Issues Raised for Arbitrators by Current and Anticipated Future Use of Social Media such as Facebook©, Twitter©, YouTube© and Other Internet-based Programs

Presented by:

L. Tyrone Holt
Peter L. Michaelson
Edna L. Sussman

Presented at:
CCA 11th Annual Meeting
October 21 – October 23, 2011
Denver, CO

Peter L. Michaelson
Michaelson ADR Chambers, LLC
Red Bank, NJ

Proprietor and Attorney, Arbitrator and Mediator -- Michaelson ADR Chambers, LLC (Dec 2010 to present) and Michaelson and Associates (1984-present); and General Counsel (virtual), Direct Grid Technologies LLC, Edgewood, New York (Oct 2010-present). Since 1991, serves as ADR neutral (arbitrator and mediator) primarily in IP, IT, and other technology-related disputes including, e.g., telecom, infrastructure and energy (oil, gas, solar), and secondarily other commercial areas; and since 1979 as an active IP practitioner.

Has arbitrated over 500 domestic and international disputes primarily: IP, IT, telecom and technology-related disputes, some with damages claimed in the range of US $100-600 Million. Serves as chair, sole arbitrator and co-arbitrator. Mediated over 200 domestic and international disputes, one being an international patent dispute with approximately US $600 Million at stake. Mediated numerous patent litigations in US District Courts involving complex electronic and mechanical technologies and Hatch-Waxman based pharmaceutical disputes. Mediated across a wide range of other substantive areas for the N.J. Superior Court system. Rendered approximately 200 domain name arbitration decisions (20 reported in USPQ), Fellow and Chartered Arbitrator, Chartered Institute of Arbitrators (UK); Fellow, College of Commercial Arbitrators (US); Fellow, Australian Center for International Commercial Arbitration (member of arbitration and mediation panels); Arbitrator-ICDR; Arbitrator (commercial, large complex case, domain name and consumer credit panels)-AAA; Arbitrator-ICC; Arbitrator-LCIA; Arbitrator - British Columbia International Commercial Arbitration Centre; Approved Mediator/Arbitrator in IP and Domain Name disputes - WIPO; Arbitrator/Mediator - CPR (technology, biotech and e-discovery panels); Arbitrator/Mediator - USDC-EDNY; Arbitrator -- FINRA; Approved Mediator-NJ Superior Court; Accredited Mediator, CEDR (UK).

Conducted seminars, served as speaker and provided numerous presentations concerning various aspects of IP law and IP-related ADR to various legal groups, and organizations; and authored articles on various aspects of arbitration, IP-related ADR and IP law. “AV” rated attorney. Has: B.S., Electrical Engineering & Economics, Carnegie-Mellon University (CMU), Pittsburgh, 1974; M.S., Electrical Engineering, CMU, 1975; J.D., Duquesne University School of Law, Pittsburgh, 1979; LL.M. (Trade Regulation), New York University School of Law, 1985 Admitted in Pennsylvania, New Jersey, New York and Alaska. For further info, see www.mandw.com/mich.html.

Edna Sussman, FCIarb
SussmanADR LLC
Scarsdale, NY

Edna Sussman is a full time arbitrator and mediator, the Distinguished ADR Practitioner in Residence at Fordham University School of Law and the principal of SussmanADR LLC. She was formerly of counsel at Hoguet Newman Regal & Kenney LLP and a litigation partner at the law firm of White & Case LLP. Ms. Sussman serves frequently as an arbitrator and mediator on complex commercial disputes, both domestic and international, and is a member of the panel of several of the leading dispute resolution institutions including the AAA, ICDR, CPR, ICDR's Energy Arbitrators list, Hong Kong, Singapore, Swiss, Dubai, Vienna and Kuala Lumpur International Arbitration Centres, FINRA, FedArb, Chinese European Arbitration Centre, U.S. Institute for Environmental Conflict Resolution and is listed as an arbitrator by the ICC, WIPO and the LCIA. As a court certified mediator, Ms. Sussman serves on the mediation panels of the federal, state and bankruptcy courts in New York. She is certified as a mediator by the International Mediation Institute. As an arbitrator and mediator, she has successfully handled numerous complex disputes in many business settings, including matters involving disputes concerning contract interpretation, financing and banking transactions, energy, environment, franchises, insurance, mergers/acquisitions, accounting, intellectual property, construction, securities, real estate, professional liability, bankruptcy and employment.

Ms. Sussman is immediate past Chair of the Dispute Resolution Section of the New York State Bar Association and serves as co-editor-in-chief of the New York Dispute Resolution Lawyer. She co-chairs the Arbitration Committees of the American Bar Association's Section of International Law and Section of Dispute Resolution and serves on the Board of Directors of the American Arbitration Association and of the College of Commercial Arbitrators. She is a fellow of the Chartered Institute of Arbitrators and serves on the executive committee of the New York Chapter. Ms. Sussman has been listed as Tier 1 Ranking in New York City by U.S. News & World Report (1 of 7 so ranked), named in The International Who's Who of Mediation Lawyers, listed annually by SuperLawyers and Best Lawyers for Alternative Dispute Resolution and named as an Outstanding Woman in Energy Law by Energy Law 360. A graduate of Barnard College and Columbia Law School, Ms. Sussman has lectured and published widely on mediation, arbitration, energy and environmental issues. Additional publications and background can be found at www.SussmanADR.com

Social Media -- Challenges for Arbitrators
-- An Explanation of Social Media

Peter L. Michaelson
Michaelson ADR Chambers, LLC

Social media is a technological outgrowth of fundamental limitations inherent in direct human-to-human communication. To better understand social media, we first need to appreciate these limitations.

1. Background -- Direct human-to-human communication

Direct human-to-human communication is inefficient and time-consuming.

