

Why Can't We Be Friends? Judges' Use of Social Media

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I. INTRODUCTION

According to the latest Pew Internet studies, as of May 2013, 72% of adult Americans have at least one social networking profile, up from 67% in 2012.¹ Even among older age groups, the percentages are sur-

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1. JOANNA BRENNER & AARON SMITH, PEW RESEARCH CENTER, 72% OF ONLINE ADULTS

prisingly high and growing: 60% of those aged 50 to 64 are active on social media, while 43% of those aged 65 and older use social networking sites.² It only stands to reason, therefore, that as the percentage of the population that has embraced the paradigm shift in communications that social networking represents continues to grow, an increasing number of those with an online presence will be members of the judiciary. Yet, this inescapable reality raises larger questions that lawyers, judges, and judicial ethics authorities all over the country are confronting: Should a judge maintain a social networking presence? How active should he or she be? Should a judge be Facebook “friends” with a lawyer who practices in her court or with members of the public who may wind up as litigants before her? And how attenuated can a Facebook “friendship” be? If a party or witness happens to count a member of a judge’s family among his online contacts, is that itself a sufficient ground for recusal? In short, to what extent is social media activity at odds with applicable canons of judicial ethics?

In 2010, the Conference of Court Public Information Officers (CCPIO) conducted a survey entitled “New Media and the Courts: The Current Status and a Look at the Future.”³ Forty percent of the responding judges said that they used one or more social networking sites—nearly 90% reported using Facebook, while 21% had a LinkedIn account.⁴ Not surprisingly, judges who were elected were far more likely to use social media (66.7%) than their counterparts who were appointed (8.8%).⁵ The majority of judges using social networking sites characterized their use as purely personal in nature, and they were clearly comfortable with this personal use—only about 35% of those using social media felt that personal use could compromise their judicial ethics in any way.⁶ The judges were considerably more divided when it came to using Facebook and other sites in their professional lives: Half either disagreed or strongly disagreed with the statement, “[j]udges can use social media profile sites, such as Facebook, in their professional lives without compromising professional conduct codes of ethics.”⁷ When the study was repeated in 2013, more than 30% of the judges responding stated that they had privacy concerns about using social

ARE SOCIAL NETWORKING SITE USERS 2 (2013), available at <http://pewinternet.org/Reports/2013/social-networking-sites.aspx>.

2. *Id.* at 3–4.

3. CHRISTOPHER J. DAVEY ET AL., NEW MEDIA COMM. OF THE CONFERENCE OF COURT PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE (2010), available at <http://ccpio.org/wp-content/uploads/2012/06/2010-ccpio-report.pdf>.

4. *Id.* at 65.

5. *Id.*

6. *Id.* at 66.

7. *Id.*

media tools, while 21.7% reported having ethical concerns about social media use.⁸

This article examines both the positive aspects of judges participating in social media as well as the ethical pitfalls. It will look at not only individual instances of judges' misconduct in their use of social media, but also the varying treatment seen in the ethics opinions and judicial rulings from around the country that have addressed the issue. These decisions reveal that attitudes toward judges being active on social media vary among the states that have dealt with this issue. These decisions, and the attitudes they reflect, shed light on how we view judges and their role in society. Are judges to be viewed as isolated from society? Are they to be viewed as philosopher-priests toiling away in our jurisprudential temples? Should they be regarded as fully connected to society and all of its foibles, with their work reflecting accessibility to the citizens they serve?

Part of the problem in analyzing judges' use of social media is that those few scholars who have looked at this area, not to mention many of the ethics bodies that have tried to tackle it as well, tend to take one of two paths in looking at the subject.⁹ The first could best be described as the restrictive approach—judges should either have no social networking presence whatsoever or, at least, a severely limited one, such as a Facebook fan page for political purposes maintained by an election campaign representative.¹⁰ For advocates of this approach, such a policy of avoidance “not only safeguards the public better . . . , it also decreases the risks of judicial disqualification and recusal.”¹¹

The second approach is what might be called the cautiously integrative¹² or “permissive approach.”¹³ This gives cautious consent to the concept of judicial use of social media, albeit with considerable trepidation, while imposing multiple caveats on such use.¹⁴ Advocates of this approach have even called for social media-specific rules of judicial ethics.¹⁵

8. CHRISTOPHER J. DAVEY & CAROL TAYLOR, CONFERENCE OF COURT PUB. INFO. OFFICERS, 2013 CCPIO NEW MEDIA SURVEY 13 (2013), available at http://ccpio.org/wp-content/uploads/2012/09/2013-New-Media-Survey-Report_CCPIO.pdf.

9. See, e.g., Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 286–90 (2011); Craig Estlinbaum, *Social Networking and Judicial Ethics*, 2 ST. MARY'S J. OF LEGAL MALPRACTICE & ETHICS 2, 5–6 (2012); Aurora Wilson, Comment, *Let's Be Cautious Friends: The Ethical Implications of Social Networking for Members of the Judiciary*, 7 WASH. J.L. TECH. & ARTS 225, 229–30 (2012).

10. See Jones, *supra* note 9 at 287–88, 300.

11. *Id.* at 302.

12. *Id.* at 287–88.

13. Estlinbaum, *supra* note 9, at 6 (citing Jones, *supra* note 9).

14. *Id.* at 23–25.

15. E.g., Jones, *supra* note 9, at 284 & n.26; Estlinbaum, *supra* note 9, at 28.

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But a more sound approach than either of these two would be the digitally enlightened or realistic approach. Social networking is here to stay, with over 1.11 billion Facebook users and nearly 500 million active Twitter users attesting to this fact,¹⁶ not to mention the continued proliferation of other social networking applications like Instagram, Pinterest, Vine, and countless others. While the technology involved may be newer, at their core, social networking sites are simply platforms for communication and social interaction. Judges have had to contend with the ethical risks, such as the appearance of impropriety posed by other forms of social interaction for decades, if not centuries. Existing rules of judicial conduct are more than sufficient to provide guidance when it comes to judges' use of social media, once one recognizes that communications and interaction via social media are no different in their implications than more traditional forms of communication. In other words, an *ex parte* communication in cyberspace is no less inappropriate than one made over drinks at a bar association gathering, whereas being a golfing buddy of the judge at a local country club is perhaps more likely to risk conveying to the public the appearance of a special relationship with or an ability to influence the judge than being Facebook "friends" with him.

Other approaches minimize or ignore the value of social media for judges not only as a practical tool for judicial election campaigns, but also as a means of public outreach about the role of courts and judicial decisions. The integrity and independence of the judiciary is aided by social media use, just as much as misuse of social networking by judges can damage the public's perception of this integrity and independence. In fact, social networking sites themselves provide tools for minimizing the risks that observers often point to when discussing judicial use of social media, such as maintaining appropriate privacy settings, having a separate professional profile or fan page, or disabling comment functions.

Those opposed to judges using social media, as well as those who favor serious restrictions on it, are all too often guilty of not understanding the technology itself or its benefits as a means of social engagement. Even more fundamentally however, such critics operate under a flawed understanding of the nature of relationships in the digital age. Accordingly, this article will begin with a look at the contrast between how some judicial ethics bodies have understood the term "friend" in the

16. *E.g.*, *Number of Active Users at Facebook over the Years*, YAHOO! (May 1, 2013, 7:27 PM), <http://news.yahoo.com/number-active-users-facebook-over-230449748.html>; Richard Holt, *Twitter in Numbers*, THE TELEGRAPH (Mar. 21, 2013, 11:06 AM), <http://www.telegraph.co.uk/technology/twitter/9945505/Twitter-in-numbers.html>.

social media context and the significance, or lack thereof, attributed to that relationship by the courts themselves.

II. A “FRIEND” BY ANY OTHER NAME? THE TRUE MEANING OF FRIENDSHIP IN THE DIGITAL AGE

Florida, the most draconian of jurisdictions when it comes to judges and social media, has made it grounds for automatic disqualification of a judge if a lawyer for one of the parties is a Facebook “friend.”¹⁷ However, a minority of the Florida Supreme Court Judicial Ethics Advisory Committee reached a different conclusion when this issue was examined because of a very different understanding—and, I would argue, a better reasoned and pragmatic one—of the true meaning of “friend” in this digital age. The minority’s view stated:

The minority concludes that social networking sites have become so ubiquitous that the term “friend” on these pages does not convey the same meaning that it did in the pre-[I]nternet age; that today, the term “friend” on social networking sites merely conveys the message that a person so identified is a contact or acquaintance; and that such an identification does not convey that a person is a “friend” in the traditional sense, i.e., a person attached to another person by feelings of affection or personal regard. In this sense, the minority concludes that identification of a lawyer who may appear before a judge as a “friend” on a social networking site does not convey the impression that the person is in a position to influence the judge and does not violate Canon 2B [of the Florida Code of Judicial Conduct].¹⁸

This minority view of friendship in the Facebook context has been more widely accepted in courts around the country than the Florida Judicial Ethics Advisory Committee majority’s view. For example, in *Williams v. Scribd Inc.*, a case concerning copyright claims against Scribd, the court observed, “it’s no secret that the ‘friend’ label means less in cyberspace than it does in the neighborhood, or in the workplace, or on the schoolyard, or anywhere else that humans interact as real people.”¹⁹ In a securities law case, *Quigley Corp. v. Karkus*, the plaintiff (Quigley

17. Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2009/2009-20.html>; see also Gena Slaughter & John G. Browning, *Social Networking Dos and Don'ts for Lawyers and Judges*, 73 TEX. B.J. 192, 194 (2010).

18. Fla. Judicial Ethics Advisory Comm., Op. 2009-20.

19. *Williams v. Scribd, Inc.*, No. 09cv1836-LAB (WMc), 2010 U.S. Dist. LEXIS 90496, at *16 (S.D. Cal. June 23, 2010) (citation omitted); see also Slaughter & Browning, *supra* note 17, at 194 (discussing S.C. Judicial Dep't Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (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 . . . as long as they do not discuss anything related to the judge’s position as a magistrate.”)).

Corporation) asserted that certain shareholders were trying to take control of the company by making “materially false statements in proxy materials.”²⁰ The plaintiff claimed that some of these shareholders maintained “extensive personal and professional connections”; therefore, the plaintiff argued, the court should find that they were acting in collusion to “solicit proxies and vote shares.”²¹ Had the shareholders—through their networks of Facebook “friends”—acquired a sufficient degree of “beneficial ownership,” certain statutory disclosure requirements would have been triggered.²² The court dismissed this argument, however, attributing “no significance” to these Facebook “friendships.”²³ The court “note[d] that electronically connected ‘friends’ are not among the litany of relationships targeted by the Exchange Act or the regulations issued pursuant to the statute. Indeed, ‘friendships’ on Facebook may be as fleeting as the flick of a delete button.”²⁴

Similarly, in *Invidia, LLC, v. DiFonzo* (a state court dispute over a non-compete agreement involving a hairstylist and the salon that formerly employed her), the court weighed the distinction between true friendship, “Facebook friendship,” and the instance when a “friend” is little more than a business contact.²⁵ *Invidia* claimed that it had experienced an “unprecedented” wave of 90 customer cancellations after DiFonzo left to work at a rival salon.²⁶ The salon pointed to the fact that their former employee was “Facebook friends” with at least eight of their clients and argued that its customer lists were valuable trade secrets.²⁷ The court, however, was not persuaded that any solicitation had taken place or that anything deep or meaningful was conveyed by being Facebook “friends,” stating the following:

[O]ne can be Facebook friends with others without soliciting those friends to change hair salons, and *Invidia* has presented no evidence of any communications, through Facebook or otherwise, in which Ms. DiFonzo has suggested to these Facebook friends that they should take their business to her chair at David Paul Salons. . . . If [the 90 clients who cancelled] are accustomed to communicating with *Invidia* through Facebook, they are probably Facebook-savvy enough to locate Ms. DiFonzo’s Facebook page after she left *Invidia*.²⁸

In *Onnen v. Sioux Falls Independent School District*, a wrongful

20. No. 09-1725 2009, WL 1383280, at *1 (E.D. Pa. May 15, 2009).

21. *Id.* at *3.

22. *Id.*

23. *Id.* at *5 n.3.

24. *Id.*

25. No. MICV20123798H, 2012 WL 5576406, at *1, *6 (Mass. Dist. Ct. Oct. 22, 2012).

26. *Id.* at *6.

27. *Id.* at *2, *6.

