JEAC Opinion 2009-20 FLORIDA SUPREME COURT
Judicial Ethics Advisory Committee
Opinion Number: 2009-20
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ISSUES

Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend."

ANSWER: No.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may post material on the committee's page on a social networking site, if the publication of the material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge's candidacy, may establish a social networking page which has an option for persons, including lawyers who may appear before the judge, to list themselves as "fans" or supporters of the judge's candidacy, so long as the judge or committee does not control who is permitted to list himself or herself as a supporter.

ANSWER: Yes.

FACTS

Social networking sites, such as Facebook, MySpace, and LinkedIn, generally serve two functions, as exemplified by the questions posed by the inquiring judge. First, the site can be used by the member simply to post pictures, comments, and other material that visitors to the site can view. Second, the site can also be used to identify a member's “friends”. The member of the social network must approve a person who requests to be identified as the member's “friend”.

When used simply to post materials, social networking sites are similar to an internet webpage where information is posted and made accessible for the public to view. Certain social networking sites permit the member to set levels of privacy permitting the member to restrict information, including the identification of the member's “friends”, to certain visitors to the member's page. For example, the member might be permitted to set the privacy settings in a manner such that only the member’s “friends” could see the names of the member’s other “friends”.

In the social network, a “friend” may post comments and links to other websites on the member's home site, known as the member’s "wall." The member may reply to these postings or delete them, but they will remain on the member’s site until deleted. The “friend’s” comments will be visible to anyone the member permits to view the site.

The Facebook website contains the following explanations about “friends” and privacy concerns:

> Your friends on Facebook are the same friends, acquaintances and family members that you communicate with in the real world.
>
> We built Facebook to make it easy to share information with your friends and people around you.
>
> We understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information. Our default privacy settings limit the information displayed in your profile to your networks and other reasonable community limitations that we tell you about.

> Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that restrict other users from accessing your information. We allow you to choose the information you provide to friends and networks through Facebook. Our network architecture and your privacy settings allow you to make informed choices about who has access to your information.

(http://www.facebook.com/policy.php?ref-pf)

Political campaigns may also establish pages on social networking sites which allow users to list themselves as "fans" or supporters of the candidate. However, as the practice exists on Facebook, the campaign is not required to accept or reject a "fan" in order for their name to appear on the campaign's Facebook page. Anyone desiring to be listed as a "fan" may do so unilaterally, without the campaign's knowledge or consent.

DISCUSSION

The first and third questions above, relating to the posting of materials by either the judge or the campaign committee are answered in the affirmative because they relate only to the method of publication. The Code of Judicial Conduct does not address or restrict a judge's or campaign committee's method of communication but rather addresses its substance. Therefore, this proposed conduct, whether by the judge or the campaign committee, does not violate the Code of Judicial Conduct. Of course, the substance of what is posted may constitute a violation. The Committee has previously concluded that campaign committees may establish websites for otherwise permitted campaign purposes. Fla. JEAC Op. 99-26. See also Fla. JEAC Opns. 00-22 and 08-11 related to campaign activities and internet websites.

However, the second question poses a fundamentally different issue because the inquiring judge proposes to permit lawyers who may appear before the judge to be identified as “friends” on the judge's social networking page. Similarly, the inquiring judge contemplates the lawyers who may appear before the judge will list the judge as a “friend” on their pages, such listing requiring the consent of the judge in order to take effect.

The inquiring judge proposes to identify lawyers who may appear in front of the judge as “friends” on the judge's page and to permit those lawyers to identify the judge as a “friend” on their pages. To the extent that such identification is available for any other person to view, the Committee concludes that this practice would violate Canon 2B.

> Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

With regard to a social networking site, in order to fall within the prohibition of Canon 2B, the Committee believes that three elements must be present. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or “friends” on the judge’s page, or denominate the judge as a “friend” on another member's page. Third, the identity of the “friends” or contacts selected by the judge, and the judge's having denominated himself or herself as a “friend” on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's “friends” may see on the judge’s page who the judge’s other “friends” are. Similarly, all “friends” of another user may see that the judge is also a “friend” of that user. It is this selection and communication process, the Committee believes, that violates Canon 2B, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.1

While judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities, some restrictions upon a judge’s conduct are inherent in the office. Thus, the