Human communication functions reasonably well on a 1:n basis, with 1 person speaking at any one time to n ($n \geq 1$) listeners. When communication is in-person, such as a seminar, discussion group or just chatting amongst a group of friends or relatives (n being relatively small), there is one speaker who is talking at any given time to all the other attendees. By extension, industrial (traditional) media, such as print, broadcast radio or television, or film, relies on the same 1:n model but since n is very large, e.g., into the millions, direct inter-personal conversation is just impractical. Hence, the speaker delivers his message through an intermediate communication media (broadcast, print, film, etc) that widely disseminates that message to an entire audience.

This model quickly fails whenever multiple people are simultaneously speaking. Human hearing is simply not sufficiently selective to filter one single voice out of many, unless that one voice is much louder than the rest. When multiple speakers talk at the same time and at approximately the same amplitude (loudness), each of their utterances interferes with those of all the other speakers. What we hear is a resulting composite of unintelligible speech produced by all the speakers: basically noise.

Just think back to the last time you went with a group of people to a loud, crowded restaurant or you attended a raucous party. All the noise from the simultaneous speech precluded you from hearing much less understanding whatever the person next to you was saying.

For humans to realistically understand spoken communication from multiple speakers, all the speakers need to talk sequentially, one after the other, not in parallel. That takes time. The more speakers, the more time.

Of course, realistically, limitations of human aural performance extend far beyond just requiring sequential speakers as that alone fails to account for inter-personal differences in auditory perception. Some of us hear well, others do not -- sometimes even with the aid of corrective devices, with this factor worsening as a result of repeated prior exposure to high amplitude sounds (and other environmental conditions), age, medical and other factors.

2. Why social media?

Social media avoids these limitations.

At its core, social media inserts a computer between communicating people. The computer, specifically a set of applications, acts as: (a) a buffer between multiple communicators such that any user can provide information to others and obtain information from any of them at any time, and (b) a publisher through which the applications provide a repository (basically extremely large databases) into which information is stored by any speaker and then later retrieved on demand by any listener and hence eventually disseminated to all requesters. Through social media, many speakers can communicate at any time to many listeners in different formats and modalities. No practical limit exists on the number of speakers, the number of listeners and the time when communication is sent or received. Anyone, regardless of age, physical condition or ability, can participate and communicate through social media as long as that individual can interact in some manner with a computer, whether through a traditional keyboard/display, speech recognition and/or synthesis or other suitable input/output device.

3. What is social media?

Wikipedia defines social media as referring to "web-based and mobile technologies to turn communication into an interactive dialogue" (social interaction) through which user-generated content is created and exchanged through methodologies that are ubiquitously accessible and scalable.[1]

[1] http://en.wikipedia.org/wiki/Social_media (accessed August 12, 2011).

Industrial media (newspapers, film, television, radio) is, for the most part, unidirectional. A subscriber reads a newspaper, listens to radio or views and listens to television, i.e., he receives information that has been broadly disseminated, but has a very limited ability, if any, to respond (other than cursing loudly to himself and others in the immediate vicinity whenever he hears something he viscerally dislikes). There are a number of instances where special-purpose viewer/listener feedback devices have been used by cable and other broadcasters in conjunction with broadcast television programs for interactively polling viewers (such as obtaining yes/no responses to predefined questions) or measuring their viewing preferences ("Nielsen" boxes) but the interaction and the resulting information has been very limited and the use of such devices is for the most part insignificant.

Social media, on the other hand, is fully bidirectional: it gives each user the ability to not only receive information from other users, but also, through interacting with a social media website (implementing the so-called "Web 2.0" initiatives), provide significant amounts of information to and interact with other users. How is this accomplished? A computer, specifically a set of applications, acts as an intermediary. User-interaction can be as simple as a user asking for comments or letting the user vote on an article, post an opinion about a product of interest, or can be as complex as obtaining an algorithmic-based, computer-generated recommendation for movies, products or other items based on the ratings supplied by other users with similar interests.

A common link between social media websites is that a user not only interacts with the site but also, through that site, interacts, in some fashion, with other users.

a) Some differentiating characteristics of social media:

Some of the properties indicative of differences between social media and industrial media are:

- Reach - Both industrial and social media technologies provide scale and are capable of reaching a global audience. Industrial media, however, typically uses a centralized framework for organization, production, and dissemination, whereas social media is by its very nature more decentralized, less hierarchical, and distinguished by multiple points of production and

utility.

- × Accessibility - The means of production for industrial media are typically government and/or privately owned. Social media tools are generally available to the public at little or no cost.

- × Usability - Industrial media production typically requires specialized skills and training. Conversely, most social media production either does not require specialized skills and training or requires just modest reinterpretation of existing skills. In theory, anyone with Internet access can utilize online tools to generate content for social media.

- × Immediacy - The time lag between communications produced by industrial media is often relatively long (measured in days, weeks or even months) compared to social media (which can be capable of virtually instantaneous responses, with effectively only the participants themselves determining the delay in their responses). This aspect is diminishing somewhat as industrial media outlets are beginning to adopt various aspects of production normally associated with social media tools.

- × Permanence - Industrial media, once created, cannot be altered (once a magazine article is printed and distributed changes cannot be made to that same article). Social media can be altered almost instantaneously by comments or editing.[2]

b) Illustrious social media websites:

- Social Bookmarking (Del.icio.us, Blinklist, Simpy) -- Users interact by tagging websites and searching through websites bookmarked by other users.

- Social News (Digg, Propeller, Reddit, Twitter) -- Users interact by voting for articles and commenting on them.

- Social Networking (Facebook, LinkedIn, Hi5, Last.FM) -- Users interact by adding friends, commenting on

[2] http://webtrends.about.com/od/web20/a/social-media.htm (accessed August 12, 2011).

profiles, joining groups and having discussions.

- Social Photo and Video Sharing (YouTube, Flickr, KodakShare) -- Users interact by sharing photos or videos and commenting on user submissions.