28. *Id.* at *6.

termination case, the plaintiff argued that the trial judge should have recused himself because “a major witness” for the defense posted a happy birthday message on the judge’s Facebook page in Czech during trial, but before the witness testified.²⁹ The South Dakota Supreme Court concluded that the message was not an ex parte communication because it did not “concern a pending or impending proceeding.”³⁰ Moreover, the court noted that the post was inconsequential and that the judge neither invited, responded to, nor acknowledged it, stating, “Judge Srstka noted that the post was only one of many and that he did not personally know [the witness]. Furthermore, Judge Srstka . . . also stated that . . . [the message] did not affect [his] decision-making, as [he] did not know it occurred.”³¹

Even in a case involving potentially devastating consequences of a Facebook “friendship” between two jurors and the mother of a victim in a criminal case, the Kentucky Supreme Court acknowledged the often-fleeting nature of this relationship:

But “friendships” on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire. The degree of relationship between Facebook “friends” varies greatly, from passing acquaintanceships and distant relatives to close friends and family. The mere status of being a “friend” on Facebook does not reflect this nuance and fails to reveal where in the spectrum of acquaintanceship the relationship activity falls.³²

Perhaps the ultimate example that “friend” can often mean anything but comes from a criminal case with important constitutional implications, *United States v. Meregildo*.³³ In *Meregildo*, one of the criminal defendants, Colon, moved to suppress evidence seized pursuant to a warrant from his Facebook account.³⁴ Colon challenged the government’s methods used to obtain evidence supporting its showing of probable cause and argued that he had a legitimate expectation of privacy when he posted to “friends” on his Facebook profile about his criminal activities.³⁵ The prosecutors accessed Colon’s “Mellymel Balla” Facebook profile through the account of one of Colon’s “friends,” who was a cooperating witness.³⁶ Thanks to this “friend,” the prosecution

29. 801 N.W.2d 752, 754, 757 (S.D. 2011).

30. *Id.* at 757–58.

31. *Id.* at 758.

32. *Sluss v. Kentucky*, 381 S.W.3d 215, 220–22 (Ky. 2012).

33. 883 F. Supp. 2d 523 (S.D.N.Y. 2012).

34. *Id.* at 524.

35. *Id.* at 525.

36. *Id.*

saw messages posted by Colon about previous violent acts and threats of violence against rival gang members, as well as demands of loyalty from fellow gang members.³⁷ While the court acknowledged that the question of “[w]hether the Fourth Amendment precludes the Government from viewing a Facebook user’s profile absent a showing of probable cause depends . . . on the user’s privacy settings,”³⁸ and that “postings using more secure privacy settings reflect the user’s intent to preserve information as private and may be constitutionally protected,”³⁹ ultimately, the decision came down to Colon placing his faith in “friends” who were anything but friendly:

While Colon undoubtedly believed that his Facebook profile would not be shared with law enforcement, he had no justifiable expectation that his “friends” would keep his profile private. . . . And the wider his circle of “friends,” the more likely Colon’s posts would be viewed by someone he never expected to see them.⁴⁰

In other words, with “friends” like these, who needs enemies?

The increasingly connected world wrought by Facebook and other social networking sites has also brought with it a heightened risk of verdicts being overturned by online misconduct by jurors (a topic that is outside the scope of this article), as well as by social networking relationships undisclosed during voir dire. While some courts have found an undisclosed Facebook “friendship” (as well as Facebook communications) between a juror and a party or witness serious enough to warrant a new trial,⁴¹ other courts have been more skeptical and recognize the casual nature of Facebook “friendship.” For example, in one recent case involving a feud between neighbors that led to a murder, the appellant challenged his conviction because of a juror’s failure to disclose a Facebook “friendship” with the victim’s wife.⁴² The juror was not specifically asked during voir dire about social networking relationships, but like all prospective jurors, she was asked if she knew anyone involved in the case.⁴³ She answered that she was acquainted with the victim’s family, describing the relationship as “casual” and as “not close, but I do know them.”⁴⁴ In rejecting the appellant’s argument that this rose to the level of hidden impartiality that prejudiced the rights of

37. *Id.* at 526.

38. *Id.* at 525.

39. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 351–52 (1967)).

40. *Id.* at 526 (internal citation omitted).

41. *See, e.g.*, *Sluss v. Commonwealth*, 381 S.W.3d 215, 229 (Ky. 2012).

42. *McGaha v. Commonwealth*, No. 2012-SC-000155-MR, 2013 WL 3123446, at *2 (Ky. June 20, 2013).

43. *Id.*

44. *Id.*

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the accused, the court opined on the casual nature of social media connections:

It is now common knowledge that merely being friends on Facebook does not, per se, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed. . . . Friendships on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire.⁴⁵

In fact, the court pointed out, with said juror having 629 “friends” on Facebook, “[s]he could not possibly have had a disqualifying relationship with each one of them.”⁴⁶

In another criminal case, a Missouri appellate court dealt with the defendant’s challenge to his conviction on multiple sex offenses involving his stepdaughter.⁴⁷ During voir dire, one prospective juror, who ultimately served as foreperson, acknowledged knowing the victim’s mother casually.⁴⁸ When the defendant claimed that this same juror’s failure to disclose his Facebook “friendship” with the mother was improper, the court held a hearing at which the juror professed “that he did not use Facebook often and his Facebook interaction with [the victim’s mother] was limited to: (1) an initial ‘hey, what’s up?’ [message] when they first became Facebook ‘friends’; and (2) a post-trial message written . . . to congratulate [the mother] on the trial.”⁴⁹ He also testified that he did not use Facebook during the trial and was unaware of the postings made by the mother during the proceedings.⁵⁰ The court found no improper conduct by the juror, noting that while he was not specifically asked about Facebook relationships, he had truthfully characterized his limited interaction with the victim’s mother, a degree of intersection that the court found to be consistent with a “Facebook relationship.”⁵¹

In yet another criminal case, a defendant convicted of murdering his then-girlfriend’s son, raised the issue of juror partiality based on an undisclosed Facebook relationship.⁵² The defendant maintained that during voir dire, the juror in question had failed to disclose that he was a

45. *Id.* at *4.

46. *Id.*

47. *State v. Hill*, No. ED 98317, 2013 WL 3009728, at *1 (Mo. Ct. App. June 18, 2013).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at *3.

52. *People v. Campbell*, No. 4-11-0517, 2013 WL 3147656, at *19 (Ill. App. Ct. June 17, 2013).

Facebook “friend” of the victim’s aunt.⁵³ The court, which considered affidavits from the individuals in question, found there was no evidence of any such bias.⁵⁴ It noted that, according to uncontradicted affidavits, the juror and the victim’s aunt “did not communicate since elementary school, other than being Facebook friends.”⁵⁵

As these cases demonstrate, even when something as vital as a defendant’s Sixth Amendment right to a trial “by an impartial jury”⁵⁶ is at stake, when examining whether an improper relationship existed involving a juror, courts view Facebook “friendships” the way most courts have—with a realistic, even somewhat jaundiced, eye.

Nevertheless, occasionally cases have popped up in which a Facebook “friendship” has been held to represent at least the possibility of a closer relationship that might meet the legal standard of bias. For example, in *Black v. Hennig*, a child support and custody case, the petitioner, Black, argued that the trial court erred by not admitting evidence that showed bias on the part of an expert witness who had a purported Facebook “friendship” with one of the opposing party’s attorneys.⁵⁷ According to Black, the court should have admitted screenshots from the Facebook page of Dr. Valerie Hale, “the clinical psychologist who conducted the custody evaluation,”⁵⁸ because they pointed to a “friendship” with Hennig’s attorney and showed the two discussed such things as shopping for clothes and otherwise “carried on a regular and personal correspondence”⁵⁹ According to Black, this “improper conduct . . . violated the Association of Family and Conciliation Courts . . . standards and compromised her professional integrity thereby invalidating her recommendations to the court”⁶⁰ The appellate court concluded that “the Facebook . . . evidence should have been admitted.”⁶¹

In *Furey v. Temple University*, a college student, who was involved in an altercation with campus police and charged with violating Temple’s code of conduct, challenged his disciplinary hearing, claimed lack of due process.⁶² Furey appealed the decision of a panel that recommended expulsion partly because one of the student representatives on the panel, Malcolm Kenyatta, was Facebook “friends” with the campus

53. *Id.*

54. *Id.* at *23–24.

55. *Id.* at *23.

56. U.S. CONST. amend. VI.

57. 286 P.3d 1256, 1260–62 (Utah Ct. App. 2012).

58. *Id.* at 1260.

59. *Id.* at 1262–63 & n.8.

60. *Id.* at 1264.

61. *Id.* at 1271.

62. 730 F. Supp. 2d 380, 384 (E.D. Pa. 2010).

police officer, Wolfe, involved in the incident.⁶³ While an investigator who looked into the matter was dismissive of the Facebook connection (Kenyatta stated that he had over 400 “friends” and that he and the officer “were not ‘friends’ in the traditional sense”),⁶⁴ a review board considered it a procedural defect.⁶⁵ However, when the Vice President of Student Affairs decided to expel Furey, the young man went to federal court.⁶⁶ The federal court held that Furey’s claims that he had been denied procedural due process could go forward, concluding that the Facebook “friendship” may have procedurally interfered with the disciplinary hearing.⁶⁷

III. JUDGES BEHAVING BADLY ON SOCIAL MEDIA

Besides the significance of a Facebook “friendship,” judges have demonstrated that when it comes to social media use, they are human too, and capable of missteps, both large and small. Essentially, judges—like lawyers and members of the public at large—need to keep in mind that the use of emerging technologies does not relieve them of traditional ethical conventions and duties. Consider the following examples:

A. *Angela Dempsey*

This Florida circuit judge was formally reprimanded by the Florida Supreme Court for two mistakes that appeared in her 2008 campaign materials.⁶⁸ One was a mailing that misrepresented Dempsey’s years of legal experience, while the other was a statement asking voters to “re-elect” her on a link to a YouTube campaign video when Judge Dempsey had in fact been appointed, not elected to the bench.⁶⁹ According to the Florida Supreme Court, this violated a judicial canon barring misrepresentation about a judge’s qualifications.⁷⁰ Chief Justice Peggy Quince said, “This case stands as a warning to all judicial candidates You will be held responsible and accountable for the actions of your campaign consultants including the way they choose to use new technology like the social media.”⁷¹

63. *Id.* at 390.

64. *Id.*

65. *Id.* at 397.

66. *See id.* at 391.

67. *Id.* at 397.

68. *In re Dempsey*, 29 So. 3d 1030, 1033–34 (Fla. 2010).

69. *Id.* at 1032.

70. *Id.* at 1033.

71. Bill Cotterell, *Florida Supreme Court Formally Reprimands Circuit Judge Angela Dempsey*, TALLAHASSEE DEMOCRAT (Apr. 7, 2010, 10:06 AM), <http://www.tallahassee.com/article/20100407/capitolnews/100407007/Florida-Supreme-Court-formally-reprimands-Circuit-Judge-Angela-Dempsey>.

B. Doe v. Sex Offender Registry Board⁷²

Although not technically judges, hearing officers serve in quasi-judicial capacities and, consequently, can be held to many of the same standards of conduct as judges.⁷³ In *Doe*, the claimant appealed his classification as a sex offender.⁷⁴ Among his arguments, Doe claimed that the hearing officer who made this determination later posted “inappropriate” comments about Doe’s case on a co-worker’s Facebook page.⁷⁵ The Massachusetts court described the hearing officer’s actions as “most unfortunate” and impugning the “dignity” of the judicial process.⁷⁶ Surprisingly, however, the court did not find that the hearing officer should have recused herself.⁷⁷

C. Eugenio Mathis

This New Mexico judge resigned in February 2013 amid allegations of improper conduct involving his wife, who also worked at the courthouse.⁷⁸ According to charges brought against the jurist, Mathis had violated the court’s computer and Internet-use policy by engaging in “excessive and improper” instant messaging with his wife.⁷⁹ These included “communications of a sexual nature” during working hours, including “intimations that he had or would be having sexual relations with her during the workday and/or on court premises.”⁸⁰ According to chat logs filed with the petition, one message actually read, “Don’t come knocking if the jury room is rockin.”⁸¹ Other comments that Mathis electronically shared included statements about the veracity of witnesses during trials, vulgar comments about parties in a domestic-violence case, and disparaging comments about other judges.⁸² The New Mexico Judi-

72. 959 N.E.2d 990 (Mass. App. Ct. 2012).

73. See, e.g., FLA. CODE OF JUD’L CONDUCT (“Anyone . . . who performs judicial functions, including but not limited to . . . hearing officer[s] shall, while performing judicial functions, conform with [these Canons] . . . and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed.”); TENN. SUP. CT. R. 10 (“A judge . . . is anyone authorized to perform judicial functions, including but not limited to . . . [a] hearing officer.”).

74. *Doe*, 959 N.E.2d at 991.

75. *Id.* at 993.

76. *Id.* at 993 & n.4.

77. *Id.* at 993.