Commentary to Canon 2A states:
“Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”
A judge’s participation in a social networking site must also conform to the limitations imposed by Canon 5A, which provides:
“A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:
cast reasonable doubt on the judge’s capacity to act impartially as a judge;
undermine the judge’s independence, integrity, or impartiality;
demean the judicial office;
interfere with the proper performance of judicial duties;
lead to frequent disqualification of the judge; or
appear to a reasonable person to be coercive.”
The Committee believes that listing lawyers who may appear before the judge as “friends” on a judge's social networking page reasonably conveys to others the impression that these lawyer “friends” are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a “friend” on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a “friend” on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.
The Committee notes, in coming to this conclusion, that social networking sites are broadly available for viewing on the internet. Thus, it is clear that many persons viewing the site will not be judges and will not be familiar with the Code, its recusal provisions, and other requirements which seek to assure the judge's impartiality. However, the test for Canon 2B is not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge. Viewed in this way, the Committee concludes that identifying lawyers who may appear before a judge as "friends" on a social networking site, if that relationship is disclosed to anyone other than the judge by virtue of the information being available for viewing on the internet, violates Canon 2(B).
The inquiring judge has asked about the possibility of identifying lawyers who may appear before the judge as “friends” on the social networking site and has not asked about the identification of others who do not fall into that category as “friends”. This opinion should not be interpreted to mean that the inquiring judge is prohibited from identifying any person as a "friend" on a social networking site. Instead, it is limited to the facts presented by the inquiring judge, related to lawyers who may appear before the judge. Therefore, this opinion does not apply to the practice of listing as “friends” persons other than lawyers, or to listing as “friends” lawyers who do not appear before the judge, either because they do not practice in the judge's area or court or because the judge has listed them on the judge’s recusal list so that their cases are not assigned to the judge.
A minority of the committee would answer all the inquiring judge’s questions in the affirmative. The minority believes that the listing of lawyers who may appear before the judge as "friends" on a judge's social networking page does

not reasonably convey to others the impression that these lawyers are in a special position to influence the judge. The minority concludes that social networking sites have become so ubiquitous that the term "friend" on these pages does not convey the same meaning that it did in the pre-internet age; that today, the term "friend" on social networking sites merely conveys the message that a person so identified is a contact or acquaintance; and that such an identification does not convey that a person is a "friend" in the traditional sense, i.e., a person attached to another person by feelings of affection or personal regard. In this sense, the minority concludes that identification of a lawyer who may appear before a judge as a "friend" on a social networking site does not convey the impression that the person is in a position to influence the judge and does not violate Canon 2B.

The question then remains whether a campaign committee may establish a social networking page which allows lawyers who may practice before the judge to designate themselves as "fans" or supporters of the judge's candidacy.

To the extent a social networking site permits a lawyer who may practice before a judge to designate himself or herself as a fan or supporter of the judge, this practice is not prohibited by Canon 2B, so long as the judge or committee controlling the site cannot accept or reject the lawyer's listing of himself or herself on the site. Because the judge or the campaign cannot accept or reject the listing of the fan on the campaign's social networking site, the listing of a lawyer's name does not convey the impression that the lawyer is in a special position to influence the judge.

Although Facebook has been used as an example in this opinion, the holding of the opinion would apply to any social networking site which requires the member of the site to approve the listing of a “friend” or contact on the member's site, if (1) that person is a lawyer who appears before the judge, and (2) identification of the lawyer as the judge’s “friend” is thereafter displayed to the public or the judge's or lawyer's other “friends” on the judge's or the lawyer's page.

REFERENCES

Florida Code of Judicial Conduct: Canon 2B; Commentary to Canon 2A.

Florida Judicial Ethics Advisory Committee Opinions: 99-26, 00-22, and 08-11.

The Judicial Ethics Advisory Committee is expressly charged with rendering advisory opinions interpreting the application of the Code of Judicial Conduct to specific circumstances confronting or affecting a judge or judicial candidate.

Its opinions are advisory to the inquiring party, to the Judicial Qualifications Commission and the judiciary at large. Conduct that is consistent with an advisory opinion issued by the Committee may be evidence of good faith on the part of the judge, but the Judicial Qualifications Commission is not bound by the interpretive opinions by the Committee. See Petition of the Committee on Standards of Conduct Governing Judges, 698 So. 2d 834 (Fla. 1997). However, in reviewing the recommendations of the Judicial Qualifications Commission for discipline, the Florida Supreme Court will consider conduct in accordance with a Committee opinion as evidence of good faith. See Id.

The opinions of this Committee express no view on whether any proposed conduct of an inquiring judge is consistent with the substantive law which governs any proceeding over which the inquiring judge may preside. This Committee only has authority to interpret the Code of Judicial Conduct, and therefore its opinions deal only with the issue of whether the proposed conduct violates a provision of that Code.

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1. By way of contrast, many other websites do not have these characteristics and a judge's use of them does not conflict with Canon 2B. For example, there are many subject matter websites which people with similar interests use to communicate with one another. Parents of students in a particular club or organization in a high school, for example, may register as a part of a parent group, with the names of all of the members of the group being visible to all of the other members. Similarly, persons with an interest in studying a particular subject, or members of a club, might be a part of a group on a website, with the names of the members visible to one another, or to the public at large. However, even if a judge is listed on one of these sites, and even if a lawyer who appears before the judge is also listed, Canon 2B is not implicated because the judge did not select the lawyer as a part of the group, nor have the right to approve or reject the lawyer's being listed in the group. The only message conveyed to a person viewing the website would be that both the judge and the lawyer both have children in the band, or are both interested in the study of a particular subject. Because the judge played no role in the selection of the lawyer whose name appears on the website, no impression is afforded to those who view the website that the lawyer is in a special position to influence the judge.