- Wikis (Wikipedia, Wikia) -- Users interact by adding articles and editing existing articles.[3]

c) Some interesting statistics[4]:

× Facebook:
  - o Facebook has more than 500 million "active" users worldwide (one out of every 12 people in the world).
  - o People spend over 700 billion minutes per month on Facebook.
  - o The average Facebook user is connected to 80 community pages, groups and events.
  - o More than 30 billion pieces of content (web links, news stories, blog posts, notes, photo albums, etc.) are shared each month on Facebook.
  - o Each month, more than 250 million people engage with Facebook on external websites.
  - o More than 200 million active users currently access Facebook through their mobile devices.
  - o About 70% of Facebook users are outside the US.
  - o Launched in February 2004

× Twitter:
  - o eMarketer estimates 20.6 million US adults will access a Twitter account at least monthly this year.
  - o 200 million Twitter users exist around the world.
  - o Twitter now comes in English, French, German, Italian, Japanese, and Spanish.
  - o 95M tweets are written per day (as of Sept. 2010)
  - o Immediately after the New York earthquake this past August 23rd, NBC News reported that over 5000 tweets per second were sent out.
  - o Launched in July 2006

[3] Ibid.
[4] http://www.social2b.com/index.php/2011/04/21/25-social-media-statistics/ (accessed August 12, 2011) and updated through www.wikipedia.com (accessed September 10, 2011)

- × LinkedIn -- which is of particular interest to attorneys and other professionals:
  - o LinkedIn has more than 120 million users.
  - o LinkedIn is adding 1 million new members every week, which equates to nearly two new members every second.
  - o LinkedIn currently has presence in 200 countries and territories around the world, with 56 million of its 100 million users being outside the US.
  - o Launched in May 2003

- × Wikipedia:
  - o Over 18 million articles have been written collaboratively by volunteers.
  - o Wikipedia ranks seventh among all websites on Alexa.com and having 365 million readers.
  - o For the first time in January 2011, Wikipedia cracked the top ten list of the most popular websites in the United States, according to ComScore Networks Inc. With 42.9 million unique visitors and rank #9, Wikipedia surpassed New York Times (#10) and Apple Inc. (#11).
  - o Launched in January 2001

- × You Tube:
  - o 35 hours of video are uploaded every minute.
  - o 70% of YouTube traffic comes from outside the US.
  - o YouTube is localized in 25 countries across 43 languages.
  - o YouTube's demographic is broad: 18-54 years old.
  - o YouTube reached over 700 billion playbacks in 2010.
  - o Over 4 million people are connected and auto-sharing to at least one social network.
  - o Created during February 2005 by 3 former Paypal employees

Staggering. Absolutely staggering. All of this has occurred in the last 10 years.

As you can see and whether we arbitrators use it or not, social media is huge and exploding. By any measure, it is truly a social phenomenon! It presents huge opportunities for all, yet also for us potentially serious and significant challenges. Where and how do these challenges arise?

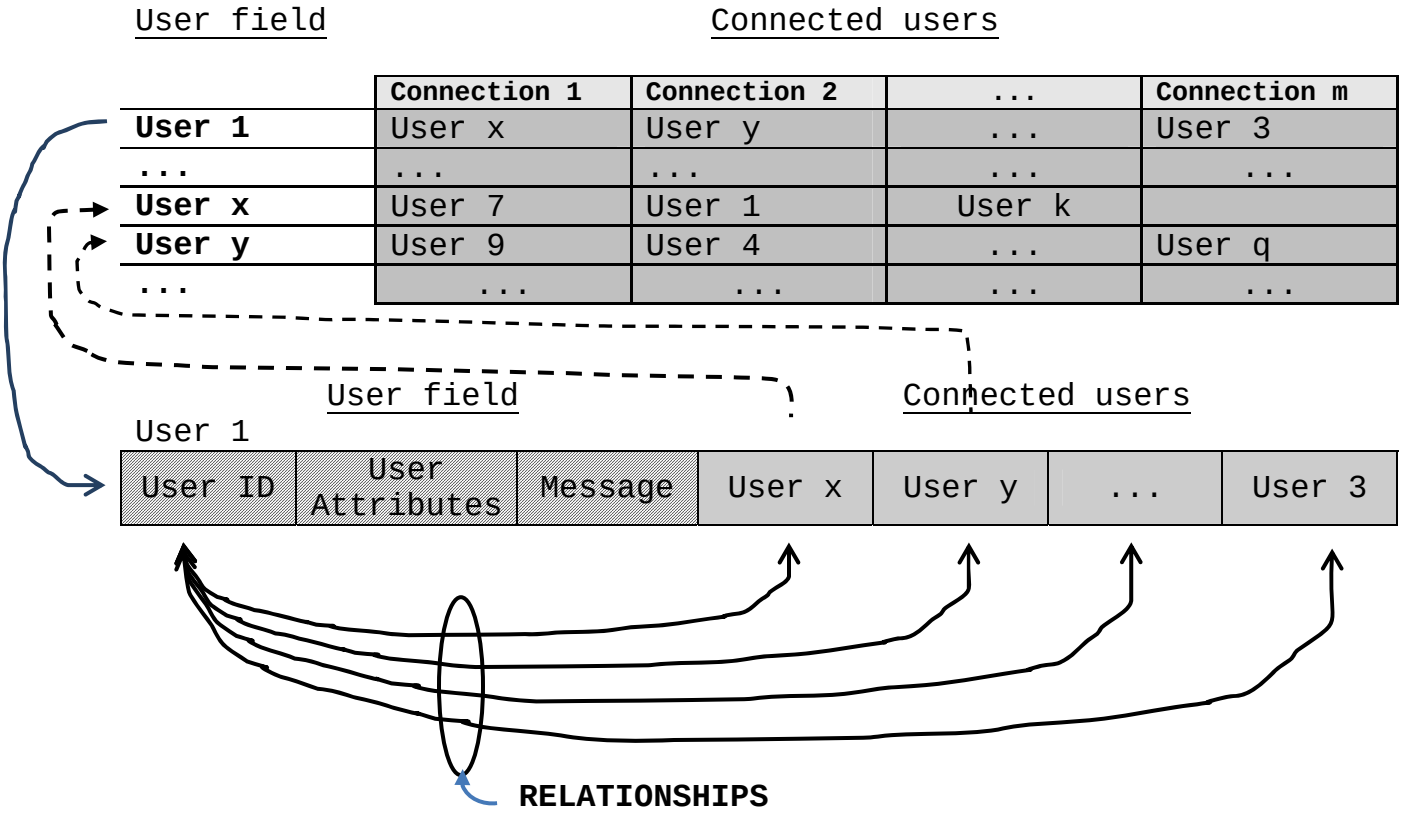
In essence, they are legal issues flowing from a fundamental technical characteristic inherent in all social

media: links that are established between separate data elements, where each element is associated, in some fashion (whether by name or other attribute), with or specifies a corresponding entity or individual.