78. See, e.g., Debra Cassens Weiss, *Judge Resigns After Admitting Improper IMs with Wife During Court, but Denies Steamy Content*, ABA JOURNAL (Mar. 5, 2013, 7:15 AM), http://www.abajournal.com/news/article/judge_resigns_after_admitting_excessive_and_imprope_ims_with_wife_during_co.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

cial Standards Commission also alleged that many of these instant messages were sent while the judge was on the bench presiding over trials and hearings and that he permitted his wife to read confidential reports.⁸³

D. *Lee Johnson*

This Ennis, Texas municipal judge ignited a firestorm of controversy by posting on his Facebook page about Heisman Trophy winner and Texas A&M quarterback Johnny Manziel receiving a speeding ticket in his town in January 2013.⁸⁴ The post did not identify Manziel by name, instead referring to a “(very) recent Heisman Trophy winner from a certain unnamed ‘college’ town down south of here . . . [who] was speeding on the 287 bypass yesterday . . . Time to grow up/slow down young’un.”⁸⁵ Johnson later added a second, apologetic Facebook post: “I meant to say ‘allegedly’ speeding, my bad.”⁸⁶ The judge, who went to the rival school of Baylor,⁸⁷ inadvertently brought the subject of legal ethics to national sports news through his actions, which also prompted a reprimand from the Ennis city manager.⁸⁸ It is bad enough to pre-judge a party in any case, but sharing that partiality with the world on Facebook? Judge Johnson also faces possible disciplinary action from the state Judicial Conduct Commission.⁸⁹

E. *Ernest “Bucky” Woods*⁹⁰

This jurist retired from his position as Superior Court Chief Justice in 2009 after relatives of a former defendant filed complaints against

83. *NM Judge Accused of Misbehavior Agrees to Resign*, ASSOCIATED PRESS, Mar. 1, 2013, available at http://www.alamogordonevents.com/ci_22696063/nm-judge-accused-misbehavior-agrees-resign.

84. *E.g.*, Chris Huston, *Over-Exuberant Judge Posts About Johnny Manziel’s Ticket on Facebook*, CBSSPORTS.COM (Jan. 17, 2013, 3:20 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/21570022/over-exuberant-judge-posts-about-johnny-manziels-speeding-ticket-on-facebook>.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See* Isaac Rauch, *“I Meant to Say ‘Allegedly’ Speeding, My Bad”: A Texas Judge Was Reprimanded for Blabbing About Johnny Manziel’s Speeding Ticket on Facebook*, DEADSPIN (Jan. 19, 2013, 7:05 PM), <http://deadspin.com/5977391/i-meant-to-say-allegedly-speeding-my-bad-a-texas-judge-was-reprimanded-for-blabbing-about-johnny-manziels-speeding-ticket-on-facebook>.

89. *See, e.g.*, Sean Lester, *Judge, Baylor Graduate, Makes Johnny Manziel Speeding Ticket Public on Facebook*, SPORTSDAYDFW (Jan. 17, 2013, 3:49 PM), <http://collegesportsblog.dallasnews.com/2013/01/judge-baylor-graduate-makes-johnny-manziel-speeding-ticket-public-on-facebook.html>.

90. The events involving former Judge Woods and Judge B. Carlton Terry, *infra* note 114, were previously discussed in an article I co-wrote 2010. *See* Slaughter & Browning, *supra* note 17, at 194; *see also* Kathryn Hayes Tucker, *Ga. Judge Steps down Following Questions About*

him for improper involvement with the defendant's ex-girlfriend, Tara Black.⁹¹ He had used Facebook to contact Ms. Black, who also appeared before him on drug charges.⁹² Over the course of this relationship, he advised her on how to proceed in court appearances before him, helped her receive deferred prosecution, and signed an order "allowing her to be released on her own recognizance so she wouldn't have to post a cash bond."⁹³ Other messages between the judge and the stylist (thirty-three pages of which were turned over as part of the response to a newspaper's open records request) detailed money that he loaned to her, lunch dates with her, and visits he made to Black's apartment.⁹⁴ Besides helping Black "behind the scenes" in her own criminal theft by deception case, Woods also used a photo taken off her Facebook page as a basis for issuing a probation revocation against a drug defendant; the defendant's family subsequently complained about Judge Woods' involvement with Ms. Black, leading to the investigation and his retirement.⁹⁵

F. *Shirley Strickland Saffold*

The Cuyahoga County Common Pleas Court judge was linked to anonymous Internet discussions about cases in her court, leading to her removal from presiding over the high-profile trial of an accused serial killer.⁹⁶ More than 80 postings were made by "Lawmiss" on Cleveland.com, website of the Cleveland Plain Dealer.⁹⁷ "Lawmiss" was then traced back to Saffold's email account and her court-issued computer.⁹⁸ The comments that were posted included calling a defense lawyer a "buffoon" and wishing he would "shut his Amos and Andy style mouth."⁹⁹ She also commented about a sentence in a 2008 multiple homicide case: "If a black guy had massacred five people then he would've received the death penalty A white guy does it and he gets pat on the hand. The jury didn't care about the victims All of them ought to be ashamed."¹⁰⁰ In removing Saffold from presiding over

Facebook Relationship with Defendant, LAW.COM (Jan. 7, 2010, 12:00 AM), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202437652986&slreturn=20130819195241>.

91. Slaughter & Browning, *supra* note 17, at 194.

92. See Tucker, *supra* note 90.

93. *Id.*

94. *Id.*

95. *Id.*

96. Dan Bobkoff, *Judge Takes Paper to Court over Online Comments*, NPR (Apr. 10, 2010, 4:25 PM), <http://www.npr.org/templates/story/story.php?storyId=125816869>.

97. *Id.*

98. *Id.*; see also Kashmir Hill, *Judge of the Day: Shirley Strickland Saffold*, ABOVE THE LAW (Mar. 26, 2010, 1:55 PM), <http://abovethelaw.com/2010/03/judge-of-the-day-shirley-strickland-saffold/#more-8157>.

99. See Hill, *supra* note 98.

100. See James F. McCarty, *Anonymous Online Comments Are Linked to the Personal E-mail*

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the trial, the Ohio Supreme Court wrote, “[T]he nature of these comments and their widespread dissemination might well cause a reasonable and objective observer to harbor serious doubts about the judge’s impartiality.”¹⁰¹

Judge Saffold was outed by the Cleveland Plain Dealer, whose public records request included the browser history of her courtroom computer.¹⁰² Although “Lawmiss” was Saffold’s screen name, her twenty-three-year-old daughter Sydney came forward and admitted to making “quite a few” of the “Lawmiss” posts.¹⁰³ While still denying making posts about her cases online, Judge Saffold brought a \$50 million lawsuit against the newspaper for invasion of privacy and breach of contract, claiming that the Plain Dealer violated the terms of use of its website by disclosing the identities of her and her daughter.¹⁰⁴

G. *William Adams*

A kind of “dishonorable mention” goes out to Judge William Adams, an Aransas County, Texas court-at-law judge.¹⁰⁵ Although Adams did not post the social media activity in question, the attention it attracted led to national outrage as well as a public warning and a suspension from the bench.¹⁰⁶ In November 2011, a YouTube video (made in 2004) depicting Adams beating his then-teenage daughter with a belt and cursing at her went viral.¹⁰⁷ Adams’ daughter, who wanted to bring public attention to the abuse, posted the video; ironically, Judge Adams actually presides over family court cases.¹⁰⁸ The disturbing video prompted a police investigation, a temporary suspension by the Texas Supreme Court, and a public warning issued to Adams by the Texas Commission on Judicial Conduct.¹⁰⁹

Account of Cuyahoga County Common Pleas Judge Shirley Strickland Saffold, CLEVELAND PLAIN DEALER (Mar. 26, 2010, 8:19 AM), http://blog.cleveland.com/metro/2010/03/post_258.html.

101. *In re* Disqualification of Saffold, 981 N.E.2d 869, 870 (Ohio 2010) (citations omitted).

102. *See* Hill, *supra* note 98.

103. *See* McCarty, *supra* note 100.

104. Bobkoff, *supra* note 96.

105. Jade Walker, *Judge William Adams Won't Be Charged over Videotaped Beating of Daughter, Police Say*, HUFFINGTON POST (Nov. 4, 2011, 12:05 AM), http://www.huffingtonpost.com/2011/11/03/judge-william-adams-video-beating-daughter_n_1075284.html.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.*; *see also* Joe Sutton, *Texas Judge in Video Beating Is Back at Work*, CNN (Nov. 15, 2012, 1:01 AM), <http://www.cnn.com/2012/10/04/justice/texas-beating-video/index.html>. A police investigator suggested that the reason that Judge Adams was not criminally charged was because the statute of limitations had expired. *See* Walker, *supra* note 105.

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H. *James Oppliger*

It is somewhat surprising that, in an age in which judges and lawyers have become sensitized to jurors engaging in online misconduct, we actually encounter a judge who blabs online about his jury service. Fresno County Judge James Oppliger, excited about actually being picked to serve on a jury, emailed several of his jurist colleagues about the unusual turn of events.¹¹⁰ Among the comments was a reference to the two lawyers squaring off in the case: “Here I am livin’ the dream, jury duty with Mugridge and Jenkins!”¹¹¹ While none of the emails discussed the evidence or deliberations in the case, one of the judges on the receiving end of Oppliger’s electronic communications was the presiding judge in the case, Judge Arlan Harrell.¹¹² After the defendant was convicted of second-degree murder, Judge Harrell disclosed the online communications, prompting defense counsel to consider seeking a new trial.¹¹³

I. *B. Carlton Terry, Jr.*¹¹⁴

Perhaps the most infamous, oft-cited case of a “judge behaving badly” on social media is that of North Carolina Judge B. Carlton Terry, Jr. In April 2009, the North Carolina Judicial Standards Commission publicly reprimanded Judge Terry for the activities of a Facebook “friendship” between himself and an attorney appearing before him.¹¹⁵ Just before a child custody and support proceeding that lasted from September 9 to September 12, 2008, Judge Terry was in chambers with Charles Schieck, counsel for Mr. Whitley, and Jessie Conley, attorney for Mrs. Whitley.¹¹⁶ When the conversation turned to Facebook, Ms. Conley said she was not familiar with it and, in any event, did not have time for it.¹¹⁷ However, the judge and Mr. Schieck were Facebook “friends.”¹¹⁸ The next day, during another in-chambers meeting, the judge and attorneys discussed testimony that raised the possibility of Mr. Whitley having had an affair, at which point Schieck commented on

110. See Corin Hoggard, *Judge Oppliger Accused of Potential Juror Misconduct*, ABC30 (Apr. 15, 2010), <http://abclocal.go.com/kfsn/story?section=news/local&id=7388930>.

111. *Id.*

112. Pablo Lopez, *Juror E-mails Muddy Trial*, McCLATCHY (Apr. 16, 2010), <http://www.mcclatchydc.com/2010/04/16/92318/juror-e-mails-muddy-trial.html#.UjumsGTEqNw>.

113. *Id.*

114. See *supra* note 90.

115. Public Reprimand: B. Carlton Terry, Inquiry No. 08-234, at 1 (N.C. Jud. Standards Comm’n Apr. 1, 2009), available at http://www.aoc.state.nc.us/www/public/coal/jsc/public_reprimands/jsc08-234.pdf; see also Slaughter & Browning, *supra* note 17, at 194.

116. Public Reprimand: B. Carlton Terry, at 2–3.

117. *Id.* at 2.

118. *Id.*

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having to “prove a negative.”¹¹⁹ That evening, Schieck posted on Facebook, “how do I prove a negative. [sic]”¹²⁰ Judge Terry responded with a comment about having “two good parents to choose from,” as well as a comment about the case continuing.¹²¹ Schieck, proving that one can “suck up” to a judge in cyberspace as well as in person, posted, “I have a wise Judge.”¹²² In addition, on September 11, 2008, Terry and Schieck exchanged Facebook comments about whether or not the case was in its last day of trial, with Terry responding, “[Y]ou are in your last day of trial.”¹²³ Judge Terry also went online to view a website that Mrs. Whitley maintained for her photography business, looking at photos and poetry she posted.¹²⁴ On September 12, 2008, in announcing his ruling, Judge Terry even quoted from one of her poems.¹²⁵

Although Judge Terry disclosed to Ms. Conley the Facebook exchanges between himself and Mr. Schieck the day before he ruled, he waited until after ruling to disclose the independent Internet research he had done.¹²⁶ Days after the trial, Ms. Conley filed a motion asking that Judge Terry’s order be vacated, that he be disqualified, and that a new trial be granted.¹²⁷ On October 14, 2008, Judge Terry disqualified himself; his order was vacated, and a new trial was granted on October 22, 2008.¹²⁸ The Judicial Standards Commission determined that he “was influenced by information he independently gathered,” as well as his ex parte communications with Mr. Schieck.¹²⁹ Furthermore, his behavior demonstrated “a disregard of the principles embodied in the North Carolina Code of Judicial Conduct” and “constitute[d] conduct prejudicial to the administration of justice that brings the judicial office into disrepute.”¹³⁰

IV. OTHER USES FOR SOCIAL MEDIA

The Judge Terry episode serves as a cautionary tale for members of the judiciary and a reminder that while judges may avail themselves—carefully—of new media, existing canons of ethics still apply regardless of the medium of communication. Even when charges of improper con-

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 2–3.

