Ethics: Recusal and Social Media

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Evidence and Procedure Seminar

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Social Media

Forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).

Source: Merriam-Webster Dictionary

Social Media

Competence and Social Media

Rule of Professional Conduct 1.1(a):

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Discovery

1) Although information on social media accounts is generally discoverable, discovery requests for social media information should be "time and subject-matter limited.“

2) Some discovery is generally allowed even if the user limits access to the content.

- **Authority**: *Arcement v. Blue Bayou Waterpark, LLC*, 2019-1374 (La. App. 1 Cir. 12/09/19).

No Third Party Discovery from Social Media Companies

1) Social media companies can refuse a non-law enforcement subpoena (Stored Communications Act, 18 U.S.C. Sec. 2701 *et seq*.).
2) Information comes from litigants.

What's Required Beyond Authentication or Identification under LCE 901?

Concurrence: The laying of a foundation for the admissibility of evidence before a trial court is of primal importance, yet it has become routine that such elementary applications of procedural law are often disregarded in the introduction of social media evidence.

Authority: *La. V. Henderson*, 2022-01113 (La. 08/11/22).

Client Advice

1) Instruct client on her social media usage.
2) Do not post case information.
3) Do not delete information.
4) Best practice – have the client acknowledge the above in writing at the time of engagement.

Code of Judicial Conduct

Canon 1 provides, in part: “A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.”

Code of Judicial Conduct

Canon 2A provides, in part: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Code of Judicial Conduct

Canon 2B provides, in part: A judge shall not allow family, social, political, or other relationships to influence judicial conduct or judgment … nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

- personal conduct that disgraces the judiciary and places the judiciary in disrepute
- inappropriate relationships
- conveying or permitting others to convey the impression of influence

Code Commentary

The same canons that govern a judge's ability to socialize in person, on paper, or over the telephone apply to electronic communications, including use of the Internet and social networking sites. Those canons include, but are not limited to lending the prestige of judicial office, ex parte communications, public comment on pending or impending proceedings, disclosure of information relevant to disqualification, and conducting extrajudicial activities to avoid casting doubt on the judge's capacity to act impartially, demeaning the judicial office, or frequent disqualification.

Source: National Center for State Courts, Social Media and Judicial Ethics (2022), pp. 1-2

Code Commentary

If a judge posts on social networking sites such as Facebook or crowdsourced sites such as Yelp or TripAdvisor, the judge may not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others. For example, a judge may not comment on, recommend, or criticize businesses, products, or services on such sites if it is reasonably likely that the judge can be identified as a judge.

Source: NCSC, p. 2

Code Commentary

When an appellate justice learns that a staff member has posted a comment on social media that violates the canons, the justice should immediately take steps to remedy the violation, including at a minimum requiring the staff member to take all reasonable steps to have the post taken down and removed from the public domain.

Source: NCSC, p. 2

Code Commentary

Judges should not use social media "to express support for or to protest current political issues," including "validat[ing], endors[ing], or 'lik[ing]' a person, image, or statement made by another," even if they do not use their titles.

Source: NCSC, p. 3

Code Commentary

A judge who views another judge's profile on Facebook and learns that it has posts about the 2020 presidential election and media coverage and bias, links to articles about politics, internet memes about politics, expressions of political opinions, and exchanges about politics with those who commented on the judge's profile or posts, has actual knowledge of code violations that raise a substantial question regarding the other judge's fitness as a judge and is required to report it.

Source: NCSC, p. 4

Code Commentary

A judge may communicate through a social media account with an attorney who will be appearing before the judge in a pending case if the communication falls within one of the exceptions for ex parte communications. A judge may not "recommend" attorneys on LinkedIn or other social media sites. A judge may not support a business on social media. A judge may support a charitable organization on social media.

Source: NCSC, p. 5

Code Commentary

A judge and a judicial association may publicly support or oppose proposed legislative or constitutional changes affecting court structure or court operations but should use discretion when expressing a position on social media.

Source: NCSC, p. 5

Disqualification

The Florida Supreme Court held that a Facebook "friendship" with an attorney appearing before a judge, standing alone, did not constitute a legally sufficient basis for disqualification, disagreeing with Florida Advisory Opinion 2009-20 which advised that a judge may not be Facebook "friends" with lawyers who may appear before the judge.

Source: NCSC, p. 18

Disqualification

The Chief Justice of the Kentucky Supreme Court disqualified a trial judge from a lawsuit brought by the Attorney General against the state Secretary of Labor because the judge had "liked" a Facebook post supporting the Attorney General's campaign for governor.

Source: NCSC, p. 18

Disqualification

The Wisconsin Supreme Court held that a serious risk of actual bias had been created in a custody dispute when, while his decision was pending following a contested hearing, the trial judge accepted a Facebook "friend request" from the mother; she interacted with him, including "liking," "loving," or commenting on at least 20 of his Facebook posts; and she "shared" and "liked" third-party posts about domestic violence, which was an issue in the case.

Source: NCSC, p. 18

Judicial Discipline

Accepting an agreed statement of facts, the New York State Commission on Judicial Conduct publicly admonished a judge for posting on his Facebook page 2 photographs of himself wearing a sheriff's uniform and personal comments expressing his appreciation for law enforcement officers and describing his appearance at a "Back the Blue" event.

Source: NCSC, p. 9

Judicial Discipline

Accepting an agreement for discipline by consent, the South Carolina Supreme Court suspended a judge for 18 months without pay for soliciting funds for the Red Cross on his Facebook page, in addition to other misconduct.

Source: NCSC, p. 10

Judicial Discipline

The Texas State Commission on Judicial Conduct publicly warned a judge for affirmatively allowing a photo constituting an endorsement of a candidate for county commissioner to be posted on his Facebook page.

Source: NCSC, p. 11

Judicial Discipline

The West Virginia Judicial Investigation Commission publicly admonished a judge for comments she made on her Facebook page about a pharmacist arrested for destroying COVID-19 vaccine dosages and about the siege at the U.S. Capitol.

Source: NCSC, p. 13