4. Simplistic view -- core database and user associations

To appreciate this in context, let's consider a very simplistic view of the very heart of every social media application: the database.

The database stores user-generated content and user information, including user-defined associations (relationships). At a very basic level sufficient for our purposes, think of a database as a two-dimensional (flat) matrix, that can be graphically depicted with rows and columns as follows:



This rather simplistic social network diagram shows a database which has a number (y) users. Each user has a corresponding entry (row) in the database. Each row contains a

user field followed by a series of data cells. For a given user associated with the row, e.g. user 1, each data cell contains a pointer (link) to another user to which the given user has established a connection. As an example, User 1 has intentionally connected himself to several users: User x, User y, ..., User 3.

A typical, and again simplistic entry, for each user is shown as a single row below the matrix, where the user field is depicted as containing three fields: a user identification (typically the user's name), various attributes of that user (these attributes will differ based on the focus of the social media site, and can be personal, professional or both), followed by a textual (video or other) message which the user has posted for dissemination to all the users to which he is connected. This particular user has defined connections to other users: User x, User y, ..., and User 3 which these relationships symbolized by the curved lines below the row. Once each of these connected users logs into the social media website, that user is presented with the text message from User 1 (the text message often contains an expiration date -- not shown -- which simply allows a database manager to delete out old messages). In the user connection block labeled User X is a link (address within the database) to that user's entry -- as symbolized by a dashed line, similar for User y (again a dashed line back to the entry for User y) and so forth. Each of the entries for each of these connected users has connections of its own to other users, and so forth. So what we basically have is a self-contained, expanding community of users with varying inter-connections amongst them.

It is the connections that each user has intentionally defined to other users that presents us, as arbitrators, with ethical issues of disclosure.

By defining such a connection, the connecting user states that, in some fashion, he is "related" to the user to which he is connected. But just what is the nature of that relationship? Is it significant? If so, under what conditions? Or is it nothing more than being merely analogous to an electronic exchange of business cards, i.e., a very fleeting and chance encounter, albeit in electronic rather than in-person form? Does such a relationship rise to the level of requiring disclosure? If so, when and how? Is this a problem of our own making, i.e., are we really making a mountain out of an ant hill with the issue surrounding disclosure of social media connections being much ado about nothing?

Now that you have the above rather rudimentary understanding in mind of what social media is and its functioning, my colleagues on the panel will now interactively discuss these ethical issues with you.

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Peter L. Michaelson
Attorney, Arbitrator and Mediator
Michaelson ADR Chambers, LLC

590 Madison Ave
18th Floor
New York, NY 10022 US
Tel: 212-535-0010
pete@mandw.com
www.plmadr.com

CCA 2011 Annual Meeting
October 22, 2011

The problem:

- Direct human-to-human communication is:
  - Inefficient
    - One speaker to a group of listeners (1 : n, n ≥1) in person or through traditional media (print, broadcast radio or TV, film) works fine
    - Speech from multiple simultaneous speakers (m : n, m ≥ 1) quickly devolves to incomprehensible noise
  - Time-consuming
    - To hear what is being said, multiple speakers need to talk sequentially, not in parallel
  - Inter-personal auditory differences exist
    - Handicaps, medical factors, etc.

Social Media – a solution

- Social media inserts a computer between speakers and listeners which:
  - Acts as a buffer, spatially and temporally
  - Accommodates many different modalities
  - No practical limit on speakers (m) or listeners (n)
  - Any one can participate, basically regardless of age and skill level

What is social media?

- "web-based and mobile technologies to turn communication into an interactive dialogue"
  - Social interaction through which user content is created and exchanged using methodologies that are ubiquitously accessible and scalable (Wikipedia)
    - Bi-directional: each user has ability to send and receive content from any other user
    - User can interact with any other user
    - Computer is intermediary

Distinguishing Characteristics of Social Media

- Reach
  - Very wide
  - Provides huge scale -- potential global audience
  - Decentralized and less hierarchical than industrial media
  - Multiple points of production and utility
- Accessibility
  - Content creation tools are publicly available at little or no cost

Distinguishing Characteristics of Social Media

- Usability
  - Does not require specialized skills or extensive training to use
    - Relies on using existing computer skills with some slight learning ("so easy a caveman could do it")
  - Any one with Internet access can use online tools to generate content
  - Little and often no cost to use

Distinguishing Characteristics of Social Media

- Immediacy
  - Time between content entry and retrieval is nearly instantaneous with delay caused mainly by recipient users in choosing when to access content
- Permanence
  - Content can be altered almost instantaneously by comments or editing by originating user

Some Social Media Websites

- Social Bookmarking
  - Del.icio.us; Blinklist
- Social News
  - Digg; Propeller; Reddit; Twitter
- Social Networking
  - Facebook; LinkedIn; Hi5; Last.FM
- Social Photo and Video Sharing
  - You Tube; Flickr; KodakShare
- Wikis
  - Wikipedia; Wikia

Interesting characteristics

- Facebook
  - > 500 Million users (one of every 12 people in the world)
  - Average user connected to 80 pages, groups or events
  - > 30 billion pages of content
  - Each month >250 Million people engage with others on Facebook
  - > 200 Million users communicate through mobile devices
  - Approx 70% of users are outside US
  - Launched Feb 2004