126. *Id.* at 3.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 3–4 (citations omitted); *see also* Slaughter & Browning, *supra* note 17, at 194.

duct have not been raised, the ease of use and pervasiveness of social media can make sites like Facebook tempting for judges. For example, in one federal court case, the judge took it upon herself to investigate the plaintiff's Facebook page to verify the plaintiff's claim of being disabled due to asthma.¹³¹ The court "note[d] that in the course of its own research, it discovered one profile picture on what [wa]s believed to be [the plaintiff's] Facebook page where she appear[ed] to be smoking If accurately depicted, [the plaintiff's] credibility [would have been] justifiably suspect."¹³²

While researching litigants on Facebook is not advisable for judges, in that case, it helped avoid Social Security fraud. But even harmless activity on social media can invite unwelcome attention for judges. In New York, Judge Matthew A. Sciarrino, Jr. was very active on Facebook—posting a photo of his crowded courtroom, details of his schedule, and even status updates from the bench.¹³³ Some speculated that his Facebook devotion was the reason for his transfer to a different bench in Manhattan.¹³⁴

Judges who actively use social networking platforms often have to decide just how connected they want to be. In January 2012, a judge from Will County, Illinois, Amy Bertani-Tomczak, was urged by prosecutors to view Facebook posts by a reckless homicide defendant, Tomacz Maciaszek, before sentencing him.¹³⁵ The twenty-five-year-old defendant, whose fatal 2008 car crash claimed the life of a seventeen-year-old high school student, professed to being contrite and leading a secluded, haunted life in the wake of the tragedy.¹³⁶ Yet, despite the prosecution's attempts to provide the court with printouts from Maciaszek's Facebook profile that supposedly undermined his claims, Judge Bertani-Tomczak refused to consider any of it: "I have not seen anything or looked at anything," she said.¹³⁷

Other judges have taken the opposite approach and incorporated social media into their judicial role:

131. *Purvis v. Comm'r of Social Security*, No. 09-5318 (SDW), 2011 WL741234, at *7 n.4 (D.N.J. Feb. 23, 2011).

132. *Id.*

133. John M. Annese, *Staten Island Criminal Court Judge to Be Transferred to Manhattan After Facebook Postings, Sources Say*, STATEN ISLAND ADVANCE (Oct. 15, 2009, 10:25 AM), http://www.silive.com/news/index.ssf/2009/10/criminal_court_judge_to_be_tra.html.

134. *Id.*

135. Jon Seidel, *Judge Ignores Man's Facebook Posts, Gives Him Jail Time for Reckless Homicide*, CHI. SUN-TIMES (Jan. 18, 2012, 12:16 PM), <http://www.suntimes.com/news/metro/10068419-418/romeoville-man-gets-jail-time-probation-community-service-for-reckless-homicide.html>.

136. *Id.*

137. *Id.*

Michigan Judge A.T. Frank uses social networking sites to monitor offenders on probation under his jurisdiction, occasionally finding photos on Myspace or Facebook pages in which the defendants are engaged in drug use or other prohibited behavior. Galveston juvenile court Judge Kathryn Lanan employs a similar tactic, requiring all juveniles under her jurisdiction to “friend” her on Facebook or MySpace so that she can review their postings for any signs of inappropriate conduct that might warrant a return to her court.¹³⁸

Another Galveston judge, Susan Criss, “friends” lawyers on Facebook—a handy tool to keep them honest.¹³⁹ “On one occasion, a lawyer had asked for and received a continuance because of a supposed death in the family.” When Judge Criss happened to check that lawyer’s Facebook page, however, she saw photos indicating that the lawyer was “partying that same week.”¹⁴⁰

Judges do find positive uses for social media. “A recent issue of *Case in Point*, the National Judicial College’s magazine, suggested that participating in social media provides judges with a low-cost means of staying informed while simultaneously enhancing public understanding of the judiciary.”¹⁴¹ The number of judges using social networking sites increases every year, due in part to the increasingly important political role played by social media.¹⁴² In states where judges are elected, social media and other forms of electronic communication can be vital in getting judicial candidates’ names out to voters, building awareness among the electorate, campaign organizing, and, of course, fundraising.¹⁴³

For those who consider social media an ethical minefield for unwary judges, it is important to remember that concerns over judges’ use of social networking go beyond U.S. borders. In France, for instance, a number of judges have developed robust Twitter followings as tweeting from the courtroom has become popular. Two French magistrates sparked controversy in 2012, however, with their attempts at humorous tweets during the middle of a trial for attempted murder in the southwestern town of Mont-de-Marsan.¹⁴⁴ One magistrate, “Ed,” tweeted about strangling the chief judge in open court before discussing

138. Slaughter & Browning, *supra* note 17, at 194.

139. *Id.*

140. *Id.*

141. *Id.* at 193.

142. *See id.* at 194.

143. *Id.*

144. *See French Magistrates Caught Tweeting During Trial*, THE TELEGRAPH (Nov. 28, 2012, 3:23 PM), <http://www.telegraph.co.uk/news/worldnews/europe/france/9708864/French-magistrates-caught-tweeting-during-trial.html>; *see also French Judges Humorously Tweeted Trial*, UNITED PRESS INT’L (Dec. 3, 2012, 9:01 AM), http://www.upi.com/Top_News/World-News/2012/12/03/French-judges-humorously-tweeted-trial/UPI-20801354543285/.

killing another member of the court out of “exasperation.”¹⁴⁵ Another judge tweeted an inquiry wondering about the possibility of slapping a witness.¹⁴⁶ The tweets did not go unnoticed by the local press, and soon regional judicial authorities launched a formal inquiry into the tweeting judges.¹⁴⁷ Both judges shut down their Twitter accounts, which led to an outcry from their thousands of Twitter followers. One of these followers decried the criticism of the judges, saying they had taken such precautions as using pseudonyms and refraining from giving much detail of the case.¹⁴⁸

In 2012, the United Kingdom adopted new rules banning judges from blogging or posting on social media about their jobs.¹⁴⁹ The guidelines include the following admonition:

Judicial officeholders should be acutely aware of the need to conduct themselves, both in and out of court, in such a way as to maintain public confidence in the impartiality of the judiciary. Blogging by members of the judiciary is not prohibited. However, judicial office holders who blog (or who post comments on other people’s blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general.¹⁵⁰

Failure to adhere to these guidelines, which also cover Twitter and other social networking sites, can lead to disciplinary action.¹⁵¹ The rules apply to all holders of judicial office in courts and tribunals, including barristers who serve as part-time judges (many of whom are used to blogging, tweeting, or going on Facebook to discuss their cases—a practice that is not forbidden as it is in the United States).¹⁵²

145. *See French Judges Humorously Tweeted Trial*, UNITED PRESS INT’L, *supra* note 144.

146. *Id.*

147. *See id.*

148. *See id.*

149. SENIOR PRESIDING JUDGE & SENIOR PRESIDENT OF TRIBUNALS, BLOGGING BY JUDICIAL OFFICE HOLDERS, GUIDANCE (U.K.), *available at* <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/blogging-guidance-august-2012.pdf>.

150. *Id.*

151. *Id.*

152. Another country that has seen fit to regulate the activity of judges on social media is the island nation of Malta. “On February 8, 2010, Malta’s Commission for the Administration of Justice approved an amendment to its Code of Ethics for Members of the Judiciary. It states, ‘[s]ince propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge, membership of “social networking [I]nternet sites” is incompatible with judicial office. Such membership exposes the judge to the possibility of breach of the record part of rule 12 of the Code.’” JOHN G. BROWNING, *THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW* 170 (Eddie Fournier, ed., 2010).

V. ATTENUATED TIES AS A CHALLENGE TO JUDICIAL IMPARTIALITY

In what may frequently be a desperate, last-gasp attempt at challenging a verdict or disqualifying a presiding judge, social media connections involving members of the judiciary have been cited by disgruntled litigants. Interestingly, while Georgia's judicial ethics authorities have not issued an opinion on judges and social networking, one recent case did feature an allegation of supposedly improper conduct in which social networking played a part.¹⁵³ In a divorce case, a father appealed three different trial court orders from three different judges.¹⁵⁴ With regard to one of the orders, in what was evidently a contentious case, the father argued that the trial judge, Judge Parrott, should have recused himself *sua sponte* on grounds of bias toward the mother.¹⁵⁵ In support of this argument, the father produced a "photocopy of a comment on his Facebook page, purportedly made by the mother weeks after the hearing occurred, in which she boasted, 'Judge Parrott and my dad had a meeting the week before our case and guess what you lost your kids.'" ¹⁵⁶ The appellate court was not persuaded that such an accusation held any merit, stating, "[T]he mother's reference on Facebook to a meeting is not evidence that the judge obtained information relevant to the case from an extra-judicial source, much less that he based his ruling on any such external information."¹⁵⁷ It is worth noting that this same case was rife with disparaging comments being made by both parents via social media, such that the trial court entered an injunction—upheld by the appellate court—barring both parties from making comments about the other on social networking sites.¹⁵⁸

A similar challenge was made during another contentious divorce case, this time in Alabama.¹⁵⁹ In it, the trial court entered an order that divided the marital assets and awarded some rehabilitative alimony to the ex-wife, albeit considerably less than had been sought.¹⁶⁰ The ex-wife moved for a new trial, alleging that the judge's "social networking connection [with] the parties' adult daughter" (who grew up in the trial venue but now lived in England) somehow tainted the judge's ruling and warranted her recusal.¹⁶¹ The trial judge denied the motion, pointing out the following:

153. *Lacy v. Lacy*, 740 S.E. 2d 695 (Ga. Ct. App. 2013).

154. *Id.* at 699.

155. *Id.* at 701.

156. *Id.*

157. *Id.* at 702–03.

158. *Id.* at 699.

159. *Clore v. Clore*, No. 2110967, 2013 WL 3242821 (Ala. Civ. App. June 28, 2013).

160. *Id.* at *1–4.

161. *Id.* at *4–5.

This Facebook is a social networking site where the word “friend” is used in a way that doesn’t have anything to do with the way before this Facebook.com ever existed—the way we used the word “friend.” . . . [J]ust because a person is connected to me on here in this manner doesn’t have anything to do with a personal relationship. I don’t have a personal relationship with this friend. We all live in a small town. I have heard both of you all’s [sic] names. I’ve heard the daughter’s name before we came in here today.¹⁶²

The appellate court agreed, observing that the ex-wife never raised the issue at any earlier stage in the proceedings, and noting that a showing of something more than “the bare status of the parties’ daughter as a ‘friend’ of the judge” would be necessary before any recusal could be granted.¹⁶³

In Cumberland County, Pennsylvania, District Judge Thomas Placey discovered the downside to having too many Facebook “friends.”¹⁶⁴ During a 2011 criminal case concerning defendant Barry Horn, Jr.’s standoff with police, it was discovered that Judge Placey and the defendant were Facebook “friends.”¹⁶⁵ Placey explained that while he knew Horn’s father, a former sheriff’s deputy, he did not consider Horn a real friend and pointed out that he accepted every “friend” request he received on Facebook.¹⁶⁶ Judge Placey explained that he doesn’t really use Facebook and that “[s]omeone says you want to be my friend, I say yes. You could be a Facebook friend of mine, I wouldn’t know it.”¹⁶⁷

Although the prosecutor did not plan to seek Judge Placey’s recusal,¹⁶⁸ other observers were more troubled by it. Shira Goodman, deputy director of Pennsylvanians for Modern Courts, stated, “[m]any judges will tell you this: There are certain things you give up when you become a judge. Some of that is social ties. [sic] . . . You have to not put yourself in situations where your impartiality can be challenged.”¹⁶⁹

Sometimes it is not even the judge’s own Facebook “friend” status that attracts controversy, but the social media connections of family members. In Will County, Illinois in 2011, defendant Kelly Klein—charged with battering a seven-month-old boy left in her day care—

162. *Id.* at *7.

163. *Id.*

164. Sara Ganim, *Cumberland County Judge Thomas A. Placey Under Fire for Having Too Many Facebook Friends*, THE PATRIOT-NEWS (Sept. 20, 2011, 8:44 AM), http://www.pennlive.com/midstate/index.ssf/2011/09/judges_facebook_friend_has_som.html.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

sought a new trial over the discovery that the presiding judge in her case, Daniel Rozak, had several children who were Facebook “friends” with members of the victim’s family.¹⁷⁰ Klein’s lawyer “claim[ed] the relationship between [Rozak’s children] and [the family in question was] deeper than a simple social-media connection,” and “the Facebook friendships between the Rozaks and the Bashars are only the tip of the iceberg.”¹⁷¹ Judge Rozak declined to recuse himself, pointing out that his children were all adults who moved out of his home years ago and, consequently, “I no longer vet their ‘friends’ and do not utilize their ‘electronic social networking sites.’”¹⁷²

The only state ethics committee to address whether a judge’s Facebook “friendship” with a party or someone related to a party requires recusal is New York.¹⁷³ In May 2013, New York’s Committee on Judicial Ethics, which responds to written inquiries from the approximately 3,400 full-time and part-time judges in that state, addressed the following question: “[W]hether [a judge] must, [upon request] . . . exercise recusal in a criminal matter because [he is] ‘Facebook friends’ with the parents or guardians of certain minors who allegedly were affected by the defendant’s conduct.”¹⁷⁴ Referring to an earlier ethics opinion about lawyers and social media,¹⁷⁵ the Committee held “the mere status of being a ‘Facebook friend,’ without more, is an insufficient basis to require recusal.”¹⁷⁶ As long as the parents of the purported victims were only acquaintances, the Committee wrote, there was no appearance of impropriety.¹⁷⁷ The Committee did, however, “recommend[] that [the judge] make a record, such as a memorandum to the [court’s] file, of the basis for [his] conclusion,” should a challenge to the decision surface.¹⁷⁸

The Committee noted that “[d]espite the Facebook nomenclature,” one has to look at the actual relationship itself.¹⁷⁹ Here, the judge had

170. Jon Seidel, *Judge’s Kids’ Facebook Friends at Issue in Bid for a New Trial*, CHICAGO SUN-TIMES (Dec. 13, 2011, 9:06 PM), <http://heraldnews.suntimes.com/news/9426713-418/facebook-friends-of-will-county-judges-children-at-issue-in-new-trial-bid.html>.

