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Disqualification and social media connections

by Cynthia Gray

Appellate courts have held that disqualification is not necessarily required based solely on a judge's social media relationship with an attorney or someone else involved in a case, although there have been surprisingly few decisions on the issue. *See Law Offices of Herssein and Herssein v. United Services Automobile Association*, 271 So. 3d 889 (Florida 2018) ("standing alone," a judge's Facebook "friendship" with an attorney appearing in a case did not require disqualification); *State v. Forguson*, 2014 WL 631246 (Tennessee Court of Criminal Appeals 2014) (a trial judge was not disqualified despite his status as Facebook "friend" of a witness, the state's confidential informant); *Youkers v. State*, 400 S.W.3d 200 (5th District Texas Court of Appeals 2013) (a trial judge was not disqualified based on a Facebook friendship and communications with the father of a criminal defendant's girlfriend).

Similarly, judicial ethics committees have advised that a social media connection alone does not create a "per se disqualification requirement" but that additional "facts and circumstances" might disqualify the judge. ***Arizona Advisory Opinion 2014-1***. *See also* ***Maryland Opinion Request 2012-7***; ***Massachusetts Letter Opinion 2016-1***; ***Missouri Advisory Opinion 186*** (2015); ***New Mexico Advisory Opinion Concerning Social Media*** (2016); ***New York Advisory Opinion 2013-39***; ***Ohio Advisory Opinion 2010-7***; ***Utah Informal Advisory Opinion 2012-1***.

Facts and circumstances

Because disqualification is not automatically required by all social media relationships, a judge must consider whether the nature and scope of a particular on-line connection raises a reasonable question about the judge's impartiality that requires disqualification whenever that person appears in a case. The relevant factors for making that determination include:

- The frequency of the judge's social media contacts and communications with the individual;
- The substance of the judge's social media contacts and communications with the individual;
- The number of social media connections the judge has;
- The nature of the judge's social networking account (for example, whether it is a personal profile or a professional page);
- The judge's practice in deciding with whom to connect (in other words, whether the judge is very exclusive or more inclusive when deciding whom to add);
- When the connection was formed; and
- Whether the judge and the individual have frequent, personal contacts in real life.

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Thus, a judge's impartiality is more likely to be reasonably questioned and disqualification is more likely to be required when an attorney/Facebook "friend" appears in a case if the judge primarily posts about personal activities; if his Facebook "friends" are mainly family and close, personal friends; if he is very selective about who he adds to the "friend" list; if the judge and the individual react to each other's posts; and if they and their families also socialize in real life. In contrast, a judge's impartiality is not likely to be questioned if the judge has created a Facebook page that is focused on court business and the judge's professional activities; if the judge has many followers on the page and they are primarily professional acquaintances; if the judge allows everyone to follow him; and if the judge and the attorney only interact in court or at bar meetings. For example, the California Judges' Association ethics committee stated that, if a judge has created a personal profile on a social media site and adopted an exclusive policy regarding whom to include on the site, the judge should disqualify if someone he has chosen to "friend" appears as an attorney in a case. ***California Judges' Association Advisory Opinion 66*** (2010).

Extreme case

Emphasizing "the extreme facts" of the case, the Wisconsin Supreme Court held that a serious risk of actual bias had been created in a child 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" several third-party posts about domestic violence, which was an issue in the case. ***In re Paternity of B.J.M.***, 944 N.W.2d 542 (Wisconsin 2020).

Five years after Timothy Miller and Angela Carroll stipulated to joint legal custody and shared physical placement of their minor son, Carroll filed a motion seeking sole legal custody, primary physical placement, child support, and a change in residence. She alleged that Miller had engaged in domestic violence and failed to adequately parent and discipline their son. Miller opposed the motion and disputed the allegations of domestic violence.

On June 7-8, 2017, Judge Michael Bitney presided over a highly contested evidentiary hearing that included 15 witnesses. On June 16, the parties filed briefs.

Three days after the briefs were filed, Carroll sent the judge a "friend" request on Facebook. The judge accepted Carroll's request.

On July 14, the judge ruled in favor of Carroll.

During the 25 days between the judge's acceptance of Carroll's friend request and his decision in her favor, Carroll "engaged with and 'reacted to' at least 20" of the judge's Facebook posts. Sixteen of her reactions were "likes" to prayers and Bible verses that he posted. She "loved" one of his posts reciting a Bible verse and a second regarding "advice" to children and grandchildren. In response to posts about his knee surgery, she

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posted: "Prayers on a healthy recovery Judge!!" and "Hope u get some rest and feel better as the days go on."

In addition, Carroll posted on her Facebook page that she was "interested in" attending a "Stop the Silence Domestic violence awareness bike/car Run." She also "liked" a third-party post related to domestic violence; reacted "angry" to a third-party post entitled, "Woman dies two years after being set on fire by ex-boyfriend;" and "shared" a third-party post related to domestic violence.

