive to the impressions such activities may create, judges may and do continue to socialize with attorneys and others.”); Florida Judicial Ethics Advisory Opinion 2009-20 (while judges may participate in social media, they may not “friend” lawyers who may appear before them); Oklahoma Judicial Ethics Advisory Opinion 2011-3 (judges may participate in social media, “friending” those who do not “regularly appear or [are] unlikely to appear in the Judge’s court”); Massachusetts Judicial Ethics Committee Opinion 2011-6 (judges may participate in social media but “may only ‘friend’ attorneys as to whom they would recuse themselves when those attorneys appeared before them”).

California Judicial Ethics Committee Opinion 66 sets out several matters a judge should consider before participating in a particular social media site:

- (1) the nature of the site, the more personal sites creating a greater likelihood that “friending” an attorney would create an appearance of favoritism;
- (2) the number of persons “friended” by the judge, with the greater the number of friends resulting in less likelihood of an appearance that any one “friend” would be in a position to influence the judge;
- (3) the judge’s procedure for deciding whom to friend, such as allowing only some attorneys to become “friends,” while excluding others; and
- (4) how regularly an attorney who is a friend appears in the judge’s court, the more frequent the appearance, the greater the likelihood of the appearance of favoritism.

Maryland Judicial Ethics Committee Opinion No. 2012-07 concludes that “the mere fact of a social connection” does not create a conflict, but, quoting California, “[i]t is the *nature* of the [social] interaction that should govern the analysis, not the *medium* in which it takes place.”

Accordingly, we conclude that, while judges may participate in social media, they must do so with caution and with the expectation that their use of the media likely will be

scrutinized various reasons by others. Because of constant changes in social media, this committee cannot be specific as to allowable or prohibited activity, but our review, as set out in this opinion, of the various approaches taken by other states to this area makes clear that judges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made. In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.

FOR THE COMMITTEE:

ALAN E. GLENN, JUDGE

CONCUR:

CHANCELLOR THOMAS R. FRIERSON, II
JUDGE CHERYL A. BLACKBURN
JUDGE JAMES F. RUSSELL
JUDGE BETTY THOMAS MOORE
JUDGE PAUL B. PLANT
JUDGE SUZANNE BAILEY