171. *Id.*

172. *Id.*

173. N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013), *available at* <http://www.nycourts.gov/ip/judicialethics/opinions/13-39.htm>.

174. *Id.*

175. *See* N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), *available at* <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm> (determining that judicial officers may use social networks, but “[a] judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network . . .”).

176. N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (emphasis omitted).

177. *See id.*

178. *Id.*

179. *Id.*

indicated that the victim's parents were only acquaintances of his.¹⁸⁰ It mentioned, "interpersonal relationships are varied, fact-dependent, and unique to the individuals involved."¹⁸¹ Accordingly, the Committee stated that it could "provide only general guidelines to assist judges who ultimately must determine the nature of their own specific relationships with particular individuals and their ethical obligations resulting from those relationships."¹⁸²

VI. JUDGED BY THE COMPANY YOU KEEP: A LOOK AT EACH JURISDICTION'S TREATMENT OF JUDGES AND SOCIAL MEDIA

Can a judge be Facebook "friends" with lawyers? What if they practice in front of that judge? And what about other courthouse personnel or members of the general public? For that matter, even if a judge does have a social networking presence, what limitations are there on what he or she can post? The answer to such questions can be found by borrowing a common Facebook phrase to describe relationships—it's complicated. At least ten states,¹⁸³ plus an ABA Judicial Ethics Opinion,¹⁸⁴ and a couple of recent appellate cases,¹⁸⁵ have attempted to address these issues. In a nutshell, most states looking at the issue have adopted an attitude of, "it's fine for judges to be on social media, but proceed with caution," except for the most restrictive state, Florida, where merely being "friends" on Facebook with an attorney of record means automatic disqualification.¹⁸⁶ Because of variations from state to state, a summary and analysis is provided on a state-by-state basis. In those states that have not yet addressed the question of judges on social networking sites, attorneys and judges alike would be well advised to examine the reasoning of the only opinion that is national in scope: the ABA Standing Committee on Ethics and Professional Responsibility.

A. ABA Formal Opinion 462

ABA Formal Opinion 462, *Judges' Use of Electronic Social Networking Media*, was issued on February 21, 2013 by the ABA Standing Committee on Ethics and Professional Responsibility, and it reminds judges to heed the ABA Model Code of Judicial Conduct when using

180. *Id.*

181. *Id.*

182. *Id.*

183. See *infra* Part VI.B–L.

184. See *infra* Part VI.A.

185. See *infra* Part VII.

186. Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecapinions/2009/2009-20.html>.

“electronic social media” (“ESM”).¹⁸⁷ This opinion is a detailed, well-reasoned look at the issue and likely will be looked at as a guide for states examining this issue in the future.

First, the ABA Opinion is pro-social media and acknowledges that “[j]udicious use” of such sites can be a valuable means of reaching out to and remaining accessible to the public.¹⁸⁸ As the opinion points out, “[w]hen used with proper care, judges’ use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forums of social connection such as U.S. Mail, telephone, email, or texting.”¹⁸⁹ The opinion also notes the value of social media in political campaigns in jurisdictions where judges are elected,¹⁹⁰ but it warns judges (and judicial candidates) to be mindful of how common features of social networking sites can be ethical traps for the unwary. For example, under Model Rule 4.1(A)(3), “[s]itting judges and judicial candidates are expressly prohibited from ‘publicly endorsing or opposing a candidate for any public office.’”¹⁹¹ By clicking a “like” button to photos, shared messages, et cetera, on the political campaign sites of others, a judge could be viewed as having improperly endorsed such a candidate.¹⁹² By the same token, the opinion urges judges who might *privately* express their views about candidates to make sure that these expressions are indeed kept private “by restricting the circle of those having access to the judge’s ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.”¹⁹³

In addition, Formal Opinion 462 reminds judges that they must “maintain the dignity of the judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives,” particularly with regard to who they connect with and

187. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462 (2013).

188. *Id.* at 4.

189. *Id.*

190. *Id.* at 3.

191. *Id.* at 4 (quoting MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(3) (2011)).

192. *Id.* at 4 & n.20 (citing *Kansas Judge Causes Stir with Facebook “Like”*, REAL CLEAR POLITICS, July 29, 2012, http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook_like.html). Butler County, Kansas District Judge Jan Satterfield caused a controversy when she was among several dozen people who clicked “like” on a Facebook post by the campaign of Sheriff Kelly Herzet. *Kansas Judge Causes Stir*, *supra*. A complaint was filed against Judge Satterfield with the Kansas Commission of Judicial Qualifications over the endorsement by a supporter of Herzet’s opponent; the complainant wrote to the newspaper reporting on the controversy, “[w]ith the growth of social media, the court system needs to define how its rules for judges apply in cyberspace.” *Id.* Judge Satterfield, in initial comments, did not seem to understand how a “like” could be an endorsement. *Id.*

193. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462, at 4 (2013).

what they share via social media.¹⁹⁴ Judges, the opinion reminds us, “must assume that comments posted to an ESM site will not remain within the circle of the judge’s connections.”¹⁹⁵ Dissemination of embarrassing comments or images, the opinion warns, can potentially “compromise or appear to compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.”¹⁹⁶

Besides providing some sobering, common-sense reminders about social networking interactions in general, the opinion also makes it clear that concerns about *ex parte* communications, independent research, and the impression that others may be in a position to influence the judge are just as valid in cyberspace as they are with more traditional modes of communication.¹⁹⁷ It warns that

“judge[s] should not form relationships with persons or organizations that may . . . convey[] an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters . . . and avoid using any ESM site to obtain information regarding a matter before the judge in violation of [ABA Model Code of Judicial Conduct] Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court.”¹⁹⁸

The opinion also provides valuable guidance on disclosure or disqualification concerns for judges using the same social media sites used by lawyers and others who may appear before a judge. Judges can be Facebook “friends” with lawyers or parties who appear before them, but when it comes to disclosure, “context is significant.”¹⁹⁹ The opinion points out that “[b]ecause of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed.”²⁰⁰

The opinion goes on to observe that whenever anyone—whether lawyer, witness, or party—with whom the judge shares a social networking connection, “the judge must be mindful that such connection may give rise to the level of social relationship or the perception of such

194. *Id.* at 1 (quoting ABA MODEL CODE OF JUDICIAL CONDUCT pmb1. 2 (2011)).

195. *Id.* at 1.

196. *Id.* at 1–2.

197. *Id.* at 2–3.

198. *Id.* at 2.

199. *Id.* (citations omitted).

200. *Id.* at 3.

a relationship that requires disclosure or recusal.”²⁰¹ In this regard, the opinion states, a “judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally.”²⁰² This includes officially disclosing any information that parties “might reasonably consider relevant to a possible motion for disqualification even if the judge himself believes there is no basis for the disqualification.”²⁰³ Importantly, judges need not review all Facebook “friends,” LinkedIn connections, et cetera, “if a judge does not have specific knowledge of an ESM connection” that may potentially or actually be problematic.²⁰⁴ In such circumstances, the number of “friends” that a judge has, whether the judge has a practice of simply accepting all “friend” requests, and other factors may help prove that there is no meaningful connection between the judge and a given individual.

Formal Opinion 462 offers a practical, well-reasoned approach for judges’ activities on social media. While recognizing that judges are not expected to lead isolated existences, and in fact experience a benefit of remaining connected and accessible via social media, the opinion simultaneously urges caution in using these sites and reminds judges that traditional ethical standards will still apply to new technologies.

B. *New York*

Like its ABA counterpart, New York Advisory Opinion 08-176²⁰⁵ is a model of common sense. In concluding that it is perfectly appropriate for a judge to embrace social networking, it points out the many reasons for a judge to do so, including “reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge’s immediate family.”²⁰⁶ Like the ABA opinion, it urges caution, reminding judges to “employ an appropriate level of prudence, discretion and decorum in how they make use of this technology.”²⁰⁷ It also reminds judges that social networks and technology in general are subject to change and that accordingly judges “should stay abreast of new

201. *Id.* (citations omitted).

202. *Id.* (citing Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 578 (2006)).

203. *Id.* (citing ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 5 (2011)).

204. *Id.*

205. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), available at <http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm>.

206. *Id.*

207. *Id.*

features of, and changes to, any social networks they use,” lest new developments of social media cause judges to run afoul of the principles of the Rules of Judicial Conduct.²⁰⁸ Finally, New York’s Advisory Opinion also sounds the now-familiar—but no less important—refrains to judges: Avoid impropriety and the appearance of it when using social networking and be mindful of the appearance that might be created by virtue of establishing a Facebook “friendship” with a lawyer or anyone else appearing in the judge’s court.²⁰⁹

C. *Kentucky*

Kentucky’s approach echoes that of New York in its cautious approval of judges being active on social networking sites. Its ethics opinion holds that a judge may “participate in an [I]nternet-based social networking site, such as Facebook, LinkedIn, MySpace, or Twitter, and be ‘friends’ with . . . persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials.”²¹⁰ However, this is a “qualified yes” from the Committee that comes with a note of caution for “judges [to] be mindful of ‘whether online connections alone or in combination with other facts rise to the level of a ‘close social relationship’ which should be disclosed and/or require recusal”²¹¹ and how to be careful that their social media activities do not lead to violations of the Kentucky Code of Judicial Conduct.²¹² Sounding alarms for the unwary, the Kentucky opinion notes, “[S]ocial networking sites are fraught with perils for judges,” warning them that the Committee’s approval of social media use “should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public.”²¹³ The opinion also warns judges of the illusory feeling of privacy that may accompany social media use; although these sites “may have an aura of private, one-on-one conversation, they are much more public than off-line conversations, and statements once made in that medium may never go away.”²¹⁴

With all of the caveats, one may wonder why the Ethics Committee of the Kentucky Judiciary gave social media a “like” in the first place. The Committee was swayed in favor of approving participation by judges by “the reality that Kentucky judges are elected and should not be

208. *Id.*

209. *See id.*

210. Ethics Comm. of the Ky. Judiciary, Formal Ethics Op. JE-119, at 1 (2010), available at http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_119.pdf.

211. *Id.* at 3 (quoting N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176).

212. *Id.* at 5.

213. *Id.* at 4.

214. *Id.* at 5.

isolated from the community in which they serve”²¹⁵ Like the New York opinion, the Kentucky Committee also discussed the reality that a designation like “friend” on Facebook was merely a term of art used by the site and that, in and of itself, being designated a “friend” “does not reasonably convey to others an impression that such persons are in a special position to influence the judge.”²¹⁶

D. *South Carolina*

Opinion Number 17-2009 from South Carolina’s Advisory Committee on Standards of Judicial Conduct is brief and limited in scope.²¹⁷ It concludes, “A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge’s position as magistrate.”²¹⁸ The opinion is silent as to any other issues, such as whether a judge would be subject to disclosure or possible disqualification if he or she were Facebook “friends” with a lawyer or party who appeared before the court. However, the opinion did note the positive side of judges being on Facebook or other social networking sites, observing, “[A] judge should not become isolated from the community in which the judge lives,” and that permitting a judge to use social media “allows the community to see how the judge communicates and gives the community a better understanding of the judge.”²¹⁹

E. *Maryland*

Maryland entered the fray with its own opinion issued in June 2012.²²⁰ The Maryland Judicial Ethics Committee addressed two main questions—the first of which was whether “the mere fact of a social [media] connection creates a conflict” for a judge.²²¹ The Committee found that it does not.²²² Analogizing an online connection to friendships outside of cyberspace, the Committee observed that the mere fact of a friendship between a judge and an attorney does not automatically warrant disqualification from cases involving the attorney, and with regard to online relationships, the Committee “sees no reason to view or

215. *Id.*

216. *Id.* at 2.

217. S.C. Judicial Dep’t Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

218. *Id.*

219. *Id.*

220. Md. Judicial Ethics Comm., Published Op. 2012-07 (2012), *available at* <http://www.courts.state.md.us/ethics/pdfs/2012-07.pdf>.

221. *Id.* at 1.

