

Asocial Media:

When Lawyers and Judges Must Disconnect

Kelly Lynn Anders

For many lawyers and judges, the use of social media can pose as many risks as rewards. With electronic communication methods sometimes surpassing the use of more traditional methods, legal professionals have little choice but to engage in some of the more popular social-media platforms, such as Facebook, LinkedIn, and Twitter.

Certainly, countless other communication methods exist and will continue to be developed; however, like the aforementioned trio, social media will likely always continue to share several key traits, each of which will continue to pose challenges for ethical communication among legal professionals. First, it is public—so public, in fact, that access spans the globe. Second, it is immediate. When comments are posted, they appear in “real time” and for all to see. Finally, it is permanent. Even after deleting comments, photos, and hyperlinks, there’s no guarantee that they will not be copied before they have been deleted, thereby leading to the possibility (no matter how slim) that anything posted online can take on a life of its own.

Any one of these possibilities, viewed singularly, could create enough ethical minefields to make even the most seasoned practitioners take pause. As a result, this uncertainty has inspired myriad articles, seminars, and guides for “best practices” in maneuvering through the potential pitfalls involved in social media where lawyers and judges are concerned. Although the American Bar Association has published several useful directives,¹ clear guidelines have yet to be included in the *Model Rules of Professional Conduct* (MRPC) or the *Model Rules of Judicial Conduct* (MRJC).

There are many valuable references that provide general guidance on social-media usage for lawyers and judges,² but they fail to address yet another delicate component involved in social-media ties—breaking them. Severing ties on social media carries with it a variety of ethically sensitive considerations, ones that involve rules of professional conduct, professionalism, and a skill that is becoming ever more nuanced—tact.

Several years ago, some states began to ban certain social-media connections between lawyers and judges, thereby requiring them to retroactively sever ties.³ But no advice was given as to how best to do so. This article will address the mechanics of severing ties on three currently popular sites, the professional implications of severing social-media connections, relevant rules governing judicial and attorney conduct,

and a discussion of “best practices” for lawyers and judges to follow when social-media ties must be broken.

I. THE MECHANICS OF SEVERING TIES ON FACEBOOK, LINKEDIN, AND TWITTER

Developing contacts is much easier than ending them. Mechanically, the processes for doing so on Facebook, LinkedIn, and Twitter are simple. Ethically and professionally, this task can be nuanced and complex.

A. UNFRIENDING AND UNLIKING ON FACEBOOK

There are two ways to sever ties on Facebook—via the “unfriend” and “unlike” features. The former is associated with disconnecting from a user’s personal page, while the latter provides a way to sever ties from pages associated with companies, clubs, groups, organizations, and other business-related pages that belong to individuals.

When one unfriends or unlikes, page owners are not notified; however, page owners and administrators are advised of new friends and likes. Unfriending and unliking are most noticeable on pages with the fewest friends and likes, or when they involve users that page owners or administrators know particularly well.

Although it is likely that fleeting friendships and affiliations routinely come and go among more junior or casual users, such as minors and college students, and they may have hundreds (and, sometimes, thousands) of friends and likes on their pages, the same cannot commonly be assumed of lawyers and judges. As a result, each disconnection could be much easier to detect, not only by page owners and administrators, but also by other friends or visitors who might be monitoring friends and likes on particular pages. In instances where connections involve lawyers and judges, it may be awkward to unlike and unfriend, even when directed to do so.

B. UNLINKING ON LINKEDIN

In contrast to Facebook and Twitter, LinkedIn is almost solely used for professional purposes, including networking, establishing and broadening contacts, joining professional groups, and even job searches and “following” companies to keep track of their news. As a result, affiliations tend to be limited to users who are less interested in participating in some of the more personal features found on Facebook (e.g., posting photographs, announcing one’s immediate whereabouts, etc.),

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Footnotes

1. See, e.g., ABA Formal Opinion 462, “Judges’ Use of Electronic Social Networking Media” (Feb. 21, 2013).

2. One of the most comprehensive and current examples is JAN L. JACOBOWITZ & JOHN G. BROWNING, *LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER’S HANDBOOK*, Ch. 8 (2017). Another is “Social Media and Judicial Ethics,” *JUD. CONDUCT REP.*, Vol. 39, No. 1 (Nat’l Ctr. for St. Cts., 2017).

3. *Id.* See also Samuel V. Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 *GEO. J. LEGAL ETHICS* 281 (2011).

and are instead more inclined to use the site to monitor career transitions, read business-related news articles targeted to their interests, recommend colleagues, and send emails. It should be noted, however, that users may opt to link to their pages on Facebook and Twitter so that posting a message on one platform will automatically ensure the identical posting on the other.