After the judge's decision, Carroll posted: "The Honorable Judge has granted everything we requested." Viewing that post, the guardian ad litem in the case discovered that Carroll and the judge were Facebook "friends" and told Miller's counsel.

Miller filed a motion for reconsideration of the judge's decision. The judge confirmed his Facebook "friendship" with Carroll, but denied the motion, asserting that he was not biased and no reasonable person would question his impartiality. Although he did not deny seeing Carroll's reactions, comments, or posts on Facebook, the judge emphasized that he "did not like any posts, respond to any posts, or conduct any communication ex parte or otherwise with Ms. Carroll . . . ." He also claimed that, when he accepted Carroll's "friend" request, he had already "decided how [he] was going to rule, even though it hadn't been reduced to writing."

The court of appeals reversed the denial of the motion for reconsideration and remanded the case with directions that it proceed before a different judge.

Affirming that decision, the Wisconsin Supreme Court considered: "(1) the timing of the Facebook friend request and Judge Bitney's affirmative acceptance; (2) the volume of Carroll's Facebook activity and likelihood Judge Bitney viewed her posts and comments; (3) the content of the Facebook activity as it related to the context and nature of the pending proceeding; and (4) Judge Bitney's lack of disclosure."

First, the Court concluded that, "the timing of the friend request implied that Carroll wanted to influence Judge Bitney's decision . . . ."

> Although Judge Bitney had "thousands" of Facebook friends, Carroll was not an established "friend." Instead, she was a current litigant who requested to be Judge Bitney's friend only after she testified at a contested evidentiary hearing in which he was the sole decision-maker. Judge Bitney had presided over the case since August of 2016; yet, Carroll friended him after he heard the evidence and the final briefs were submitted, but before he rendered a decision.

The Court emphasized that the judge had had to take "the affirmative step of accepting Carroll's 'friend request'" and that, by doing so, he "accepted access to off-the-record facts that were relevant to the dispute, namely information regarding Carroll's character and parental fitness." The Court noted that, according to an affidavit from Miller's sister, "Carroll made a 'purposeful switch in [her] Facebook persona to support her

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position in the custody dispute,' including changing her pictures and posts 'from party type pictures and posts to family pictures and posts about children and family.'"

Further, the Court stressed that Carroll had engaged with and "reacted to" a significant number of the judge's Facebook posts and that the judge would have received a notification for each of Carroll's reactions and comments. The Court acknowledged that there was no conclusive evidence that the judge had read Carroll's posts, but emphasized that, although the judge had the opportunity to deny seeing them, he had not done so.

In addition, based on the correlation between their social media contacts and the subject of the litigation, the Court concluded:

> Carroll was allowed the opportunity to give Judge Bitney additional information about herself and an extra "remember me" almost 25 different times during the time period when the matter was under advisement, all unbeknownst to Miller. By reacting to and engaging with Judge Bitney's posts, Carroll was effectively signaling to Judge Bitney that they were like-minded and, for that reason, she was trustworthy. She was conveying to him off-the-record information about her values, character, and parental fitness—additional evidence Miller did not have the opportunity to rebut. Under a "realistic appraisal of psychological tendencies and human weaknesses," this off-the-record information about Carroll, created a serious risk of actual bias. . . .

Finally, the Court determined that the judge's failure to disclose the "friendship" "at any point, in any way or form" deprived Miller of the "opportunity to refute what Judge Bitney might have seen Carroll post or share."

Emphasizing this "improper asymmetry of access," the Court held: "The totality of the circumstances and the extreme facts of this case, viewed objectively, rise to the level of a serious risk of actual bias, which rebuts the presumption of Judge Bitney's impartiality." Although the Court applied the "serious risk of actual bias" test that is the constitutional due process standard from *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the factors identified by the Court are also relevant to an "appearance of impartiality" analysis under the code of judicial conduct. If the circumstances of a case are significant enough to require disqualification under the due process clause, they would also raise enough reasonable questions to require disqualification under the lower threshold of the code.

Judicial participation in demonstrations, protests, marches, and rallies

Tens of million people participated in thousands of racial justice demonstrations across the country beginning in May, and the protests continue. As of July 27, six judicial ethics advisory committees had issued opinions in response to inquiries about whether judges or court staff can join them. A post on the Center for Judicial Ethics blog summarized those opinions. In addition, the CJE is keeping track of the opinions on its website. In less than 30 minutes, the inaugural on-line CourtClass tutorial from the CJE also covers judges and court staff participating in marches and demonstrations.