222. *Id.* at 5.

treat 'Facebook friends' differently."²²³

The Committee also asked more broadly, "What are the restrictions on the use of social networking by judges?"²²⁴ Like its counterparts in other states, the Maryland Committee urged caution, "admonish[ing] members of the Judiciary to 'avoid conduct that would create in reasonable minds a perception of impropriety.'"²²⁵ The opinion approvingly references ethics opinions from other states, including New York and California, ultimately concluding that a judge may participate in social media as long as he or she does so in a manner that complies with the existing rules of judicial conduct.²²⁶ Quoting the California opinion,²²⁷ the Maryland authorities key in on the fact that the nature of the social interaction, rather than the medium in which it takes place, is what ultimately governs the analysis.²²⁸ Like other ethics committees, it advises judges to proceed with caution.²²⁹

F. *Massachusetts*

Massachusetts has also weighed in on this issue. Like other states examining this issue, it held that judges can be members of social networking sites.²³⁰ However, it provided more specific guidance, rather than just sounding a general note of caution. Referencing specific activities proscribed by the Code of Judicial Conduct, it warns judges to refrain from the following activities on social media:

comment[ing] on or permit[ing] others to comment on cases currently pending before [the judge] . . . ; join[ing] "Facebook groups" that would constitute membership in an organization in violation of Section 2C [of the Code of Judicial Conduct]; . . . [making] political endorsements . . . ; [or] identify[ing] [oneself] as a judge or permit[ing] others to do so . . . [so as to avoid] lend[ing] the prestige of judicial office to advance the private interests of the judge or others.²³¹

Importantly, Massachusetts' stance on "friending" of attorneys is stricter than most states. The opinion states, "[T]he Code prohibits judges from associating in any way on social networking web sites [sic] with attor-

223. *Id.*

224. *Id.* at 1.

225. *Id.* (quoting MD. CODE OF JUDICIAL CONDUCT R. 1.2(b) (2010)).

226. *Id.* at 2–3.

227. See Cal. Judges Association Ethics Comm., Op. 66 (2010), available at <http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>.

228. See Md. Judicial Ethics Comm., Published Op. 2012-07.

229. *Id.* at 3.

230. Mass. Comm. on Judicial Ethics, Op. 2011-06 (2011), available at <http://www.mass.gov/courts/sjc/cje/2011-6n.html>.

231. *Id.*

neys who may appear before them. Stated another way, in terms of a bright-line test, judges may only ‘friend’ attorneys as to whom they would recuse themselves when those attorneys appeared before them.”²³² Here, the Massachusetts authorities cited with approval the most draconian of the states to examine this issue, Florida, agreeing that such relationships “create[] a class of special lawyers who have requested this status” and that such lawyers would at least “appear to the public to be in a special relationship with the judge.”²³³ Significantly, Massachusetts does not focus on the number of “friends” a judge may have, his or her practice with regard to “friend” requests (i.e., accept them all or be more selective), or even the nature of the relationship.²³⁴ For Massachusetts, the most important element is apparent impropriety, and Massachusetts justifies such a limitation on judges with the fact that it comes with the territory—judges must “accept restrictions on . . . the judge’s conduct that might be viewed as burdensome by the ordinary citizen.”²³⁵

G. *Tennessee*

In an October 2012 advisory opinion, Tennessee joined the majority of states in allowing judges to use social networking sites, albeit cautiously.²³⁶ Citing other states that have previously addressed this issue, with particular emphasis on California’s analysis, Tennessee warns judges that their use of social networking “will be scrutinized [for] various reasons by others.”²³⁷ The Committee declined to provide specific details on permissible or prohibited activity by judges “[b]ecause of constant changes in social media.”²³⁸ Instead, it urges judges to “be constantly aware of ethical implications as they participate in social media,” and to decide “whether the benefit and utility of participating in social media justify the attendant risks.”²³⁹

H. *Oklahoma*

Oklahoma offered its contribution to the dialogue on whether judges may participate in social media in July 2011. Oklahoma’s opin-

232. *Id.*

233. *Id.* (quoting Fla. Judicial Ethics Advisory Comm., Op. 2010-06 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>).

234. *See id.*

235. *Id.* (quoting MASS. CODE OF JUDICIAL CONDUCT R. 2A cmt. (2003)).

236. *See* Tenn. Judicial Ethics Comm., Op. 12-01, at 1 (2012), available at http://www.tncourts.gov/sites/default/files/docs/advisory_opinion_12-01.pdf.

237. *Id.* at 3–4.

238. *Id.* at 4.

239. *Id.*

ion answers the question of whether or not a judge may have a social networking profile with a cautious “yes.”²⁴⁰ However, in answer to the question of whether a judge may add “court staff, law enforcement officers, social workers, attorneys and others who may appear in his or her court as ‘friends,’” Oklahoma’s Judicial Ethics Advisory Panel provides a resounding “no” (except for court staff).²⁴¹ Agreeing with the observation that “social networking sites are fraught with peril for judges,”²⁴² Oklahoma’s Panel opines that whether or not being a Facebook “friend” of the judge actually puts that individual in a special position is immaterial.²⁴³ What matters, as far as the Panel is concerned, is whether or not the designation of “friend” could convey the impression of inappropriate influence over the judge to others.²⁴⁴ Stating “public trust in the impartiality and fairness of the judicial system is so important that it is imperative to err on the side of caution,”²⁴⁵ Oklahoma held that judges should not be Facebook “friends” with “social workers, law enforcement officers, or others who regularly appear in court in an adversarial role.”²⁴⁶

I. *Ohio*

Ohio also cleared the way for judges to be active on social media in an opinion by the Supreme Court of Ohio’s Board of Commissioners on Grievances and Discipline in December 2010.²⁴⁷ However, doing so, said the Board, “require[s] a judge’s constant vigil.”²⁴⁸ Acknowledging a basic reality of the Facebook era—that “[a] social network ‘friend’ may or may not be a friend in the traditional sense of the word”²⁴⁹—the Ohio Board stated that there was nothing wrong with a judge being Facebook “friends” with lawyers, including lawyers who appear before the judge.²⁵⁰ The Ohio opinion goes into considerable detail, discussing not only ethics opinions from other states, but also the Judge B. Carlton Terry disciplinary proceeding from North Carolina.²⁵¹

240. Okla. Judicial Ethics Advisory Panel, No. 2011-3, at ¶ 3 (2011), *available at* <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147>.

241. *Id.* at ¶¶ 4, 8.

242. *Id.* at ¶ 7 (citing Ethics Comm. of the Ky. Judiciary, Formal Ethics Op. JE-119, at 1 (2010), *available at* http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_119.pdf).

243. *See id.* at ¶ 7.

244. *Id.* at ¶ 8.

245. *Id.* at ¶ 9.

246. *Id.* at ¶ 8.

247. *See* Ohio Bd. of Comm’rs on Grievances and Disputes, Op. 2010-07 (2010).

248. *Id.* at 7.

249. *Id.* at 2.

250. *Id.*

251. *Id.* at 4–7; *see also supra* Part III.I.

Equally significant is the fact that the Ohio Board does not merely content itself with making sweeping generalizations or urging jurists to be careful. Instead, it goes through a detailed litany of specific rules of judicial conduct that might be impacted by social networking, including several that have escaped commentary by other states' judicial ethics authorities, including the following specific admonitions:

A judge must maintain dignity in every comment, photograph, and other information shared on the social network. . . .

A judge must not foster social networking interactions with individuals or organizations if such communications will erode confidence in the independence of judicial decision making. . . .

A judge should not make comments on a social networking site about any matters pending before the judge

A judge should not view a party's or witness' page on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. . . .

. . . .

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. . . .

A judge may not give legal advice to others on a social networking site.²⁵²

Like several other ethics opinions, the Ohio Board's opinion also urges judges to be cautious posting content to their social networking profiles and to keep abreast of specific site policies and privacy controls.²⁵³

J. California

California's impressive contribution to the body of knowledge on judicial ethics and social media came in the form of California Judges Association Judicial Ethics Committee Opinion 66, issued in November 2010.²⁵⁴ While the California Committee gave "a very qualified yes" to the questions of whether a judge may be a member of an "online social networking community" and whether a judge may be Facebook "friends" with lawyers who may appear before him, it was not quite as receptive when it came to judges "friending" lawyers who actually appear before the judge.²⁵⁵ On that point, the Committee answered in the negative.²⁵⁶

252. Ohio Bd. of Comm'rs on Grievances and Disputes, Op. 2010-07, at 7-8 (2010).

253. *Id.*

254. See Cal. Judges Association Ethics Comm., Op. 66 (2010), available at <http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>.

255. *Id.* at 1.

256. *Id.*

The opinion begins with a helpful overview of social networking sites and their features, including two features that might come in particularly handy for a judge proceeding with caution in the use of social media: “unfriending” people and creating a “block list” of those precluded from accessing a user’s page.²⁵⁷ It then examines some of the ethical risks that can be posed by using social media, including posting information about cases currently before the judge on “friends” “walls”; expressing views or not deleting posts by others that may call into question a judge’s impartiality; posting inappropriate comments or pictures that may demean the judicial office; endorsing candidates for non-judicial office by “liking” their candidate pages; and “lending the prestige of the judicial office” to improperly advance the personal interests of the judge or others.²⁵⁸

Perhaps the greatest value of the California opinion, however, is its thoughtful analysis of factors that should be considered by a judge before participating in social media and determining if there are any appearance issues with attorney “friends” appearing before that judge. These factors include the following:

1.) The nature of the site: Essentially, a site that has more unique and personal details available to the public is more likely to create at least the perception that the attorney has inappropriate influence over the judge.²⁵⁹ Conversely, social media pages for an organization like an alumni group or bar association are less likely to create such an impression.²⁶⁰

2.) The number of persons “friended” by the judge: Simply put, “the greater number of ‘friends’ on the judge’s page, the less likely it is . . . that any one individual participant is in a position to influence the judge.”²⁶¹

3.) How the judge determines whom to “friend”: A judge who accepts all “friend” requests would be less likely to create the impression that a certain lawyer or lawyers holds any sway with the judge.²⁶² However, a more selective practice of “friending” only lawyers from the plaintiff’s bar, or excluding lawyers from a particular firm, is more likely to lead to the appearance of bias, either for parties with whom the judge is “friends” or against those who lack such a Facebook “friendship” with the judge.²⁶³

257. *Id.* at 3.

258. *Id.* at 4–5.

259. *Id.* at 8.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

4.) How regularly an attorney appears before a judge: Essentially, the more frequently an attorney actually appears before a judge, the less likely it is that being Facebook “friends” would be permissible.²⁶⁴ On the other hand, online relationships pose less of a risk of creating the appearance of having a special position of influence when the attorney rarely appears before his “friend” the judge.²⁶⁵ For example, a civil litigator who happens to have a “friend” relationship with a criminal court judge is less likely to prompt cries of “foul.”

It is also worth noting that the California ethics opinion provides several helpful hypothetical scenarios of where social media interaction would and would not be permissible.²⁶⁶ With regard to its position that a judge should *not* be Facebook “friends” with an attorney who has a case pending before him, the California Ethics Committee is direct.²⁶⁷ And,

[i]f the online interaction were permitted, a judge would have to disclose not only the fact that interaction took place in the first instance, but also that it is going to continue. This continuing contact could create the impression that the attorney is in a special position to influence the judge simply by virtue of the ready access afforded by the social networking site.²⁶⁸

K. Florida

Without a doubt, there is no state more restrictive when it comes to judges and social media than Florida. Florida has released not just one ethics opinion, but five between 2009 and 2013. It has also spawned a dispute over how restrictively to interpret its ethical prohibitions on judges and social networking that went all the way to the Florida Supreme Court.²⁶⁹

The first and most widely criticized²⁷⁰ ethics opinion from the Florida Supreme Court Judicial Ethics Advisory Committee was Opinion No. 2009-20, issued in November 2009.²⁷¹ It posited several questions: (1) whether judges could be “friends” on a social networking site with

264. *Id.*

265. *Id.*

266. *See id.* at 9–10.

267. *Id.* at 10.

268. *Id.* at 11.

269. *See* Domville v. State, 103 So. 3d 184 (Fla. Dist. Ct. App. 2012), *rehearing denied sub nom.* State v. Domville, No. SC13-121, 2013 WL 599133 (Fla. Feb. 14, 2013). For a detailed discussion of the case history, see Part VII.A.

270. *See, e.g., supra* text accompanying notes 17–18. The rejection of Florida’s draconian restrictions is implicit in the fact that other states have refused to adopt similar approaches. *See supra* Part VI.B–J.

271. Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecapinions/2009/2009-20.html>.

lawyers; (2) whether a judge's campaign committee could post material related to a judge's candidacy on a social networking site; and (3) whether lawyers and other supporters may list themselves as "fans" on a judge's campaign social networking site.²⁷² The answers to the second and third inquiries, perhaps bowing to the realities of political campaigning in the digital age, were yes—as long as the judge or his campaign committee do not control who is permitted to list himself as a "fan" or supporter.²⁷³

However, it is the first inquiry, and particularly the Committee majority's negative response to it, that has elicited the sharpest reactions. The majority felt that allowing a judge to accept or reject contacts or "friends" on his or her social networking profile would violate Canon 2B of the Code of Judicial Conduct, because "this selection and communication process . . . [may] convey[] or permit[] others to convey the impression that [such 'friends'] are in a special position to influence the judge."²⁷⁴ According to the Committee, there is something special about being classified as a judge's "friend" because that status is viewable not only to the judge's other "friends," but to all of their "friends" as well.²⁷⁵ While the majority conceded that "friend" status doesn't automatically mean that such individuals are in a special position of favor or influence, it was more fixated on the appearance of such a status.²⁷⁶ Accordingly, the Committee concluded, "[S]uch identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted."²⁷⁷

To its credit, the opinion did discuss the position of a minority of the Committee, which felt that the majority was attributing an importance to the status of being "friends" on Facebook that bears no resemblance to the term's actual meaning in an online context.²⁷⁸ The majority opinion also draws a clear delineation between lawyers who may practice before a given judge (who are prohibited from being "friended") and persons who are either not lawyers or are lawyers who don't appear before the judge. As the Committee makes clear,

this opinion does not apply to the practice of listing as 'friends' persons other than lawyers, or to listing as 'friends' lawyers who do not appear before the judge, either because they do not practice in the judge's area or court or because the judge has listed them on the

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *See id.*

277. *Id.*

278. *Id.*

judge's recusal list so that their cases are not assigned to the judge.²⁷⁹

The second opinion, Judicial Ethics Advisory Committee Opinion No. 2010-04, issued in March 2010, posed the same inquiry about "friending" lawyers with regard to a judge's judicial assistants or clerks.²⁸⁰ Here, the Committee recognized that keeping a judicial assistant from "friending" a lawyer presented First Amendment concerns.²⁸¹ Moreover, the same fear of creating a public perception that such a lawyer "friend" would be in a position to influence the judge was absent, in the eyes of the Committee.²⁸² As the Committee concluded,

[a]s long as a judicial assistant utilizes the social networking site outside of the judicial assistant's administrative responsibilities and independent of the judge, thereby making no reference to the judge or the judge's office, this Committee believes that there is no prohibition for a judicial assistant to add lawyers who may appear before the judge as 'friends' on a social networking site.²⁸³

The third opinion, Judicial Ethics Advisory Committee Opinion No. 2010-06, also issued in 2010, presented a chance to scale back the draconian implications of the Committee's 2009 opinion by addressing a scenario where a judge had taken certain steps to minimize, if not eliminate, public perception that being a "friend" of the judge carried with it implications of a special relationship or position of influence.²⁸⁴ In the scenario before the Committee, the judge offered to communicate with all "friends" who were attorneys and "post a permanent, prominent disclaimer on the judge's Facebook profile" explaining that the Facebook "friend" status meant that the judge and the friend were merely acquaintances, not necessarily a "friend" in the "traditional sense."²⁸⁵

The Committee was not persuaded; even with such caveats, a judge still would not be permitted to "friend" an attorney who might appear before her.²⁸⁶ Even if it was the judge's custom to "friend" all the lawyers who sent such a request, or all those whose names she recognizes or who have "friends" in common with her, the Committee held it would still not be permissible to have as a Facebook "friend" a lawyer who appeared before the judge.²⁸⁷ As close as the Committee was willing to

279. *Id.*

280. Fla. Judicial Ethics Advisory Comm., Op. 2010-04 (2010), available at <http://www.jud6.org/legalcommunity/legalpractice/opinions/jecopinions/2010/2010-04.html>.

281. *Id.*

282. *Id.*

283. *Id.*

284. See Fla. Judicial Ethics Advisory Comm., Op. 2010-06 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2010/2010-06.html>.

285. *Id.*

286. *Id.*

287. *Id.*

come was a pronouncement that a judge would not have to “un-friend” lawyers who were “friends” because they shared membership in a voluntary bar association with the judge and “use[d] Facebook to communicate among themselves about that organization and other non-legal matters.”²⁸⁸

The fourth opinion, Florida Judicial Ethics Advisory Committee Opinion No. 2012-12, issued in May 2012, represented one more chance for Florida to step back from its outlier status by considering judges’ involvement with the considerably more professional, business-oriented, and presumably more “acceptable” social networking site, LinkedIn.²⁸⁹ However, when the Committee considered the question of “[w]hether a judge may add lawyers who may appear before the judge as ‘connections’ on the professional networking site, Linked In [sic], or permit such lawyers to add the judge as their ‘connection’ on that site,” the answer again was a curt “[n]o.”²⁹⁰ While the Committee made note of the inquiring judge’s distinction between sites like Facebook and the more professional LinkedIn, it based its ruling on the unwieldiness of requiring “each judge who had accepted a lawyer as a friend or connection to constantly scan the cases assigned to the judge, and the lawyers appearing in each case, and ‘defriend’ or delist each lawyer upon a friend or connection making an appearance in a case assigned to the judge.”²⁹¹ The Committee cited with approval California’s approach, which allows a judge to “friend” lawyers based on the low likelihood of them having to appear before that judge (based on factors like the type of practice that lawyer has, or the court’s jurisdiction), but does not allow judges to “friend” lawyers with cases pending before that court.²⁹² In the Committee’s eyes, even with a site like LinkedIn, it seemed more feasible to “just say no” than to adopt an approach “that contemplates a judge constantly approving, deleting, and reapproving lawyers as ‘friends’ or ‘connections’ as their cases are assigned to, and thereafter concluded or removed from, a judge.”²⁹³ It is also worth noting that, like its 2009 opinion, there was a dissenting view as well.²⁹⁴

In the fifth and most recent opinion, the Florida Supreme Court Judicial Ethics Advisory Committee addressed judicial activities on yet

288. *Id.*

289. See Fla. Judicial Ethics Advisory Comm., Op. 2012-12 (2012), available at <http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2012/2012-12.html>.

290. *Id.*

291. *Id.*

292. *Id.* (citing Cal. Judges Association Ethics Comm., Op. 66 (2010), available at <http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>).

293. *Id.*

294. *Id.*

another social networking platform, Twitter.²⁹⁵ In this opinion, the narrow questions confronted by the Committee were whether a judge seeking re-election would be allowed to “create a Twitter account with a privacy setting open so that anyone—including lawyers—would be able to follow” the judge and whether the campaign manager would be permitted to “create and maintain the Twitter account, instead of the judge” directly.²⁹⁶ The Committee’s answer to both questions was “yes,” noting the utility of Twitter for political campaigning as the Twitter account could share “tweets” about a candidate’s “judicial philosophy, campaign slogans, and blurbs about the candidate’s background,” as well as update followers about upcoming events.²⁹⁷

However, the Florida Judicial Ethics Advisory Committee hearkened to its earlier opinions restricting judicial use of social media, noting that certain dimensions of Twitter could violate Canon 2B’s prohibition against conveying or permitting others “to convey the impression that [they are] in a special position to influence the judge.”²⁹⁸ The Committee noted that a Twitter user could block specific followers, mark certain tweets as “favorites,” create lists of followers, and subscribe to lists created by another user.²⁹⁹ These features, the Committee observed, posed the potential of violating Canon 2B:

If a user posts a tweet that is complimentary or flattering to the . . . judge, the judge could re-tweet it or mark it as a “favorite.” No matter how innocuous the tweet, this could convey or permit the tweeter to convey the impression that the tweeter is in a special position to influence the judge. . . . [Twitter followers] could be perceived to be in a special position to influence the judicial candidate. The . . . judge could avoid this appearance by not creating any lists of followers. Still, if the . . . judge were to appear on another Twitter user’s list of followers, that follower could create the impression of being in a special position to influence the judge.³⁰⁰

The Committee also expressed concern that “[a] judge’s Twitter account [could] create[] an avenue of opportunity for ex parte communication.”³⁰¹ The Committee described how such a scenario would play out:

Assume a Twitter user is a party who has a case assigned to a judge with a Twitter account. The party could send the judge a tweet about

295. Fla. Judicial Ethics Advisory Comm., Op. 2013-14 (2013), *available at* <http://www.jud6.org/legalcommunity/legalpractice/opinions/jecopinions/2013/2013-14.html>.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

the case. The judge unwittingly would receive the tweet. The only way to avoid receiving the tweet would be if the judge knew the party's Twitter account name, and exercised Twitter's blocking option when the judge set up the judge's Twitter account.³⁰²

While the Committee ultimately opined that the safest course of action is simply to have the judge's campaign manager create and maintain the Twitter account,³⁰³ the Committee's reasoning is flawed and reflects the same limited grasp of social networking as its earlier opinions. First, the risk of ex parte contact by virtue of having a Twitter account is no greater than that created by having a publicly known email account, a direct-dial telephone number, or a physical address at the courthouse—all of which are readily ascertainable about most judges. A party determined to attempt an ex parte communication with a judge would be only temporarily frustrated by the lack of a Twitter account or by being blocked from a judge's Twitter account before turning to more traditional avenues of communication. Second, the Committee mistakenly attributes greater significance to the act of following or being followed on Twitter, or of retweeting and being retweeted, than those more familiar with the social networking-microblogging site would accord such acts. Just as it mischaracterized the significance of "friend" status on Facebook, the Committee also places an inordinate importance on being a follower or someone who is followed on Twitter, especially in light of the fact that users have no say in who follows them.

L. *Other States*

Other states have certainly considered, but have not yet issued decisions on, the issue of judges' activity on social media. For example, Georgia's Committee, chaired by Georgia Supreme Court Justice Hugh Thompson, began meeting in 2012 to consider a wide range of possible updates to the state's judicial code of ethics, including judicial use of social media.³⁰⁴ The Utah Judicial Council has created a Social Media Subcommittee to examine the issue of judges using social media.³⁰⁵ Other jurisdictions, such as Indiana's Delaware County, have adopted social media policies prohibiting county court employees from misuse of

302. *Id.*

303. *Id.*

304. R. Robin McDonald, *Ga. Judicial Reform Addressing Social Media on the Horizon*, L. TECH. NEWS (Jan. 21, 2012), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202539064898>.

305. See SOCIAL MEDIA SUBCOMMITTEE, JUDICIAL OUTREACH COMM., REPORT AND RECOMMENDATIONS OF THE SOCIAL MEDIA SUBCOMMITTEE OF THE OF THE JUDICIAL OUTREACH COMMITTEE RE: JUDICIAL EMPLOYEE USE OF SOCIAL MEDIA (2011), available at http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Social_Media_Subcommittee_FINAL_REPORT.ashx.

social networking sites.³⁰⁶ Such misuse includes posting photos online of court employees “in an intoxicated condition” and discussing or revealing on a social networking site “any information related to a judge, co-workers, parties before the court, attorneys who appear before the Court, local law enforcement officials, and/or any information obtained through the employee’s observation of and/or work with the Court.”³⁰⁷ Commentators in states like Georgia and Pennsylvania have speculated about how a judicial ethics committee might decide with regard to judges and social media, but official pronouncements have yet to be issued.³⁰⁸ One commentator has even gone so far as to “unofficially” add Indiana and Wisconsin to the list of states weighing in on the topic of judges and social media.³⁰⁹ However, it is important to clarify that these “unofficial opinions” come from individual authors writing articles in local legal periodicals in which they theorize how state judicial ethics authorities might come down on the issue, and they are *not* official pronouncements from governing bodies.³¹⁰

VII. CASES CONSTRUING JUDGES’ ACTIVITIES ON SOCIAL MEDIA

To date, there have been two significant decisions discussing the limitations that can be placed on judges’ interactions via social networking sites.³¹¹ The first, from Florida, interprets that state’s highly restrictive stance on judges being Facebook “friends” with attorneys. The second, from Texas, addresses the issue of whether recusal is warranted when a judge’s Facebook “friends” happen to include someone affiliated with the victim(s) of a crime.

306. DEL. CIR. CT. SOC. NETWORKING POLICY (2011), available at <http://www.thestarpress.com/assets/pdf/C7178737830.pdf>.

307. *Id.*

308. See, e.g., J. Randolph Evans & Joshua B. Belinfante, *Ga. Judges on Facebook: To Friend or Not to Friend?*, L. TECH. NEWS (Aug. 30, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202512740798>; Samuel C. Stretton, *Do Judicial Officers Belong on Facebook?*, L. TECH. NEWS (Nov. 29, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202533670255>; see also McDonald, *supra* note 304.

309. See Brian Hull, Note, *Why Can't We Be "Friends"? A Call for a Less Stringent Policy for Judges Using Online Social Networking*, 63 HASTINGS L.J. 595, 608 & n.93, 612, 614 (2012).

310. See, e.g., Adrienne Meiring, *Ethical Considerations of Using Social Networking Sites*, IND. CT. TIMES, Dec. 2009, at 10, available at <http://indianacourts.us/times/2009/12/ethical-considerations-of-using-social-networking-sites/>; Richard J. Sankovitz, *Can't We Be Friends? Judges and Social Networking*, THE THIRD BRANCH, Winter 2010, at 10.

311. Although a case has not yet surfaced, New York has also addressed this issue in a hypothetical in an ethics opinion. See N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013), available at <http://www.nycourts.gov/ip/judicialethics/opinions/13-39.htm>.

