

Let's Be Friends

(But What About Friending Judges?)

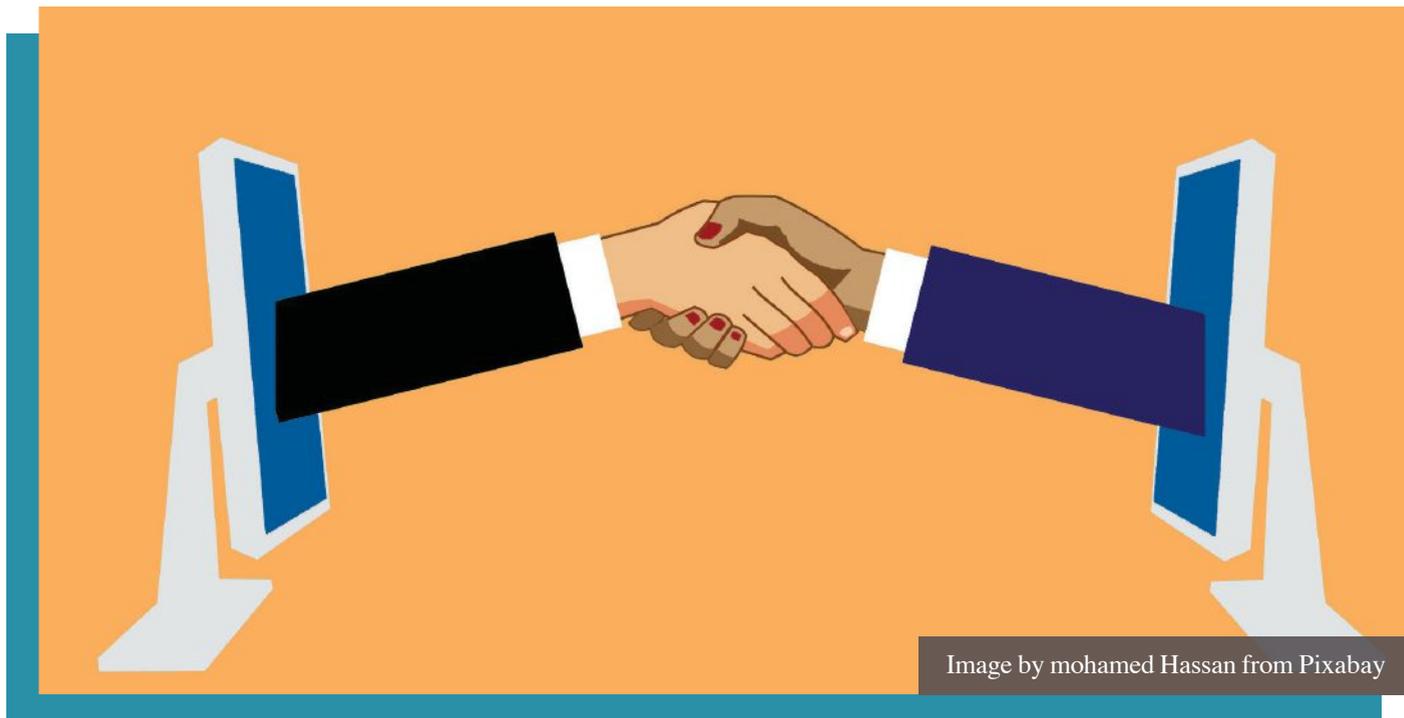


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When it comes to social media, it seems that everybody wants to be friends with and connect or link with everyone else. While that may be easy with former classmates and others, it isn't as simple when the person whom you want to friend, or who is asking you to be your friend, is a judge. Not just any judge, but a judge before whom you appear or may appear. Can you be a "friend" of that judge?

The answer isn't simple, particularly in a state like Pennsylvania, where judges are elected and seek donations from lawyers for their campaigns. In addition, many lawyers knew judges before they became judges, and some of us have had decades-long relationships with judges. As a result, the question of what type of connections are appropriate for lawyers and judges is not easily answered.

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility tackled the

issue in 2014, in Formal Opinion 2014-300 ("Ethical Obligations For Attorneys Using Social Media"), in which the committee concluded that a lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. From the flipside, the committee concluded that attorneys may ethically connect with judges on social networking websites provided the purpose is not to influence the judge. The committee cautioned, however, that attorneys who connect with judges may create an appearance of bias or partiality.

The Pennsylvania Rules of Professional Conduct do not prohibit lawyers from connecting with judges, nor do the Model Rules upon which Pennsylvania's rules are based. The Pennsylvania Rules of Judicial Conduct are also silent upon the issue, except for Comment (4) to Rule 2.9 ("Ex parte Communications"), which states, "A judge shall avoid comments and

interactions that may be interpreted as ex parte communications concerning pending matters or matters that may appear before the court, including a judge who participates in electronic social media." This comment does not address, however, friending judges.

The situation can be awkward. For example, I have known one Pennsylvania appellate judge for decades, socially and professionally. In another instance, I have been "friends" with multiple attorneys who were appointed or elected to the bench. Out of a sense of conservatism, in every case, I "unfriended" the judge, with the hope that if the judge discovered my conduct, they would not hold it against me, or my clients.

What is an attorney or a judge to do?

To provide additional guidance, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 488 ("Judges' Social or Close Personal Relationships with Lawyers or Parties

as Grounds for Disqualification or Disclosure”) on September 5, 2019. In the opinion, the committee concluded that Rule 2.11 of the Model Code of Judicial Conduct identifies situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned, including cases implicating some familial and personal relationships. The opinion noted that the Model Code of Judicial Conduct is silent about the obligations imposed by other relationships.

The opinion ultimately concluded that judges are not required to disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Finally, judicial disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.

Further clouding the issue, the opinion distinguished “friends” with

“social media ... friends” by noting in a footnote that: “Social media, which is simply a form of communication, uses terminology that is distinct from that used in this opinion. Interaction on social media does not itself indicate the type of relationships participants have with one another either generally or for purposes of this opinion. For example, Facebook uses the term ‘friend,’ but that is simply a title employed in that context. A judge could have Facebook ‘friends’ or other social media contacts who are acquaintances, friends, or in some sort of close personal relationship with the judge. The proper characterization of a person’s relationship with a judge depends on the definitions and examples used in this opinion.”

In short, a Facebook friend is different from a judicial acquaintance, friend, or person with whom a judge has a close personal relationship. After that point, it is ultimately up to the lawyer and judge to determine what to do.

There is one easy solution that avoids the entire “Facebook question”: Judges and lawyers should avoid friending, linking, or otherwise connecting with each other on social media. Doing so avoids the situation in *Law Offices of Herssein and Herssein, P.A. vs. United Services Automobile Association*, No. SC17-1848,

in which the Florida Supreme Court held “that an allegation that a trial judge is a Facebook ‘friend’ with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification.”

In reaching this conclusion, the court explained that “the mere existence of a Facebook ‘friendship,’ in and of itself, does not inherently reveal the degree or intensity of the relationship between the Facebook ‘friends.’ ... the mere existence of a Facebook ‘friendship’ between a judge and an attorney appearing before the judge, without more, does not reasonably convey to others the impression of an inherently close or intimate relationship. No reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook ‘friends’ with a relationship of an indeterminate nature.”

In short, there is little guidance. But a prudent judge, and an equally prudent attorney, can avoid scrutiny by merely declining to be friends online. ■

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