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Judicial campaigns on-line *by Cynthia Gray*

Judicial ethics committees have approved the use of websites and social media by judicial candidates, permitting them, like all other candidates, to promote their campaigns to voters using those now-standard political communication tools. For example, the Florida committee advised that a judicial candidate may create a Twitter hashtag for her campaign and tweet slogans, statements about her judicial philosophy, and blurbs about her background. *Florida Advisory Opinion 2013-14*. Other opinions explain that judicial campaigns may have websites and Facebook pages that:

- Include statements written in the first person as if from the candidate about campaign events, candidate appearances, public speeches, and the candidate's qualifications (*Florida Advisory Opinion 2020-10*);
- Include videos of the candidate personally describing their experience, qualifications, and similar subjects *(Florida Advisory Opinion 2020-13*);
- Invite potential followers to watch the website for updates and to submit questions to the candidate (*Florida Advisory Opinion 2020-13*);
- Request support in English and Spanish (*Florida Advisory Opinion 2020-13*);
- Include a link for making contributions to a campaign committee (*Florida Advisory Opinion 2014-4*);
- Include newspaper articles and editorials about the campaign (*Florida Advisory Opinion 2000-22*); and
- Link to newspaper articles about a trial over which the candidate presided and photographs taken by the newspaper in the courtroom during the trial (*New York Advisory Opinion 2007-135*).

(Many of the advisory opinions on these issues are from Florida because the Judicial Ethics Advisory Committee has an Election Practices Subcommittee that responds immediately to campaign questions when the normal committee procedure would not allow for "a response in time to be useful to the inquiring candidate or judge." Subcommittee opinions "have the same authority as an opinion of the whole Committee." Through June, for example, the elections subcommittee had issued four opinions in 2020.)

Moreover, judicial candidates may use their personal social media accounts to:

- Advertise their own campaigns (*Michigan Advisory Opinion JI-147* (2019));
- Link to their judicial campaign websites or social media pages (*Louisiana Advisory Opinion 271* (2016));
- "Like" or "share" their campaign pages (*New York Advisory Opinion 2013-126*; *North Dakota Advisory Opinion 2016-2*); and

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- Request that friends vote for them (*Florida Advisory Opinion 2016-13*).

See also *New York Advisory Opinion 2013-126* (a judge may use a signature block on her personal email that states, "Please Like us on Facebook," identifying her campaign committee's name).

However, unlike candidates for other public offices, judicial candidates must comply with the code of judicial conduct while campaigning, including while on-line. The code has limits on campaign speech and fund-raising that would surprise non-judicial candidates and that bind incumbent judges running for re-election and candidates who are not already on the bench.

Moreover, judicial candidates are required to "take reasonable measures to ensure that other persons do not undertake" any prohibited activities on their behalf and that their campaign committees comply with the code. Rule 4.1(B) and Rule 4.4(A), *American Bar Association Model Code of Judicial Conduct* (2007). Judges and candidates have been sanctioned for content on their Facebook pages or websites posted by others to whom they had delegated the task.

Campaign speech

Under Rule 4.1(A)(13), judicial candidates must not make promises of conduct in office, other than pledges to faithfully and impartially perform their duties. There are no cases or advisory opinions applying that rule to statements on-line, but, by analogy, whatever judicial candidates cannot say in campaign materials, speeches, or advertisements, they cannot say on Facebook, in a Tweet, or on a website. For example, the following campaign statements have been held to constitute inappropriate pledges:

- Campaign literature promising that a candidate "will show you how to stick up for your rights, beat your landlord, ... and win in court!" (*In the Matter of Chan*, Determination (New York State Commission on Judicial Conduct November 17, 2009));
- A campaign flyer declaring: "Above all else, Pat Kinsey identifies with the victims of crime," and, "Pat Kinsey will support our valiant law enforcement officers . . . not make their job harder" (*Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003));
- A statement at a televised candidate forum that, "Even though I've been asked to find a statute unconstitutional as a sitting judge, I have refused to do so. Because again, it's not my job to legislate from the bench" (*Inquiry Concerning DuPont*, 252 So. 3d 1130 (Florida 2018)); and
- A campaign leaflet with a pie chart and the statement referring to the incumbent: "Norm Miller's projected revenues from traffic tickets for 2017 was $50,000. He failed to reach that by over $13,500 and he overspent his court budget by over $10,000. Can Princetown afford to keep Norm Miller as Judge?" (*In the Matter of VanWoeart*, Determination

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(New York State Commission on Judicial Conduct March 31, 2020) (censure for this and other misconduct)).

On the other hand, candidates can accurately and fairly compare their record to their opponent's record (*North Dakota Advisory Opinion 2016-3*) and make specific promises about court administration or the improvement of the judicial system, such as pledging to begin court promptly each morning, to rule expeditiously, to urge colleagues to amend a rule relating to case allocation, to hold "night court," to seek additional funds for more court staff, or to consider creative sentencing options (*Ohio Advisory Opinion 2002-8*).