Depending on the level of privacy selected on one's profile, it is possible for users who are linked to see others' connections within their networks. In the most lax privacy option, a user's connections may be viewed by any LinkedIn user—both inside and outside of the user's immediate network. It cannot be assumed that every lawyer and judge uses the most stringent privacy setting; even if some do, this does not erase the possibility that others will gain access to lists of connections that were intended to have limited access.

On LinkedIn, the unlinking process is as simple as clicking a button. As with Facebook, there are no notifications sent when links are broken.

C. UNFOLLOWING ON TWITTER

Just as Facebook has added new words to the popular cultural lexicon with “unliking” and “unfriending,” Twitter has introduced the concept of “unfollowing,” which enables users to cease receiving tweets from users they once “followed.” On Twitter, a user's followers remain public knowledge, particularly for accounts used for business or professional purposes. Twitter assists users in locating companies, schools, organizations, and public figures to follow, based on perceived interests that stem from tracking accounts followed by users and others in their networks.

Lawyers and judges may have Twitter accounts that are used for personal or professional purposes, and there are many articles and seminars that provide general guidance about the ethical considerations involved in doing so. The same is true for law firms, which, in small numbers, also use Twitter for firm marketing and informational purposes. It is uncertain whether these resources provide instruction about the potential complications that may be involved in severing ties. Rather, they appear to be focused more on their formation and maintenance.

Tweets are currently limited to 280 characters, but users may send unlimited numbers of such updates on a daily basis. A simple “unfollow” button is all that one needs to click to end a connection. As with Facebook and LinkedIn, users are not notified when this occurs.

II. SOCIAL-MEDIA DISCONNECTIONS AND THE MODEL RULES

Because of the lack of notification when a user opts to end a social-media connection, one could wrongly assume that severing ties would automatically be easier, less awkward, and more socially graceful. On the contrary, this simple act can test even the most experienced legal professional's rudimentary understanding of the concept of professionalism in the law.

Regardless of whether attorneys and judges are parting ways through traditional or virtual channels, ethical expectations are the same—or they should be. The following sections will address relevant rules in the MRPC and MRJC that may directly or indirectly relate to severing social-media ties.

A. EXITING SOCIAL MEDIA AND THE MODEL RULES OF PROFESSIONAL CONDUCT

As previously mentioned, social media is not currently included in the MRPC. However, it is surprising to note that the current rules do not include any language or guidance about lawyers severing ties with judges or other lawyers in any medium. Perhaps it's thought that parting ways is merely a part of general communications, such as “hello” and “good-bye”; it is more likely that such “goodbyes” were not previously envisioned. But times have changed, and social media is no longer new. As a result, the absence of guidance in the MRPC highlights a lack of clarity about modern expectations of professional communication among legal professionals that needs to be addressed and resolved.

The primary focus of communication in the MRPC, Rule 1.4, concerns a lawyer's duties in reference to communications with clients. Additional expectations concerning communicating with clients can be found in Rule 7.1; however, even in text addressing client communications, very little, if any, guidance exists to instruct lawyers on “best practices” or even basic expectations for severing ties. With recent discussions in legal education, media, and other sources about the lacking preparation of “practice-ready” lawyers, it cannot be assumed that this skill has been mastered (or even addressed) simply because one has successfully completed law study and has the wherewithal to create a social-media presence.

Absent clear-cut guidance, general participation in social media may, in part, be governed by Rules 3.5 (Impartiality and Decorum of the Tribunal), 8.4(d) and (e) (Misconduct), and the various rules concerning advertising, along with the aforementioned Rules 1.4 and 7.1. Yet another applicable section of the MRPC is Rule 5.1, which addresses “Responsibilities of Partners, Managers, and Supervisory Lawyers,” who are charged with establishing guidelines for the professional performance of junior lawyers.

Additionally, there are some firms and managing partners who may have established internal guidelines for attorneys to follow when engaging in social-media activities. However, absent guidelines from the MRPC, lawyers' performance will likely continue to lack consistency or uniformity, which can cause confusion about expectations of best practices for lawyers, judges, and others who are directly or indirectly involved in the legal community, including clients, jurors, and the general public.

