

Rules of Engagement: judges and ESM

by

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This is Minnesota. We encourage each other to be friendly. We certainly don't expect judges to be friendless people. We understand and accept that judges sometimes count lawyers as their friends. What, then, is it about Facebook friending that creates an issue?

The ABA recently addressed this issue from the perspective of the judge. In Formal Opinion 462, the ABA noted that "[s]ocial interactions of all kinds, including ESM [electronic social media], can be beneficial to judges to prevent them from being thought of as isolated or out of touch." They noted, however, that there are significant differences between in-person and digital social interactions. Unlike in-person interactions that typically are limited to those actually participating face-to-face, digital interactions may be shared with thousands of people without the consent or knowledge of the original poster.

Digital interactions — particularly without the use of emoticons — are susceptible to misinterpretations arising out of a lack of context or a failure to understand the poster's unique sense of humor. Visual or vocal cues are missing and statements made may be misinterpreted. Additionally, digital social interactions have the potential to take on a life of their own and may remain available for viewing many years after they were originally posted.

From the judge's perspective, all of this raises ethical issues under the Minnesota Code of Judicial Conduct. Rule 1.2 of the Code requires judges to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and counsels the avoidance of impropriety and the appearance of impropriety. Rule 2.4(C) of the Code provides that a judge shall not convey or permit others to convey that any person or organization is in a position to influence him or her. Rule 2.11 of the Code requires judges to disqualify themselves in any proceeding in which the judge's impartiality might reasonably be questioned because, among other things, the judge has a personal bias or prejudice concerning a party or the party's lawyer.

The ABA, in Formal Opinion 462, reviewed similar provisions contained in the Model Code of Judicial Conduct and concluded that these provisions do not, per se, prohibit judges from participating in ESM. They state, "Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication [presumably

with a lawyer, witness or party appearing before the judge], the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.”

In this regard, the ABA joins several other states — Ohio, Kentucky, South Carolina, and New York — in opining that judges may participate in ESM, including “friending” of lawyers, without the mere fact of that participation being a disqualifying event. It should be noted that Florida has reached the opposite conclusion. There has not yet been a formal pronouncement from the Minnesota Board on Judicial Standards on this issue.

From the lawyer’s perspective then, what are the relevant rules? The Office of Lawyers Professional Responsibility does not typically take positions contrary to Formal ABA Opinions. With respect to this issue and in the absence of any Minnesota authority to the contrary, the OLPR will assume the ABA got it right. Given this, there are still a number of provisions of the Minnesota Rules of Professional Conduct (MRPC) that should be considered.

First, and hopefully obviously, do not use Facebook or other ESM to discuss a pending case with a judge or express your opinion on the matter. This could run afoul of any number of rules, not the least of which is Rule 3.5(g), MRPC, which prohibits ex parte communications with judges about the merits of a case in an adversary proceeding.

Second, Rule 8.4(f), MRPC, provides that it is professional misconduct to knowingly assist a judge in conduct that is in violation of the applicable rules of judicial conduct. Avoid ESM connections with judges that will raise an issue as to the judge’s bias or impartiality — either because of the nature and frequency of the connections, the content of the communication, or because the judge is in a jurisdiction (like Florida) that prohibits ESM connections.

Finally, Rule 8.4(e), MRPC, provides that lawyers may not state or imply an ability to improperly influence a government agency or official or to achieve results by means that violate the MRPC or other law. Do not advertise, tout, brag to your clients or otherwise state or imply that you have some special influence with a judge because of your ESM connections with the judge.