False or misleading

Judicial candidates are prohibited from "knowingly or with reckless disregard for the truth, mak[ing] any false or misleading statement" under Rule 4.2(A), and that rule has been applied to on-line content. For example, manipulated photos posted on websites or social media violate this provision if the resulting image "is exaggerated, repurposed and mischaracterized to the point that it is rendered patently untrue." *In the Matter of Callaghan*, 796 S.E.2d 604 (West Virginia 2017) (two-year suspension without pay and $15,000 fine for posting a campaign flyer on Facebook that had a "photoshopped" photograph of President Obama with the candidate's opponent, the incumbent judge, and the description, "Barack Obama & Gary Johnson Party at the White House . . . . While Nicholas County loses hundreds of jobs"). *See also* *In the Matter of Almase*, Findings of fact, conclusions of law, and imposition of discipline (Nevada Commission on Judicial Discipline October 22, 2018) (reprimand of former judge for her campaign's posting of a photoshopped picture of herself and Dwayne "the Rock" Johnson on her campaign Facebook page, misleading the public into believing that the actor had endorsed her re-election, and for her subsequent comment on the post).

The California Commission on Judicial Performance severely censured a judge for, in addition to other misconduct, misrepresenting on his campaign website that he was the current president of the Family Values Coalition and two political action committees. *Inquiry Concerning Kreep*, Decision and order (California Commission on Judicial Performance August 7, 2017). Noting that a candidate for judicial office is responsible for the statements published on his campaign website even when the statements are posted by campaign staff, the Commission found that, although there was no evidence that the judge knowingly made misstatements, he demonstrated a reckless disregard for the truth by failing to review a final draft of his campaign website before it "went live" or to review his biography on the site after it went up.

The Florida Supreme Court removed a judge from office for, in addition to other misconduct, disseminating false and misleading information about his opponent on his campaign website as well as in response to a League of Women Voters questionnaire and in a candidate forum. *Inquiry Concerning DuPont*, 252 So. 3d 1130 (Florida 2018). The judge had claimed

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that his opponent had changed his name, was "a member of www.hideyourpast.com, which is a website that you join to hide your personal history," and had been ticketed for parking in a handicapped spot without a permit, speeding in a school zone, and passing a school bus that was loading children. The judge admitted only to "mistakes" and "carelessness," claiming that he had relied on a campaign consultant and opposition researcher. The Court stated that the judge's assertion that he had no evil intent was irrelevant and concluded that, not only had the judge failed "to verify the accuracy of the information he was provided as was his obligation," but he had apparently manufactured some of the facts he disseminated.

In addition, a judicial candidate is required to "act in a manner consistent with the integrity and independence of the judiciary" under Rule 4.1(A), and judges and judicial candidates have been disciplined for violating that rule on social media during their campaigns.

- A judge implied in email advertisements and on Facebook that her opponent was unfit for judicial office because he was a criminal defense attorney, stating, for example, "Attorney Gregg Lerman has made a lot of money trying to free Palm Beach County's worst criminals. Now he's running for judge!" *Inquiry Concerning Santino*, 257 So. 3d 25 (Florida 2018) (removal).
- A judge posted a message to her campaign opponent on Facebook that stated: "[H]ere's an Italian wish…'bafongoo' and that's accompanied by a flick of the wrist under the chin. My spelling is phoenic [sic], I'll let you figure out what that means." ***Public Warning of Wright and Order of Additional Education*** (Texas State Commission on Judicial Conduct September 22, 2015) (warning for this and other misconduct).
- In Facebook posts, a judicial candidate described government receptionists as "dumb*** colored women;" opined that "too many women taking men's jobs try to be men when they oughta be home taking care fo[sic] kids;" described Middle Easterners as "Abab," "Arab," "camel bangers," and "ragheads;" stated that "many black men beat their women" and "so many men run off," leaving "single white women and their white parents to raise the babies;" and stated that "white women who date black men are trash and ruined." ***In the Matter of Kohout*, Order** (West Virginia Supreme Court of Appeals October 7, 2016) (censure and permanent injunction from seeking judicial office for this and other misconduct).
- A judge during her election campaign liked or replied to crude comments on Facebook about her opponent, for example, "liking" the comment "I'd like to shove the flyers up Norm's butt!" ***In the Matter of VanWoeart*, Determination** (New York State Commission on Judicial Conduct March 31, 2020) (censure for this and other misconduct).

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Endorsements

Judges and judicial candidates in most states are prohibited from publicly endorsing or opposing candidates for public office (sometimes with exceptions for judicial offices); therefore, their personal and campaign websites and social media accounts cannot include such endorsements.

For example, a Texas judge received a public warning for numerous posts on his Facebook account endorsing his brother's campaign for the school board. ***Public Warning of Saucedo*** (Texas State Commission on Judicial Conduct December 5, 2019). The posts included campaign advertisements, photographs of his brother wearing campaign t-shirts while "block walking" and passing out campaign literature, and a link to an on-line news article about his brother announcing his candidacy. In his response to the Commission, the judge stated that the posts were "done by staff and supporters," but he accepted responsibility.