Interesting characteristics

- Twitter
  - 20.6 Million US adults will access Twitter acct at least monthly
  - Versions in English, French, German, Italian, Japanese and Spanish
  - 95 Million tweets/day (as of 9/2010)
  - Immediately after 8/23/11 NY earthquake, 5000 tweets/second were transmitted
  - Launched July 2006

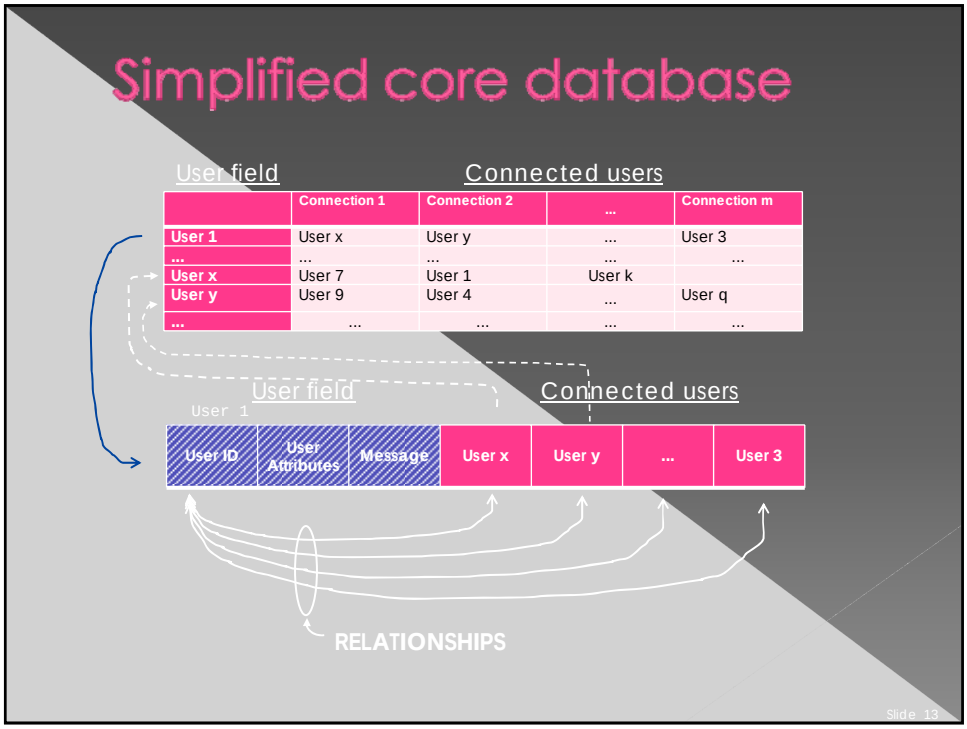
Interesting characteristics

- LinkedIn
  - > 120 Million users, 56 Million are outside US
  - Adding 1 Million new users/week (2 new members/second)
  - Has presence in > 200 countries
  - Available in English, French, German, Italian, Portuguese, Russian and Turkish
  - Launched May 2003
- Wikipedia
  - > 18 Million articles collaboratively written by volunteers
  - Ranked 7th among all websites in activity
  - One of 10 most popular websites in US, surpassed New York Times and Apple
  - Launched January 2001

Interesting characteristics

- You Tube
  - 35 hours of video uploaded/minute
  - 70% of traffic is from outside US
  - Localized for 25 countries across 43 languages
  - Users are 18-54 years old
  - > 700 Billion playbacks in 2010
  - > 4 Million people are connected and sharing
  - Created February 2005 by 3 former PayPal employees

Simplified core database



Recent Case Law –Petitions to vacate awards based on failures to disclose

By Edna Sussman

In recent years, there has been an increasing number of petitions to vacate awards based on failures to disclose/evident partiality. While undoubtedly most such petitions are rejected and we never hear about them, a disturbing number are getting traction in court. A game of what some are referring to as a game of "gotcha" is emerging with counsel and parties making inquiries and even hiring private investigators after the award to find facts which would provide them with a basis for challenging the award.

A few of the recent decisions seeking to vacate awards based on failures to disclose is discussed below.

Challenged and vacated

Commonwealth Coatings Corp. v. Continental Casualty Corp, 393 U.S. 145 (1968) is the seminal United States Supreme Court case dealing with arbitrator disclosure. In the underlying arbitration, the panel chair failed to disclose that one of his regular customers was a party to this case. There had been no business dealings for about a year; in fact the court described those dealings as sporadic. And the amounts involved were relatively minor. The court's plurality decision by Justice Black vacated the underlying arbitration award, which had been confirmed by the U.S. District Court and the Court of Appeals, on the grounds that the lack of disclosure created "an appearance of bias." The court seemed less concerned about the nature of the business relationship between the arbitrator and the party than by the arbitrator's failure to make a disclosure about the relationship. Arbitrators, the court found, "must disclose to the parties any dealings that might create an impression of possible bias." Justice White's concurrence stated it differently and said that "if arbitrators err on the side of disclosure as they should, it would not be difficult for the courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award." Arbitrators are not disqualified if parties accept them after disclosure or if they are unaware of the facts but the relationship is "trivial." The circuits have split on the exact standard to be met.

Karlseng et al. v. H. Jonathan Cooke, No. 05-09-01002-CV, 2011 WL 2536504 (Tex. App. Dallas Jun. 28, 2011).

A Texas court of appeals vacated a $22 million arbitration award because the arbitrator (a former U.S. district court magistrate) failed to disclose a relationship he had with a lawyer representing the respondent. The arbitrator failed to disclose contacts which included being treated with his wife to a $1,600 dinner and ball game, receiving Christmas gifts, hosting the attorney at his home, and conversations several times a year about business advice. The court found that the arbitrator, who said he did not remember these contacts until his wife refreshed his memory before he testified. In vacating the court said that the arbitrator "failed to make any effort to reflect on the interests, contacts, and relationship he enjoyed for many years" with the lawyer in the case.

Alim v. KBR (Kellogg, Brown & Root)—Halliburton, 331 S.W.3d 178 (Tex. App. Dallas 2011).

