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Standing Column

Technology

***38** THE BLACK HOLE EFFECT: WHEN INTERNET USE AND JUDICIAL ETHICS COLLIDE

Judge Herbert B. Dixon Jr. [FNa1]

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The Judges' Journal's regularly appearing Ethics column has, in this issue, been incorporated into Judge Dixon's Technology column, which examines issues at the intersection of technology and judicial ethics.

According to conventional wisdom, a black hole is a region in outer space caused by a compact mass that sucks everything towards it and from which nothing, including light, can escape. Scientists are still investigating the phenomenon and have yet to reach a consensus about its causes and effects. The same can be said about the Internet and the trouble in which some judges find themselves when, drawn to its communications conveniences, they cross a line into a place from which it is very difficult to escape with their reputations intact.

Judicial ethicists are not in agreement about how far a judge may delve into new technologies without incurring consequences. But most seem to agree when that proverbial judicial misconduct line has been crossed. The old-fashioned methods of judicial misconduct--an inappropriate letter, telephone call, or statement during a court proceeding--have now had added to their ranks inappropriate uses of Facebook, MySpace, LinkedIn, texting, and e-mail. The examples below illustrate the point.

Georgia Judge Steps Down Following Questions About Facebook Relationship with Defendant

Newspaper accounts surfaced earlier this year of stunning instances of alleged judicial misconduct in Georgia concerning inappropriate contacts with a litigant by a judge using a social media site and e-mail, [FN1] The reported events involved Judge W., who made initial contact on Facebook with Ms. B., whose case was pending before him. Over the course of their Internet contact, Judge W. and Ms. B. met for lunch, she borrowed money from the judge, she talked to the judge about her own case, he visited her new apartment, he signed an order releasing her on personal recognizance in her own case, and he advised her on case strategy. At some point in the relationship with the judge, Ms. B. told him about her male friend whose probation she thought had been unfairly revoked due to a misunderstanding. Ms. B. jokingly offered the judge a year of free massages from a friend in return for Judge W.'s assistance.

The extent of the judge's relations with Ms. B. came to light when her male friend's family complained that Judge W. was unfairly holding their son in jail and produced 33 pages of e-mails between the judge and Ms. B. According to newspaper accounts, the district attorney determined that there was no criminal violation and

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Judge W. resigned his position shortly after the allegations became public.

North Carolina Judge Reprimanded for Ex Parte Facebook Discussion

In another case, North Carolina Judge T. was publicly reprimanded by the Judicial Standards Commission for *ex parte* communications with counsel for a party and independently gathering information by viewing a party's Website in the same case. [FN2] According to the Commission's report, Judge T. became Facebook friends with a local attorney. A huge problem with this new relationship was that at the time of the "friending," Judge T. was presiding over an ongoing child custody case in which the attorney was representing the husband. During this pending litigation, the husband's attorney became concerned about allegations in the ongoing case that his client was having an affair and posted on his Facebook account, "how do I prove a negative?" The attorney's remark resulted in a posting by Judge T. on his Facebook account that he had "two good parents to choose from" and ***39** that, due to the case not being settled, "he" (clearly referring to the husband) "will be back in court." If these reciprocal postings were not enough, the husband's attorney then posted on his Facebook account, "I have a wise Judge."

There are other tidbits involving this friendship, including an additional issue considered by the Commission concerning the propriety of Judge T.'s several visits to the wife's website during the ongoing litigation and whether those website visits influenced Judge T.'s rulings. The saga began to unravel when the judge mentioned the Facebook contacts with the husband's attorney to the wife's attorney. After Judge T.'s ruling in the case, the wife's attorney filed a motion requesting a new trial and Judge T.'s disqualification, both of which were eventually granted.

As demonstrated by ethics opinions issued in South Carolina, Florida, New York, and Kentucky, one difficult issue concerning the use of these technologies is defining the initial limit of appropriate judicial conduct.

South Carolina: A Judge May Be Facebook Friends with the Judge's Employees and Law Enforcement Officers

The South Carolina Advisory Committee on Standards of Judicial Conduct responded to an inquiry by concluding that a judge may be a member of Facebook and may have law enforcement officers and employees of the magistrate as Facebook friends as long as they do not discuss anything related to the judge's position as magistrate. [FN3] The Committee reasoned that "[a]llowing a magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge." Although the Committee did not address the specific issue, some commentators have suggested that the Committee's reasoning should allow a judge to be Facebook friends with lawyers who regularly practice before that judge as long as there is not a discussion of anything related to the judge's official duties.

Florida: A Judge May Not Be Facebook Friends with Lawyers on the Judge's Calendar

When the precise question asked was whether judges could "friend" lawyers on the judge's docket, the Florida Judicial Ethics Advisory Committee responded with an unqualified "no," stating that judges may not add lawyers who appear before them as friends on a social networking site. [FN4] The Committee reasoned 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 the lawyer "friends" are in a special position to influence the judge. The Com-

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mittee concluded that the issue 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. And, to this final question, the Committee concluded 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 Florida Committee adds that "[w]hile 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."

The Florida Committee noted that there are many subject matter websites that 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, there is no violation of the Code of Conduct because the judge neither selected the lawyer as a part of the group nor had the right to approve or reject the lawyer being listed in the group. According to the Committee, the only message conveyed to a person viewing the website would be that the judge and the lawyer both have children in the band, or are both interested in the study of a particular subject. And 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.

In contrast, however, the Florida Committee concluded that a committee of responsible persons conducting an election campaign on behalf of a judge may establish a social networking page that 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.

Finally, the Committee reported that a minority of its members did not agree with the restrictions imposed by the majority's conclusion. The minority reasoned 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 ***40** 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.