The Montana Supreme Court sanctioned a judge for publicly endorsing on her personal Facebook profile the Republican candidate for county commissioner and the Republican incumbent candidate for county attorney. *Inquiry Concerning Harada* 461 P.3d 869 (Montana 2020) (30-day suspension without pay for this and other misconduct). The judge admitted the violation but noted that the privacy settings she had established on her profile meant that her endorsements could not be read by everyone, relying on ***American Bar Association Opinion 462*** (2013). In that opinion, noting that "judges may privately express their views on judicial or other candidates for political office," the ABA committee suggested that judges use social media privacy settings to ensure that their views do not become public, by "restricting the circle of those having access to the judge's page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether." However, endorsements are prohibited even in posts supposedly concealed by privacy settings because, although a judge can limit who has access to her social media account, she cannot control what those individuals do, innocently, inadvertently, or maliciously, to disseminate the judge's posts beyond the intended, limited audience. Therefore, "even if a Facebook page has restricted access, the page should be considered as potentially available to the public" and therefore governed by the same rules that limit other public conduct by judges. ***Utah Informal Advisory Opinion 2012-1***.

Other judges have also been disciplined for posting endorsements on social media.

- A judge posted: "Cast your vote in the Senate District 16 Special Election. I will be voting for Angela Turner Lairy! . . . Let's not lose this seat!" *Commission on Judicial Performance v. Clinkscales*, 192 So. 3d 997 (Mississippi 2016) (reprimand for this and other misconduct).
- A judge posted candidates' campaign materials on Facebook. ***In the Matter of Romero*** (New Mexico Supreme Court February 13, 2015) (permanent retirement).
- A judge wrote posts that appeared to endorse a presidential candidate on his Facebook account, which identified him as a judge

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and was "accessible to all members of Facebook." *In the Matter of Johns*, 793 S.E.2d 296 (South Carolina 2016) (six-month suspension without pay for this and other misconduct).

- A judge posted campaign advertisements for other candidates on his Facebook account. ***Public Reprimand of Lopez*** (Texas State Commission on Judicial Conduct June 6, 2018).

Further, in addition to direct posts, "liking," "following," or "friending" campaigns or candidates on Facebook (or the equivalent reactions on other platforms) are reasonably construed as endorsements and, therefore, prohibited by the code. The Massachusetts advisory committee stated that, "a judge must not use Facebook to endorse (e.g., 'like' or 'follow') . . . political candidates, or otherwise violate the Code's restrictions on abusing the prestige of judicial office and participating in political activity." ***Massachusetts Advisory Opinion 2016-9***. *See also* ***Arizona Advisory Opinion 2014-1*** (a judge "may not be a 'friend' of [a state] representative's campaign committee's Facebook page or 'like' that page, as such associations would indicate that the judge supports and is endorsing that individual's reelection"); ***Massachusetts Letter Opinion 2016-1*** (a judge with a public Twitter account must not follow the Twitter accounts of political candidates); ***New York Advisory Opinion 2015-121*** (a judge may not "like" or "friend" any political Facebook page from her personal Facebook account); ***Utah Informal Advisory Opinion 2012-1*** (a judge may not be a "friend" of a candidate on a Facebook page specifically designed to promote the individual's candidacy"); ***U.S. Advisory Opinion 112*** (2014) (a judge should avoid "'liking' or becoming a 'fan'" of a political candidate).

Judges have been disciplined for:

- "Liking" a comment on a candidate's Facebook page (***Kansas Commission on Judicial Qualifications 2012 Annual Report*** (private cease and desist order));
- "Liking" the Facebook pages of candidates (**Order of private reprimand** (Kentucky Judicial Conduct Commission April 2, 2015));
- "Liking" a Facebook post that publicly endorsed a candidate for public office and making a contribution to the candidate (***In the Matter of Cohen*, Agreed order of public reprimand** (Kentucky Judicial Conduct Commission July 21, 2014)); and
- Accepting a "tag" that allowed a photo of the judge with a candidate for county commissioner and the candidate's campaign sign to be posted on his personal Facebook account (***Public Warning of Madrid*** (Texas State Commission on Judicial Conduct April 3, 2019)).

The restriction on endorsing and opposing candidates has been interpreted to apply to any public comment by a judge "praising or criticizing" an individual running for public office. ***Utah Informal Advisory Opinion 2016-2***. Thus, a judge's post asking a negative question to then-presidential candidate Donald Trump—"Is the fact that the IRS has audited you almost every year when your peers hardly ever or never have been, something to

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be proud of? What does that say . . . about your business practices?"—was held to violate the code. *In re Kwan*, 443 P.3d 1228 (Utah 2019) (six-month suspension without pay for this and other misconduct).