A Texas court of appeals vacated an award because the arbitrator, who maintained no records and relied on his memory alone for his conflicts check, failed to disclose that he had 6 years earlier served as an arbitrator in a case in which the respondent's representative appeared as the party representative for a company which at the time of the arbitration was no longer affiliated with the company on the earlier arbitration. The court concluded that the arbitrator "failed to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrators' partiality."

Benjamin, Weill & Mazer v. Nancy Hurwitz-Kors, 195 Cal. App. 4th 40 (Cal. App. 1st Dist. 2011).

In an arbitration involving a dispute over attorneys' fees, a California court of appeals vacated an arbitration award because it found that the arbitrator failed to disclose information about his personal law practice. Respondent in support of the application to vacate the award the award pointed to the arbitrator's web site which identified him as frequently representing law firms and to the fact that he was counsel to a law firm at the time of the arbitration in connection with a petition to compel arbitration of a fee dispute. The court found that the arbitrator should have disclosed these facts which might have led the defendant to "reasonably entertain a doubt" that the arbitrator would be able to arbitrate the dispute impartially.

Dealer Computer Services Inc. v. Michael Motor Company, Inc., 761 F. Supp. 2d 459 (S.D. Tex.1910)
ON APPEAL TO THE 5TH CIRCUIT

The federal district court vacated an award where the arbitrator disclosed that she had served as an arbitrator in a prior dispute concerning the respondent car dealership and had put a question mark next to the question about whether any witness had previously appeared before her. The arbitration concerned a contract nearly identical to the one in the prior arbitration and the focus of both arbitrations was an interpretation of the same clause in the contract and the same damages expert appeared both arbitrations. The court found that the arbitrator's prior exposure to the legal issues and witnesses "creates a reasonable impression that she had prejudged at least some of the issues" and the failure to disclose constituted "evident partiality."

We will be watching how the Fifth Circuit deals with this one. The appellate brief filed by the appellant, of course, makes the facts sound more favorable for the arbitrator; if accurate, it would appear that at least some of the associates in the 5 person law firm which represented the losing party knew about the arbitrator's participation in the other arbitration and there were other indications that the parties knew about it.

Amoco v Occidental Petroleum, 2011 Tex App. LEXIS 3674 (Ct App. Tex. 14 Dist, 2011)
Award vacated where arbitrator moved to a new law firm during the arbitration and the firm represented an affiliate of one of the parties. The court stated that evidence of non-disclosure is enough to establish partiality regardless of whether the undisclosed information necessarily proves partiality or bias.

Scandinavian Reinsurance Company Limited v. St. Paul Fire & Marine Insurance Co., et al., 732 F. Supp. 2d 293 (S.D.N.Y. 2010).

ON APPEAL TO THE SECOND CIRCUIT

A federal district court vacated an arbitration award in which two of the arbitrators failed to disclose their simultaneous involvement in a separate arbitration. The losing party found out about the second arbitration when it was vacated by the third circuit for being "completely irrational" and at odds with the parties' submissions. The court found two arbitrations "overlapped in time, shared common issues, involved related parties, and had a common witness" on contract interpretation and intent. The court concluded that the arbitrators had placed themselves in a position where they could receive *ex parte* information about the reinsurance business and be influenced by credibility determinations and influence each other's thinking based on proceedings in the other arbitration. The court held that the simultaneous service in the two arbitrations constituted a material conflict of interest and the failure to disclose met the standard for evident partiality because the relationships between the two arbitrations were material and the arbitrators had knowledge of the relationships.

This case has drawn considerable comment. We will be watching how the Second Circuit deals with this one. Needless to say the appellate brief filed by the appellant makes the facts sound much less egregious.

Challenged but not vacated – close to home

Midwest Generation EME LLC v. Continuum Chemical Corp., 768 F. Supp. 2d 939 (N.D. Ill. 2010)

The issue before the Magistrate Judge was whether to permit discovery with respect to a petition to vacate an award based on an assertion that one of the arbitrators "intentionally concealed … a system of referrals and professional business relationships" between the construction law group at his firm and the construction law group in the firm representing one of the parties; the relationship was described in a later submission as a "*de facto* marketing relationship." The court rejected the application for discovery finding that the evidence presented simply showed a series of public, almost exclusively parallel professional contacts, involving writing and lecturing on construction related matters all of which were readily discoverable to whoever cared to look. The court reviewed in detail the speaking and writing "relationships" offered in support of the application,

which included membership in the same professional organizations, presenting papers at the same professional conferences, writing chapters in the same books, etc. The court noted that counsel for the losing party had the same kind of relationships with the arbitrator challenged.

Seaside Heights v. RHS Ventures, (Sup. Ct NY Co. 2011) unreported

The court rejected a petition to vacate base on a failure by one arbitrator to disclose overlapping professional associations, speaking at the same professional conferences on different panels, representation by arbitrator's prior firm of the law firm for one of the parties where the arbitrator reported that she had not conducted a conflict check at her prior firm and the arbitrator had no involvement in that matter. The court noted that the additional relationships could have been ascertained much earlier and that "a party to an arbitration may not sit idly back and rely exclusively upon the arbitrator's disclosure." The court also rejected the allegations with respect to a second arbitrator, a former judge of the NY Court of Appeals, and charges that the prevailing parties' attorneys had engaged in witness tampering for which the challenging party offered post hearing transcripts of secretly recorded conversations. Sanctions were granted by the court.

CRC Inc. v. Computer Sciences Corp., 2010 U.S. Dist. LEXIS 109562 (S.D.N.Y. 2010) The court found the arbitrator's failure to disclose that his firm was co-counsel in several matters with the firm representing one of the parties, which was not something that his firm's conflicts check was set up to ascertain and about which he did not know, was "too insubstantial to warrant vacating the award" and too attenuated to " constitute more than mere speculation of bias." But the court said that this was "unfortunate" and such conduct was "hardly commendable."

Sanctions - will we see more of this?

World Paradise Inc. v. Suntrust Bank, 403 Fed. Appx. 468; 2010 U.S. App. LEXIS 24254 (11th Cir. 2010) sanctions granted for frivolous appeal of confirmation of an award and denial of the motion to vacate which was based on evident partiality.