A. *Domville v. State*

In *Domville v. State*,³¹² Pierre Domville faced three charges of lewd and lascivious battery on a child.³¹³ At the trial court level, Domville's attorney filed a motion to disqualify the trial judge because he happened to be "friends" on Facebook with the prosecutor handling the case.³¹⁴ Domville's affidavit in support of the disqualification motion pointed out that he himself was a Facebook user and that his "friends" on that site were limited to his "closest friends and associates, persons whom [he] could not perceive with anything but favor, loyalty, and partiality."³¹⁵ His affidavit also "attributed [previous] adverse rulings to the judge's Facebook relationship with the prosecutor. The trial judge denied the motion as 'legally insufficient.'"³¹⁶

On appeal, in a September 5, 2012 per curiam opinion, the Court of Appeals relied heavily on the Judicial Ethics Advisory Committee's November 2009 ethics opinion prohibiting judges from being Facebook "friends" with attorneys.³¹⁷ Reiterating the Committee's conclusion that "a judge's activity on a social networking site may undermine confidence in the judge's neutrality," and because it felt that Domville had "alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair trial," the appellate court denied disqualification and remanded to the circuit court.³¹⁸ Interestingly, the three elements that the Court of Appeals took from the 2009 ethics opinion in bringing judges' social networking activities within the prohibition of Canon 2B were the following: (1) "[t]he judge must establish the social networking page"; (2) the site must give the judge discretion to accept or reject "friend" requests; and (3) "[t]he identity of the 'friends' . . . selected by the judge . . . must then be communicated to others."³¹⁹ The first two elements—having a Facebook profile and being able to accept or decline "friend" requests—have nothing to do with Canon 2B's prohibition against conveying or allowing others to convey

312. 103 So. 3d 184 (Fla. Dist. Ct. App. 2012), *rehearing denied* No. 4D12-556, 2013 WL 163429 (Fla. Dist. Ct. App. Jan. 16, 2013), *aff'd sub nom.* *State v. Domville*, No. SC13-121, 2013 WL 599133 (Fla. Feb. 14, 2013).

313. *E.g.*, Lisa J. Huriash, *State Pondering Whether to Hear Case of Who Judges Can "Friend"*, SUN SENTINEL (Feb. 4, 2013), http://articles.sun-sentinel.com/2013-02-04/news/fl-florida-facebook-judge-20130204_1_criminal-case-appeal-judge-friend.

314. *Domville*, 103 So. 3d at 185.

315. *Id.*

316. *Id.*

317. *Id.* at 185–86 (citing Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2009/2009-20.html>).

318. *Id.* at 186.

319. *Id.* at 185 (emphasis added).

the impression that they are in a special position to influence the judge.³²⁰ The third element, that the “friend” status must be communicated to others, is the only one of any bearing to the Committee’s (and now the appellate court’s) chief concern. Why, then, does Florida’s Judicial Ethics Advisory Committee not simply elect a lesser prohibition? In other words, instead of banning judges from “friending” attorneys altogether, why not simply require judges to keep their “friends” private by implementing the appropriate privacy settings on their profiles?

It is a question that has not been answered by Florida authorities, or indeed any of the few states that restrict judges from “friending” attorneys who appear before them, such as California or Oklahoma. However, there are both practical concerns and policy reasons why this may not be a workable solution. From a practical standpoint, such a tactic would require judges to master their privacy settings and to be vigilant for changes made by Facebook and other social networking sites to their privacy policies, which have been revised repeatedly and are likely to be revised often in the future. It would also demand imposing a similar requirement on attorneys to keep all of their “friends” private, if this list of “friends” happened to include members of the judiciary. Not only would this involve a sweeping change affecting a population outside the jurisdiction of judicial ethics authorities, it would also present—on a grander scale—the same kind of practical challenge of requiring attorneys to implement and keep up with the ever-changing privacy functionality of Facebook and other sites.

From a public policy perspective, the idea of allowing judges to have a list of attorney “friends,” as long as they keep it hidden from public view, is hardly likely to fulfill the goal of maintaining the public’s confidence in the integrity of the legal system and the impartiality of the judiciary. If anything, such a policy is only likely to erode public confidence and generate distrust of both the process and the outcome of a particular proceeding. It is a fact of life that relationships exist between judges and lawyers that are not public knowledge, such as golfing, hunting, or other social relationships, but it is another thing entirely to have a policy or mandate to keep these relationships hidden.

In any event, in January 2013, the Florida Fourth District Court of Appeals ruled on the State’s Motion for Rehearing and Motion for Certification.³²¹ While the court denied the motion for rehearing, it did certify the following question to the Florida Supreme Court: “Where the presiding judge in a criminal case has accepted the prosecutor assigned to the

320. See FLA. CODE OF JUDICIAL CONDUCT Canon 2B (2008).

321. *Domville v. State*, No. 4D12-556, 2013 WL 163429 (Fla. Dist. Ct. App. Jan. 16, 2013), *aff’d sub nom.* *State v. Domville*, No. SC13-121, 2013 WL 599133 (Fla. Feb. 14, 2013).

case as a Facebook ‘friend,’ would a reasonably prudent person fear that he could not get a fair and impartial trial, so that the defendant’s motion for disqualification should be granted?”³²² While Judge Gross concurred in the certification of the question, his concurrence left no doubt as to his opinion regarding judges being active on social media:

Judges do not have the unfettered social freedom of teenagers. Central to the public’s confidence in the courts is the belief that fair decisions are rendered by an impartial tribunal. Maintenance of the appearance of impartiality requires the avoidance of entanglements and relationships that compromise that appearance. Unlike face to face [sic] social interaction, an electronic blip on a social media site can become eternal in the electronic ether of the [I]nternet. Posts on a Facebook page might be of a type that a judge should not consider in a given case. The existence of a judge’s Facebook page might exert pressure on lawyers or litigants to take direct or indirect action to curry favor with the judge. As we recognized in the panel opinion, a person who accepts the responsibility of being a judge must also accept limitations on personal freedom.³²³

Although both this appellate court and the Attorney General of the State of Florida considered this issue to be of “great public importance,”³²⁴ in February 2013, the Florida Supreme Court declined to hear the appeal and consider the question that had been certified to it, giving no reason for its decision.³²⁵ Consequently, the 2009 Judicial Ethics Advisory Committee ethics ruling remains the prevailing law in Florida, if nowhere else.

B. *Youkers v. State*

Youkers v. State,³²⁶ a criminal appellate case, dealt with a situation strikingly similar to the one before the New York Committee on Judicial Ethics,³²⁷ with the only difference being a twist involving an actual communication on Facebook between the victim’s father and the trial judge.³²⁸ *Youkers* appealed the revocation of his eight-year prison sentence and community supervision following his conviction for assaulting his pregnant girlfriend.³²⁹ Among his grounds for appeal was the contention that he did not receive a fair trial because trial judge lacked impar-

322. *Domville*, 2013 WL 163429, at *1.

323. *Id.*

324. *Id.*

325. *State v. Domville*, No. SC13-121, 2013 WL 599133 (Fla. Feb. 14, 2013).

326. 400 S.W.3d 200 (Tex. App. 2013).

327. See N.Y. Advisory Comm. on Judicial Ethics, Op. 13-39 (2013), available at <http://www.nycourts.gov/ipf/judicialethics/opinions/13-39.htm>.

328. *Youkers*, 400 S.W.3d at 204.

329. *Id.* at 203.

tiality because of a Facebook “friendship” with the girlfriend’s father and an alleged ex parte communication.³³⁰ At his motion for new trial, the trial judge testified that he knew the father from having run for elected office at the same time, and that while they were Facebook “friends,” that was “the extent of their relationship.”³³¹ Their only communication through Facebook began just before to the defendant’s original plea when the father messaged the judge to seek leniency for Youkers.³³²

The trial judge’s actions were a model of how to respond to any ex parte communication, whether received through Facebook or more traditional media:

The judge responded online formally[,] advising the father [that] the communication was in violation of rules precluding ex parte communications . . . [and] that any further communications from the father about the case or any other pending legal matter would result in the father being removed as one of the judge’s Facebook ‘friends.’ The judge’s online response also advised that the judge was placing a copy of the communications in the court’s file, disclosing the incident to the lawyers, and contacting the judicial conduct commission to determine if further steps were required.³³³

The father responded and apologized “for breaking any ‘rules or laws’ and promising not to . . . make comments ‘relating to criminal cases’ in the future.”³³⁴ Per the testimony offered at the hearing on the motion for new trial, the trial judge followed through with all of the steps that he indicated would be taking.³³⁵

In a thoughtful, thorough, and well-reasoned opinion, Justice Mary Murphy of Dallas’ Fifth District Court of Appeals first pointed out that this was a case of first impression in Texas: “No Texas court appear[ed] to have addressed the propriety of a judge’s use of social media websites such as Facebook. Nor [wa]s there a rule, canon of ethics, or judicial ethics opinion in Texas proscribing such use.”³³⁶ Justice Murphy went on to cite ABA Judicial Ethics Opinion 462 approvingly, both for the beneficial aspects of allowing judges to use Facebook (i.e., remaining active in the community) and for the proposition that the status of Facebook “friends” is not necessarily representative of “the degree or

330. *Id.*

331. *Id.* at 204.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 205.

intensity of a judge's relationship with that person.'"³³⁷ As the court pointed out, "the designation, standing alone, provides no insight into the nature of the relationship."³³⁸ And in examining the record for further context, the court noted that there was nothing to indicate that the "Facebook friendship" between the judge and the girlfriend's father—who was actually asking for leniency—was anything but a fleeting acquaintance.³³⁹

Most importantly, the court pointed out, the judge fully complied with the state protocol for dealing with *ex parte* communications.³⁴⁰ And while the court noted that judges should, in using social media, remain mindful of their responsibilities under applicable judicial codes of conduct, everything about this judge's actions was consistent with promoting public confidence in the integrity and impartiality of the judiciary.³⁴¹ Significantly, the court observed that while new technology may have ushered in new ways to communicate and share information, the same ethical rules apply: "[W]hile the [I]nternet and social media websites create new venues for communications, our analysis should not change because an *ex parte* communication occurs online or offline."³⁴²

VIII. CONCLUSION

Most states, and ABA Judicial Ethics Opinion 462, acknowledge that the use of social networking sites can benefit judges in both their personal and professional lives, including not just helping a judge stay in touch with the rest of the community, but also providing vital tools for raising both funds and voter awareness in states where judges are elected officials. In addition, most states view the mere existence of a Facebook "friendship," without more, as signifying very little due to the realities of "friendship" in the digital age. However, as the examples discussed in this article illustrate, treatment of judges' use of social media contains some variances from state to state. As existing rules of judicial ethics continue to be applied to scenarios involving technology never envisioned when those rules were created, some tension will no doubt continue to exist where technology and the law intersect.

Albert Einstein once said, "It has become appallingly obvious that our technology has exceeded our humanity."³⁴³ This is particularly true

337. *Id.* at 205–06 (quoting ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462, at 3 (2013)).

338. *Id.* at 206 (citation omitted).

339. *Id.*

340. *Id.* at 207.

341. *Id.*

342. *Id.* at 206.

343. This quotation is commonly, if not reliably, attributed to Albert Einstein.

in an age where “friending” has become a verb, relationships are formed with the speed of a search engine, increasing numbers of people live more and more of their lives online, and digital intimacy has become the norm. And in a society that has become accustomed to politicians, entertainers, star athletes, and other celebrities being hoisted on their own digital petards and undone by social media miscues, it is only prudent to regard social media as something of an ethical minefield for judges. Even pop culture reminds us of this fact. The CBS legal drama *The Good Wife* aired an episode entitled *What Went Wrong*, in which the intrepid lawyers at Lockhart Gardner attempted to set aside a verdict in which an innocent defendant is convicted of murder.³⁴⁴ As they search for signs of juror misconduct, they learn that the judge—lauded as an expert on legal ethics—had inadvertently connected with one of the jurors via social media during the trial.³⁴⁵

Perhaps appropriately in an era of Facebook’s hold over society, the issue of judges and social media can best be described with one of the social networking site’s contributions to our twenty-first century lexicon: “It’s complicated.” While a judge’s misuse of social media can certainly violate canons of ethics and negatively impact public perception of the judiciary, so can other, more traditional relationships formed or communications made by judges. As social networking continues its inexorable spread, and as young lawyers join the judicial ranks while older jurists cautiously embrace digital media, the issue of judges’ activities on social media will become increasingly prominent. An approach that is either overly restrictive or too cautious in its interpretation of modern communication platforms with existing principles of judicial ethics does no one a service—not the judiciary, not the legal profession, and certainly not the public itself. A more digitally enlightened and realistic approach, on the other hand, acknowledges the folly of either trying to come up with new rules every time technology threatens the status quo, or of ignoring or proscribing the use of such innovations. Isolating judges from something viewed as so vital by much of the community is hardly desirable, as is depriving judges of technological knowledge (or at least familiarity) that can inform their handling of cases.

While judges should proceed with caution when using social networking platforms—as they should with any communication platform—they should still proceed.

344. *The Good Wife: What Went Wrong* (CBS television broadcast Dec. 11, 2011).

345. *Id.*