New York: A Judge May Be a Facebook Friend of a Lawyer on the Judge's Calendar, But ...

The New York Advisory Committee on Judicial Ethics advised that it could not discern anything inherently inappropriate about a judge joining and making use of a social network and gave a "qualified" yes to the question whether it was appropriate for the judge to accept an e-mail invitation to join an online "social network." [FN5] After responding "yes," the Committee's opinion reminds the reader that a judge must avoid the appearance of impropriety and that the judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The opinion also advises that the judge should be mindful of the appearance created when the judge establishes a connection with an attorney or anyone else appearing in the judge's courtroom and must consider whether any such online connections rise to the level of a "close social relationship" requiring disclosure and/or recusal. The Committee noted that the guidance provided by its opinion

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was a nonexhaustive list of issues that judges using social networks should consider. To further emphasize the opportunities for problematic Internet activities, the Committee referenced news reports regarding negative consequences and notoriety for those who used social networks haphazardly. Finally, recognizing the inevitability of technological advancements, the Committee urged judges who use social networks to stay abreast of the new features of, and changes to, any social network they use because neither the opinion, nor any future opinion the Committee could offer, can accurately predict how the technologies will change and affect judges' ethical responsibilities.

Kentucky Agrees with New York

Some commentators have suggested that people are often not actually friends with their Facebook "friends" and that this ethics issue would not exist if Facebook had defined the people to whom a member is linked as something other than a friend, e.g., a contact or a link. These commentators conclude that being Facebook friends does not "reasonably convey" the impression that the lawyer Facebook friend to a judge is in a special position to influence the judge. In essence, that was the conclusion of the Ethics Committee of the Kentucky Judiciary. [FN6]

While social networking sites may create a more public means of indicating a connection, the Kentucky Committee's view is that the designation of a "friend" on a social networking site does not, in and of itself, indicate the degree or intensity of a judge's relationship with the person who is the "friend." The Committee conceives such terms as "friend," "fan," and "follower" to be terms of art used by the site, not the ordinary sense of those words.

The Kentucky Committee joined the conclusion of New York that a judge's listing of lawyers as friends on a social networking site alone does not violate the Kentucky Code of Judicial Conduct, and specifically does not convey or permit others to convey the impression that they are in a special position to influence the judge. However, like the New York Committee, Kentucky cautioned that judges should be mindful of whether online connections alone or in combination with other facts rise to the level of "a close social relationship" that should be disclosed and/or requires recusal.

The Kentucky Committee was compelled to note that, as with any public media, social networking sites are fraught with peril for judges, and that its opinion should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public.

Applicable Provisions of the ABA Model Code of Judicial Conduct

Generally, the rules that are discussed most prominently by the Ethics Committees rendering opinions on the subject of a judge being Facebook friends with lawyers who regularly practice before the judge are similar to the ABA Model Code of Judicial Conduct Canon 1, Rules 1.2 and 1.3; [FN7] Canon 2, Rule 2.9(A); [FN8] and Canon 3, Rule 3.1(C), [FN9] notwithstanding the difference of opinion between the jurisdictions concerning the exact point at which the misconduct begins. Each jurisdiction's opinion has its benefits and limitations. Where one jurisdiction might erect a wall to prevent a judge's fall on the slippery slope beyond which there is no recovery, another jurisdiction may erect a caution sign that requires the judicial officer to exercise appropriate discretion. The passage of time may eventually provide a consensus as to the most effective approach that will help judges to avoid the ultimate disciplinary finding of judicial misconduct.

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Conclusion

Judicial ethicists disagree on where to draw the initial line that determines judicial misconduct in a judge's use of the Internet. However, regardless of where the line is initially drawn, at a certain point there is universal recognition of the “black hole effect” on the judge who has gone too far and is guilty of judicial misconduct. At that point, we may be guided by the sage observation of Justice Potter Stewart regarding the difficulty of precisely defining pornography. The answer is, to borrow the phrase from Justice Stewart: “... I know it when I see it ....” [FN10]

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[FN1]. Katheryn Hayes Tucker, *Ga. Judge Steps Down Following Questions About Facebook Relationship with Defendant*, LAW.COM (Jan. 7, 2010), http:// www.law.com/jsp/article.jsp?id=1202437652986&hbxlogin=1.

[FN2]. N.C. Jud. Standards Comm'n, Public Reprimand, Inquiry No.08-234 (2009), *available at* http:// www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

[FN3]. S.C. Advisory Comm. on Standards of Jud. Conduct, Advisory Op. No. 17-2009 (2009), *available at* http:// www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009.

[FN4]. Fla. Jud. Ethics Advisory Comm., Op. No. 2009-20 (2009), *available at* http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeaco-pinions/2009/2009-20.html.

[FN5]. N.Y. Advisory Comm. on Jud. Ethics, Op. 08-176 (2009), *available at* http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm.

[FN6]. Ethics Comm. of the Ky. Judiciary, Formal Jud. Ethics Op. JE-119 (2010), *available at* http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf.

[FN7]. Canon 1:

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

Rule 1.2:

Promoting Confidence in the Judiciary

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.

Rule 1.3:

Avoiding Abuse of the Prestige of Judicial Office

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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.

[FN8]. Canon 2:

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

Rule 2.9:

Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex pane communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter ...

[FN9]. Canon 3:

A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

Rule 3.1:

Extrajudicial Activities in General

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

...

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

[FN10]. Concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), explaining Justice Steward's conclusion that the motion picture under consideration, a French film called *Les Amant* (The Lovers), was not pornography.

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