Solicitations

In most states, judicial candidates cannot personally solicit campaign contributions but must use a campaign committee to raise funds, and, therefore, judicial candidates cannot use websites or social media accounts to solicit contributions, but their committees can.

The West Virginia Supreme Court of Appeals sanctioned a former judicial candidate for posting on his personal Facebook profile: "I'm asking all my friends on here to visit my FB page, Edward Kohout Monongalia County Circuit Judge and please try to send us a contribution, whatever you can comfortably send. Checks payable to Ed Kohout for Judge . . . ." ***In the Matter of Kohout*, Order** (West Virginia Supreme Court of Appeals October 7, 2016). The candidate had also posted on his campaign Facebook page:

> Anyone who wants to donate money to the campaign can make the check payable to "Ed Kohout for Judge."
>
> Folks. I'm shameless[ly] asking for campaign contributions. The electioneering starts in January so I'm gonna need to buy signs etc. I'd appreciate any help you can send.

In 2008, the Florida committee advised that a campaign website created and maintained by a judge personally could not refer to and facilitate financial donations to the judge's re-election campaign, but that the judge's campaign committee could create and maintain a campaign website for that purpose. ***Florida Advisory Opinion 2008-11***. Subsequent opinions reiterated that advice. ***Florida Advisory Opinion 2012-15*** (a judicial campaign website that solicits funds must clearly indicate that the candidate does not maintain it personally); ***Florida Advisory Opinion 2010-28*** (a judge or judicial candidate may not host a website or Facebook page promoting his election campaign); ***Florida Advisory Opinion 2010-21*** (if a judicial candidate has a campaign website that allows a viewer to click on the word "contribute" to open a new page with information on contributing to the campaign, the site must be maintained by the campaign committee).

However, as noted, the code requires a judicial candidate to exercise enough control over the content of a website or social media account to ensure compliance with the rules, and there seems no significant, substantive difference between that supervision and maintaining sites. In a subsequent opinion, the Florida committee clarified that a candidate could create or design a website with a contribution link or oversee the design and content of such a website maintained by a paid communications firm or committee member as long as the contributions are solicited by the campaign committee and the contributions go to the committee account. ***Florida Advisory Opinion 2014-4***. The opinion explained that fund-raising on a website created by the candidate was only prohibited if the site was

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personal and made no reference to the candidate's committee. Moreover, on-line requests for financial support must be made by the committee or committee members, not by the candidate in a video or in a post written in the first person as if by the candidate. ***Florida Advisory Opinion 2020-13***; ***Florida Advisory Opinion 2020-10***.

Cf., ***New York Advisory Opinion 2007-135*** (a judge may not solicit campaign contributions on her own website, but her campaign committee may do so on a website it sponsors if the site directs donations to the campaign committee and not to the judge); ***New Mexico Advisory Opinion Concerning Social Media*** (2016) (a judicial candidate who maintains a social media site may not engage in fund-raising on his site although his campaign committee may use a social media site to raise funds); *State v. Thomas*, 376 P.3d 184 (New Mexico 2016) (a judicial campaign's social media site should be established and maintained by the committee, not the candidate personally); ***North Dakota Advisory Opinion 2016-2*** (a judicial candidate may help maintain his campaign's social media account except for those pages that solicit contributions); ***West Virginia Advisory Opinion* (February 23, 2012)** (a candidate may use a PayPal button on her campaign committee's official web page to collect campaign contributions).

Judicial candidates have asked advisory committees whether the solicitation clause bars them from directing people to their on-line fund-raising pages. The Florida committee advised that a judicial candidate may not share with her personal social media friends an invitation to her campaign's "Kickoff Fundraiser" or a link to a website that suggests the viewer contribute to the campaign or that provides a link for contributions. ***Florida Advisory Opinion 2019-22***. Providing candidates a little more leeway, the North Dakota committee advised that a judicial candidate may request that people "like" or "share" a campaign page or post but should not make "any suggestion that in context might be perceived as a direct, personal solicitation of contributions . . . ." ***North Dakota Advisory Opinion 2016-2***. Similarly, the Louisiana committee stated that, when linking her personal website or social media profile to her campaign committee's social media page, a judicial candidate should not mention campaign contributions but only "state something very general, such as: 'To find out more about my campaign, visit my campaign committee's website at the following link.'" ***Louisiana Advisory Opinion 271*** (2016). The Louisiana committee added that a candidate may link to a campaign page that in turn links to a contribution page, but may not link directly to the contribution page or to a social media account that is used solely for soliciting funds. The Michigan judicial ethics committee advised that judicial officers and judicial candidates may advertise their own campaigns on their "personal or professional social media accounts" as long as it is the committee, not the candidate, that solicits funds. ***Michigan Advisory Opinion JI-147*** (2019).

Judicial candidates have asked advisory committees whether the solicitation clause bars them from directing people to their on-line fund-raising pages.