Seaside Heights v. RHS Ventures, (Sup. Ct NY Co. 2011) – see discussion above-sanctions granted

Ethical Opinions on Judges and Social Media
By Edna Sussman

Following is a summary of and excerpts from the ethical opinions issued to date with respect to judges' use of social media and particularly whether judges can be "friends" or "connections" with lawyers who may appear before them. The opinions are presented in chronological order so the evolution of the thinking on the subject as it became better known is evident.

Generally the opinions permit judges to engage in social networking sites including with lawyers who may appear before them but caution that great care must be taken in this milieu to assure appropriate conduct. In brief, judges must judge whether a social network contact is actually a close personal relationship that requires recusal or disclosure, cannot make a public comment that could affect outcome or impair fairness, cannot comment on a pending case, cannot have *ex parte* communications with counsel before them, cannot conduct independent web research, must avoid lending the prestige of the office to the judge's or others' interests and must behave in a tasteful manner.

California, in a recent opinion, provides the most a detailed analysis. With respect to analyzing whether the social network creates an appearance of partiality and special influence, the opinion suggests looking at the nature of the social network and the content posted, the number of contacts, how selectively contacts are allowed to join and how regularly the attorney appears before the judge. If the attorney may appear, disclosure is enough. But the opinion states that when an attorney appears before the judge, he or she must be unfriended or otherwise dropped. California also cautions that judges must be vigilant and delete inappropriate comments made by others.

Florida, an early opinion on the subject, alone opined flatly that judges may not add lawyers who might appear before them on a social networking site.

New York *Opinion #08-176* (0 *1/29/09).*

Available at
http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm

Query: A judge received an e-mail inviting him/her to join an online "social network" and inquires whether it is appropriate for him/her to accept that offer and participate.

Committee's Digest: "Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."

Discussion: "The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge's court, subject to the Rules Governing Judicial Conduct (the "Rules") (*see* Opinion 07-141). Moreover, the Committee has not opined that there is anything per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page... Thus, the question is not whether a judge can use a social network but, rather, how he/she does so…"

"The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal (*compare* Opinion 07-141 *with* Opinion 06-149)…"

"Further, other users of the social network, upon learning of the judge's identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advice. As is true in face-to-face meetings, a judge may not engage in these communications..."

"The guidance set forth above is, and can only be, a non-exhaustive list of issues that judges using social networks should consider. The Committee urges all judges using social networks to, as a baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology, above and beyond what is specifically described above…"

"Judges who use social networks consistent with the guidance in this opinion should stay abreast of new features of, and changes to, any social networks they use and, to the extent those features present further ethics issues not addressed above, consult the Committee for further guidance."

South Carolina -*Opinion # 17-2009*
Advisory Committee on Standards of Judicial Conduct, South Carolina (10/2009)

Available at
http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009

"A judge may be a member of Facebook and be friends with law enforcement officers and employees of the judge as long as they do not discuss anything related to the judge's position."

"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. Canon 2(A), Rule 501, SCACR. However, the commentary to Canon 4 states that complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Allowing 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. Thus, a judge may be a member of a social networking site such as Facebook."

Florida -Opinion #2009-20 (11/17/2009)
Judicial Ethics Advisory Committee, Florida Supreme Court.

Available at
http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html

Issue: Whether a Judge may post comments and other material on the Judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct? ANSWER: Yes.

Issue: Whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend." ANSWER: No.

Discussion: The first question is answered in the affirmative because it related only to the method of publication. The Code of Judicial Conduct does not address or restrict a judge's method of communication but rather addresses its substance. Therefore, this proposed conduct by the judge does not violate the Code of Judicial Conduct. Of course, the substance of what is posted may constitute a violation.

The inquiring judge proposes to identify lawyers who may appear in front of the judge as "friends" on the judge's page and to permit those lawyers to identify the judge as a "friend" on their pages. To the extent that such identification is available for any other person to view, the Committee concludes that this practice would violate Canon 2B which states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

It is the selection and communication process of social networks where invitations are issued to friend or connect and accepted that led the Committee to believe that it violates Canon 2B, "because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge."

The opinion notes that “a judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”

A minority of the committee disagreed with the conclusion reached.

Kentucky -*Formal Judicial Ethics Opinion #JE-119* (1/20/20lO), *Judge’s Membership on Internet-based Social Networking Sites* Ethics Committee on the Kentucky Judiciary.

Available at
http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf

Inquiry: “May a Kentucky judge or justice, consistent with the Code of Judicial Conduct, participate in an Internet-based social networking site, such as Facebook, Linkedin, MySpace or Twitter and be "friends" with various persons who appear before the Judge in court such as attorneys, social workers and/or law enforcement officials.” Answer: Qualified yes.

“The Committee’s view is that 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 a “friend.’” These are “terms of art used by the site.” However the Committee believes judges should be mindful of “whether on-line connections alone or in combination with other factors rise to the level of a “close personal relationship” which should be disclosed and/or require recusal.”

But there are perils. “Judges must act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” …”Pictures and commentary posted on the sites which might be of questionable taste, but otherwise acceptable for member of the general public, may be inappropriate for judges.”

Furthermore, while a proceeding is pending judges are prohibited from making any public comment that “might reasonably be expected to affect its outcome or impair its fairness”… and “judges are prohibited from practicing law or giving legal advice/” Social networking sites are much more public than off line converstations.

The opinion makes clear that the committee struggled with whether it should be a “qualified yes” or a “qualified no” but decided judges should not be isolated from the community and ended with an admonition that judges should be “**extremely cautious”** in participating in social networking sites.

California Opinion # 66 (11/13/2010)

CALIFORNIA JUDGES ASSOCIATION, Judicial Ethics Committee

ONLINE SOCIAL NETWORKING
available at
http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf

Questions and conclusions:
1)"May a judge be a member of an online social networking community?" Yes

2) "May a judge include lawyers who may appear before the judge in the judge's online social networking?" Very qualified yes

3) "May a judge include lawyers who have a case pending before the judge in the judge's online social networking?" No

The discussion begins with an explanation of social networking and the access available to what is on a person's page and how the privacy settings work.