B. EXITING SOCIAL MEDIA AND THE MODEL RULES OF JUDICIAL CONDUCT

Much like the lack of coverage in the MRPC, the MRJC neither specifically addresses social media, nor provides guidance for severing ties with lawyers or other judges. Indirect guidance is contained in Canons 2 and 3, specifically in Rules 2.2 (Impartiality and Fairness), 2.4 (External Influences on Judi-

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cial Conduct), and 3.1 (Extrajudicial Activities in General). Additional guidance for performance in this area is found in Rules 1.2 (Promoting Confidence in the Judiciary) and 1.3 (Avoiding Abuse of the Prestige of Judicial Office).

Of the scant number of directives in the MRJC related to communication, most are focused on the interests of parties whose cases are being heard in court proceedings. Although traditional methods of communication have logically and historically been left to judicial discretion—and, for the most part, with great success—the public and uncontrollable nature of social media calls for a different approach. Guidance in entering into active participation in social-media communication, along with clearly defined rules for severing ties with lawyers and others inside and outside of the legal community with whom judges may be linked, would provide much-needed clarity about an increasingly important element of what it means to serve as a judge in the new millennium—and to do so in a way that deftly combines professionalism, decorum, and accessibility.

III. RECOMMENDED BEST PRACTICES FOR LAWYERS AND JUDGES WHO MUST SEVER TIES ON SOCIAL MEDIA

Although Facebook, LinkedIn, and Twitter do not advise a user of broken connections, a lawyer's or judge's basic understanding of professionalism in the law should dictate the importance of disclosure. Regardless of who is breaking the tie—the judge or the lawyer—one should notify the other of the intention to do so, along with the rationale. For casual acquaintances, an email would be sufficient. For more personal connections, which, for this purpose, are limited to the small number of one's closest colleagues, a brief telephone call or in-person meeting to discuss the reason for the impending disconnection would be preferable, provided adequate time exists to do so. However, considering the limited amount of free time enjoyed by any legal professional, availability for personal advisories may be limited at best. An email, though not preferred, would at least put close contacts on notice of the need to sever ties so that they would know to expect it, and an invitation to call or meet to discuss the matter could be included in the message.

Although it is unlikely that anyone would take offense to severing ties due to a mandate, there are also instances where lawyers and judges opt to do so voluntarily. Examples may include breaking ties because of changes in employment, disassociations due to sanctions, or the ending of friendships. With the exception of the last reason, advance notice of the intention to sever the tie is the most professionally prudent approach.

Lawyers and judges may wish to draft standard email language to have on hand to use for this purpose, based on a variety of reasons, with text that can be cut and pasted to suit the occasion. They may also wish to cite to the opinion that, in mandated instances, has caused the reason for the disconnection. As an example, in the case of Florida's 2012 opinion concerning connections between lawyers and judges on LinkedIn, an email from a judge to a lawyer could read:

Although we have been connected on LinkedIn in the past, and this connection has been beneficial, I

must reluctantly break all connections on this site with lawyers who may appear before me, due to a recent opinion issued in May 2012 by the Judicial Ethics Advisory Committee of the Florida Supreme Court (Opinion No. 2012-12). Of course, this does not alter our opportunities to interact collegially outside of social-media channels. Understandably, the Committee is concerned about mistaken impressions about judicial influence, which I am sure you agree is essential for us all to protect. So that you are not caught by surprise, or left to wonder why I have broken our connection, I am sending this note as an advisory. Please contact me with any questions.

A lawyer could send a similarly worded advisory to judges in his or her network. Advance notice is far preferable to disappearing without any explanation for doing so, and having email text readily available literally takes seconds to employ, while leaving positive impressions that will be recalled for the duration of one's career.

IV. CONCLUSION

Social media, in some form, is very likely here to stay. Currently popular sites, such as Facebook, LinkedIn, and Twitter, may come and go, but their commonalities (public, immediate, and permanent) will form the bases for any social-media sites that may replace them in the future. Yet another commonality that these social-media sites share is the lack of notification to users when a connection chooses to sever ties.

No one engages in social-media activities planning to disconnect. On the contrary, the ultimate goals of becoming involved in social-media activities on a professional level are to strengthen and enhance current connections, develop new contacts, and to establish an online presence that positively solidifies one's reputation in the legal community.

Because lawyers and judges are held to a higher standard of professionalism than the average social-media user, clarification about best practices for disconnections between lawyers and judges on social media has become a necessity. Such a lack of guidance has the potential to create unnecessary confusion, particularly in instances where the severing of social-media ties is mandated. If such guidance were included in the MRPC and MRJC based on the aforementioned general traits inherent to social media, this would provide much-needed clarity for years to come.



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