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Virtual campaign solicitation

Answering an inquiry from a judicial candidate, the Florida judicial ethics committee addressed the new reality of campaign fund-raising while social distancing and sheltering-in-place during the COVID-19 pandemic. *Florida Advisory Opinion 2020-9*.

The candidate asked two questions about virtual events:

1. May a judicial candidate appear on a computer or TV screen during a video meet and greet or video fundraiser while a donation button appears on the screen?
2. May a judicial candidate appear on a computer monitor for a virtual fundraiser and can a donation button appear if the candidate leaves the screen temporarily, and then the button disappears when the judicial candidate reappears on the screen?

In response, the committee emphasized that "the same principles applicable to in-person campaign events and activities are applicable to virtual campaign events and activities. Specifically, a judge or judicial candidate may not in any way take part in the solicitation of campaign contributions."

The committee concluded that a judicial candidate may appear on screen during a virtual fund-raiser sponsored by the candidate's campaign committee—as long as there is no donation button on the screen. The committee explained that allowing a candidate to appear when a donation button is also on the screen would be the same as permitting a member of the candidate's campaign committee "to hold up a donate sign, while the judicial candidate was addressing potential supporters at an in-person campaign event or activity."

Further, the committee advised, a candidate must leave a virtual meeting before the committee asks for contributions to avoid creating the reasonable impression that the solicitation was being made by the candidate. The candidate's departure should be announced, the committee added, because "simply leaving a virtual meeting is not always that easily noticed by those who continue to participate." Finally, it stated, the candidate "may not come back to the virtual meeting after the ask."

The candidate also asked the committee two questions about telephonic events:

1. May a committee of responsible persons solicit donations for a judicial candidate during a telephonic campaign event if they are in another room other than the judicial candidate and the judicial candidate temporarily leaves the event during the request?
2. May a judicial candidate work with a committee of responsible persons to do introductions telephonically and once the judicial

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candidate leaves the conversation may members of the committee solicit support and/or donations?

The committee stated that a candidate may appear during a telephonic campaign event sponsored by the candidate's campaign committee but must leave the event before the committee asks for contributions, the candidate's departure must be announced, and the candidate may not come back to the event after the ask.

Finally, the committee prohibited a candidate from making introductions during a telephonic campaign event before leaving the conversation to allow members of the committee to make the solicitation. The committee described that as a "'transparent attempt" to avoid personal solicitation that remains solicitation "'but done with a wink and a nod. The presence of the candidate in the conversation continues. It is as if the candidate is looking over the shoulder of the solicitor.'" (The committee was quoting *Wisconsin Advisory Opinion 1997-7*.) The committee did add that a candidate may advise the campaign committee about persons who should be solicited as long as the candidate is not present during the solicitation.

Recent cases

Ex parte communications in a small community

Based on a stipulation, the Florida Supreme Court publicly reprimanded a judge for routinely conducting first appearances without complying with the rules of criminal procedure and statutes and engaging in improper ex parte communications with defendants, witnesses, litigants, family members, and others. *Inquiry Concerning Scaff* (Florida Supreme Court May 28, 2020). According to the notice of formal charges, between June 2009 and December 2019, the judge regularly conducted first appearance hearings without the presence of or input from the Office of the State Attorney, the Office of the Public Defender, or victims. These bond hearings often took place by telephone, frequently were held with little or no notice to the state attorney, the public defender, or victims, and sometimes were conducted even without the participation of the defendants.

The charges gave several examples of the judge's actions. On April 29, 2017, the judge telephoned the county jail booking department to set the bond for three men who had been arrested during a fight. He called the jail and set the bond before the defendants had been booked into or even arrived at the jail because he had been contacted by their family members. The judge continued to communicate with the jail and the family and friends of the arrestees throughout the night, at one point telling an officer at the jail that he had heard "19 different stories."

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In another case, the judge had lowered a defendant's bond after the defendant's relatives went to his chambers and convinced him that the case was "overcharged." In another case, the judge told an arrestee that the arrestee's mother had come to his chambers to speak with him. In addition, the judge routinely volunteered to have his judicial assistant make phone calls on behalf of arrestees trying to bond out of the county jail.

The judge admitted his misconduct but explained that he "had been trying to facilitate the expeditious setting of bonds." Immediately after receiving the notice of investigation, the judge took steps to prevent future ex parte communications, for example, locking the door to his chambers to stop litigants or others from entering his office to attempt to speak with him, placing signs "around the courthouse explaining that he is not permitted to speak with 'any person about any court case,'" and setting a fixed time for first appearances.

In its findings and recommendation, the Judicial Qualifications Commission noted that the judge sits in a rural county with a population of 14,000-15,000 and is responsible for conducting most first appearance hearings. The Commission stated that, although the judge's conduct "was unquestionably improper," it was "mindful of the unique challenges of serving as the lone judicial officer in a small community."