Question 1- The same rules that govern a judge's ability to socialize and communicate in person, on paper and over the telephone apply to the Internet. Judges are not required to isolate themselves from their communities. Indeed, the commentary to Canon 4A expressly states that "a judge should not become isolated from the community in which the judge lives." In this day and age, that community exists and increasingly interacts in the realm of cyberspace. There is no express rule against participating in an online social network site and, so long as any provisions of the Canons are not otherwise violated, a judge is free to do so. It is permissible.

However, the opinion notes that the use of technology does pose unique issues that may have significant ethical implications and recites a non-exhaustive list of ethical concerns: (a) Public comment on pending cases (must assume all postings are public and prohibited) ; (b) Casting doubt on a judge's ability to act impartially (**Must not only avoid making comments but must be vigilant and delete comments posted on judge's page by others**); (c) Demeaning public office (must promote confidence and refrain from demeaning the judiciary even if posts or pictures would be acceptable for others); (d) Impermissible political activity (can't endorse or oppose candidates or link to political organizations or comment on legislation); (e) Lending the prestige of the judicial office (can't advance the interests of the judge or others)

Question 2 - There is no ethical rule prohibiting judges from interacting with lawyers who appear before them. The commentary to Canon 4A points out that a judge should not be separated from the community in which the judge lives. Judges are not only allowed, but are encouraged to participate in bar associations and other groups dedicated to the improvement of the law.

The committee concluded that a *per se* prohibition of social networking with lawyers who may appear before a judge is not mandated by the Canons, but stressed that a judge's interaction

with attorneys who may appear before the judge will very often create appearances that would violate the Canons. The Committee listed various factors that need to be considered in determining whether it would be permissible to interact with attorneys on a social networking site.

(a) Appearance issues - Depending on the nature of the site, a reasonable person could conclude that an attorney who interacts with a judge on the judge's social networking site is in a position of special influence and could reasonably question the judge's ability to be impartial in cases involving that attorney. Given the increased use of Internet searches of party opponents by tech-savvy litigators this concern cannot be taken lightly. In this day and age, one should assume that lawyers, parties and even witnesses involved in a case may search Facebook and other sites to obtain background information about opposing counsel, parties and the judge. In conducting that search, it would be troubling, to say the least, to discover that the opposing counsel and the judge are "friends" on a social networking site. The opinion lists several factors to be considered in this regard:

(i) Nature of the social networking site- the more personal the more likely to cast doubt. If distinct groups like bar or alumni associations it is no worse than participating in those groups

(ii) Number of friends on the page - the greater the number the less likely it would reasonably lead to an impression of being in a position to influence

(iii) The judge's practice in deciding who to include - if selective may give rise to an appearance of partiality

(iv) How regularly the attorney appears before the judge- the more frequently the attorney appears before the judge the less likely to be permissible

If other contacts would cause the judge to disclose a relationship, including that attorney on the social network may be improper regardless of the nature of the site. The opinion discusses a few hypothetical situations.

On disclosure the opinion states:

"In those cases where "friending" an attorney is permissible, the issue then becomes what ethical obligations arise when the attorney appears before the judge. **It is the committee's view that at the very least disclosure is required in every case.** For example, even though generally a judge need not disclose that an attorney appearing before him/her is a member of a bar association in which the judge is also a member, if the judge and the attorney are both members of a social networking site utilized by members of that organization the judge should disclose this fact as well as the extent and nature of the professional and online contacts. The need for disclosure arises from the peculiar nature of online social networking sites, where evidence of the connection between the lawyer and the judge is widespread but the nature of the connection may not be readily apparent. Assuming that including the lawyer was permissible, disclosure should be sufficient to dispel any concerns that the attorney is in a special position to influence the judge or that the judge would not be impartial."

Question 3 – If an attorney appears before the judge, he or she must be "unfriended" and the fact this was done should be disclosed along with the disclosure required. The appearance issues cannot be overcome by disclosure in this circumstance.

The opinion concludes with "notwithstanding the explosion of participation in online social networking sites, judges should carefully weigh whether the benefit of their participation is worth all the attendant risks."

Ohio -*Opinion #2010-7* (12/03/10),
Ohio Supreme Court,Board of Commissioners on Grievances and Discipline.

Available at **http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010//op_10-007.doc**

"SYLLABUS: A judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct. A judge who uses a social networking site should follow these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), a judge should not make comments on a social networking site about any matters pending before the judge—not to a party, not to a counsel for a party, not to anyone. To comply with Jud. Cond. Rule 2.9(C), a judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), a judge should disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, a judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site."

Question: May a judge be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge?

Discussion: A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily. A social network "friend" may or may not be a friend in the traditional sense of the word.

"Social interaction between a judge and a lawyer is not prohibited. Yet, a judge's actions and interactions must at all times promote confidence in the judiciary. A judge must avoid impropriety or the appearance of impropriety, must not engage in *ex parte* communication, must not investigate matters before the judge, must not make improper public statements on pending or impending cases, and must disqualify from cases when the judge has personal bias or prejudice concerning a party or a party's lawyer or when the judge has personal knowledge of facts in dispute."

The opinion discusses a reprimand of a judge in North Carolina who communicated with counsel on Facebook and did independent research on a pending case. The opinion also reviews the opinions issued in other states. The Board's syllabus sums up its views.

Additional resources

Committee on Codes of Conduct, Judicial Conference of the United States, *Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees (4/1/2010).* A guide to how social media works and suggestions on how courts can deal with the issue including sample judicial employee policies. Available at http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf

Additional resources are also available on line at the National Center for State Courts web site. It contains articles and ethics opinions on social networking as they are issued. Available at http://www.ncsc.org/Topics/Media-Relations/Social-Media-and-the-Courts/Resource-Guide.aspx