Appropriate discourse or personal attack

Approving a resolution proposed by a special committee, the Judicial Council of the U.S. Court of Appeals for the 7th Circuit publicly admonished a district court judge for the first two sentences of a law review article he wrote entitled, "The Roberts Court's Assault on Democracy." ***Resolution of Complaints Against Adelman*** (7th Circuit Judicial Council June 22, 2020). The article was published in the *Harvard Law Review* in March 2020.

The article begins:

> By now it is a truism that Chief Justice John Roberts' statement to the Senate Judiciary Committee that a Supreme Court justice's role is the passive one of a neutral baseball "umpire who [merely] calls the balls and strikes," was a masterpiece of disingenuousness. Roberts' misleading testimony inevitably comes to mind when one considers the course of decision-making by the Court over which he presides.

According to the Council, the thesis of the article is that, in a number of decisions over the last 15 years, the U.S. Supreme Court has "undermined the rights of poor people and minorities to vote" and "increased the economic and political power of corporations and wealthy individuals," resulting in "government that is not as responsive as it should be to the will of the majority of the people."

There were media reports about the article, and three individuals filed complaints. For example, one stated: "I don't see how a party with a conservative background appearing before Judge Adelman could be confident that they would receive fair, even-handed treatment."

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The Council noted that the complaints raised "competing policy considerations in an area of judicial ethics where there is ample room for disagreement."

> The nation has a long tradition of vigorous public debate over Supreme Court decisions, and judges, including judges in the district and circuit courts, have long participated in those debates. Judges are able to bring special insight and perspective to those debates. At the same time, judges also have special responsibilities stemming from their roles in dispensing even-handed justice in all cases that come before them and in strengthening public confidence in the judiciary.

Noting that the judge drew much of his article "from dissenting opinions in the decisions he criticizes," the Council acknowledged that "judges criticize one another's reasoning, sometimes harshly" and stated that the admonishment should not "be interpreted as suggesting that judges should be silenced from criticizing court decisions." The Council concluded that "the vast majority" of the judge's "substantive criticism of Supreme Court decisions" was "well within the boundaries of appropriate discourse," although it noted that it was not "endorsing or disagreeing" with his views.

On the other hand, the Council explained, federal judges are required "to write and speak in ways that will not interfere with their work as judges" or "with public perceptions that the judges will approach the cases before them fairly and impartially." It explained:

> The opening two sentences could reasonably be understood by the public as an attack on the integrity of the Chief Justice rather than disagreement with his votes and opinions in controversial cases. The attacks on Republican party positions could be interpreted, as the complainants have, as calling into question Judge Adelman's impartiality in matters implicating partisan or ideological concerns. While not addressed by specific rules of judicial conduct, these portions of the article do not promote public confidence in the integrity and impartiality of the judiciary.

Finally, the Council reminded "all judges within the circuit of our obligations to ensure that judges' public speaking and writing do not undermine public confidence in the fair administration of justice."

> Complaints like this, about judges' non-judicial writings, have been rare and should stay that way. There is ample room for federal judges to speak and write about the law, including criticisms of past decisions, without prompting appropriate complaints. Judges should be encouraged to do so consistent with Canon 4 for purposes of public and legal education. At the same time, it behooves all federal judicial officers to speak and write about the law with special care for their responsibilities to the public and to the larger judicial system, including refraining from personal attacks.

Attached to the admonition was a letter from the judge acknowledging that some of the points he made in the article "were inappropriately worded," expressing his "deep regret for not being more careful," and apologizing for any language that "could be construed as questioning

The Council noted that the complaints raised "competing policy considerations in an area of judicial ethics where there is ample room for disagreement."

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the integrity of the Chief Justice or any other member of the Court or as expressing a bias against the Republican Party."

"Misuse of the title and tools" of office

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly admonished a judge for expressing his opposition to a building permit sought by a neighbor in two emails to city officials. *In re Lucas*, Stipulation, agreement, and order (Washington State Commission on Judicial Conduct June 26, 2020). In the signature block of both emails, the judge identified himself as a Snohomish County Superior Court Judge; both emails were sent from the judge's official county work email address. The first email was sent to the city planner in charge of reviewing the permit request; the second email was sent to a city council member. The judge's emails did not affect the review of the permit, but witnesses indicated that the emails got "a heightened level of attention" that they may not have received if the sender had not been identified as a judge.

The Commission found that "a reasonable person would perceive the emails . . . as an effort to exert pressure and/or gain preferential treatment from those city officials." The Commission noted the judge's explanation that "time pressure and a lack of familiarity with the auto-signature function caused him to overlook that his official signature had been included on the email." However, the Commission emphasized that, "it is very much the responsibility of a judge (and of any public servant) to be scrupulously attentive to avoid the misuse of the title and tools of their office."

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