

FRIEND REQUEST DENIED: JUDICIAL ETHICS AND SOCIAL MEDIA

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ABSTRACT

Social media sites such as Facebook, Twitter, and LinkedIn have revolutionized our social lives and dominate the way we communicate with each other. Whether it comes to personal or professional use, social media platforms come with a multitude of complications. What to post, whom to “friend,” whom to share information with, and what job updates to share are just some of the problems social media users face daily. These complications are only multiplied for judges. A judge’s unique position to influence makes what constitutes acceptable social media usage much more complex. With almost 1.5 billion users on Facebook and 300 million users on LinkedIn, the chances of what you post on social media being seen are extremely high. This is something that judges must keep in mind. Social media usage has blurred the lines of acceptable judicial conduct on the Internet. While the American Bar Association and certain jurisdictions have provided some advisory opinions on what constitutes acceptable judicial conduct on social media platforms, the opinions are not uniform and provide little advice. This note addresses this problem and provides guidance for judges on what should constitute acceptable social media usage.

INTRODUCTION

A family court judge accepts a Facebook friend request from a social worker that regularly appears before him. A trial court judge endorses on LinkedIn the skills of a former law clerk. A juvenile court judge Facebook friends young delinquents who have appeared in his court to keep an eye on their activities. A judge accepts a friend request from an attorney whom the judge has met at bar association events. The attorney has not yet appeared in the judge's courtroom, but possibly could. Are these associations on social media acceptable? Do these actions violate a judge's duties to maintain impartiality and avoid impropriety or the appearance of impropriety? What, if any, judicial canons and rules of professional conduct may be implicated as a result of these relationships? With the recent increase of social media usage, the answers to these questions and what constitutes acceptable associations between judges and individuals who appear or may appear in their courtrooms have become murky.

This note will focus primarily on judges' use of the social media sites Facebook and LinkedIn and will provide judges with useful guidelines and recommendations for proper social media usage. Part I of this note will give background information on Facebook and LinkedIn. Part II will discuss the different judicial canons and ethical rules that may be implicated by social media usage. Part III will discuss the recent advisory opinions and jurisdictional variations on the topic. Part IV will contain my recommendations and guidelines for judicial use of social media.

I. BACKGROUND

Social media platforms have inundated every aspect our lives. Most of the world has heard of social media sites such as, Facebook, LinkedIn, MySpace, and Twitter. Social media platforms such as these allow their users to create profiles in order to share information with other users on the site, often called "friends," "followers," or "links." Sites like Facebook and LinkedIn create "networks of individuals, events, groups and/or organizations with shared relationships, interests or activities."¹

A. Facebook

Facebook allows users to do things such as, "friend"² other users; add photo albums; post status updates; and share relationship connections, interests in movies, music, and television shows. Individuals can adjust their privacy settings to control what information their Facebook and non-Facebook friends can see on their page. Some additional privacy settings

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1. Karen Salaz et al., *New Media and the Courts: The Current Status and a Look at the Future*, 28 (2010).
 2. The term "friend" will be used throughout the note. "Friend" in regards to Facebook refers to the virtual online connections of two individuals through the site.

include controlling whether your name can be searched on Facebook, whether people can message you on Facebook, and whether people can request to friend you. Essentially, individuals can arrange their Facebook account so that all access is restricted to only those whom they wish to know about the account.

There are over 1.39 billion monthly active Facebook users worldwide.³ While Facebook membership still skews towards a younger population, the 45-to-54-year-old age group has seen a 46% growth in Facebook usage since the end of 2012.⁴ Facebook use has not only increased among the general population, but the legal field has also seen an increase in usage. Forty percent of judges report that they use social media sites, with a majority of these judges using Facebook.⁵ Eighty-five percent of lawyers report that they use Facebook for personal use.⁶ Twenty-six percent of individual lawyers and thirty-four percent of law firms use Facebook for professional purposes.⁷ More and more professionals are pointing out the benefits to those in the legal field of using social media. These benefits include lawyers being able to “network for referrals, research defendants and potential jury members, market their law firms, and vet potential legal hires and current associates.”⁸ While Facebook seems to be the most popular social media network, other networks, such as LinkedIn, are gaining traction.

B. LinkedIn

LinkedIn is most commonly known as a professional networking site. LinkedIn has over 300 million users.⁹ Fifty-six percent of law firms reported using LinkedIn for firm business in 2014.¹⁰ Executives, experts, professionals, current students, and recent graduates join LinkedIn to network, develop business opportunities, collaborate on projects, share job opportunities, and make new connections. LinkedIn users have profiles,

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3. Dan Noyes, *The Top 20 Valuable Facebook Statistics*, ZEPHORIA INTERNET MARKETING SOLUTIONS (Feb. 10, 2015), <https://zephoria.com/social-media/top-15-valuable-facebook-statistics>.
 4. Cooper Smith, *7 Statistics About Facebook Users That Reveal Why It's Such A Powerful Marketing Platform*, BUSINESS INSIDER (November 13, 2015), <http://www.businessinsider.com/a-primer-on-facebook-demographics-2013-10>.
 5. SALAZ ET AL., *supra* note 1, at 66.
 6. Allison Shields, *Blogging and Social Media*, AMERICAN BAR ASSOCIATION (2014), <http://www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html>.
 7. *Id.*
 8. Leora Maccabee, *Facebook 101: why lawyers should be on Facebook*, LAWYERIST (April 23, 2009), <https://lawyerist.com/1970/facebook-101-why-lawyers-should-be-on-facebook>.
 9. Kurt Wagner, *LinkedIn Hits 300 Million Users Amid Mobile Push*, MASHABLE (April 18, 2014), <http://mashable.com/2014/04/18/linkedin-300-million-users>.
 10. Allison Shields, *Blogging and Social Media*, AMERICAN BAR ASSOCIATION (2014), <http://www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html>.

which allow them to share headshots, past jobs, current employment, expertise, accomplishments, and articles that are of interest to them.¹¹ Additionally, LinkedIn allows your “first-degree connections”¹² to “endorse”¹³ certain skills you may have such as, proficiency at Microsoft Word or PowerPoint, research and writing, and public speaking. LinkedIn also allows individuals to write recommendations for their first-degree connections that appear on that connection’s page for anyone who has access to that connection’s page to see. Furthermore, LinkedIn, like Facebook, allows for certain privacy settings. You can turn on or off your activity broadcasts;¹⁴ select which connections can see your activity; select what others see when you have viewed their profile¹⁵; select who can see your connections; choose who can follow your updates; and change your profile photo visibility. Like Facebook, LinkedIn allows users to make their profiles and activity as public or private as they wish.

II. CANONS AND RULES IMPLICATED

Social media use can create circumstances where a judge may violate one of the Judicial Canons. Three different Judicial Canons along with certain rules of judicial conduct could be violated by a judge’s careless use of social media.

A. Canon 1

Canon 1 of the Model Code of Judicial Conduct states that “a judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”¹⁶ A judge being a Facebook friend with a lawyer who has a case pending before his court or with a law enforcement officer involved in the investigation of a criminal case could create the appearance of impropriety. It may look to the public like the judge could not be impartial in the case because of the apparent relationship with that lawyer or law

11. SALAZ ET AL., *supra* note 1, at 29.

12. First-degree connections are with those to whom you are directly connected. A second-degree connection would be someone to whom you are not personally connected but who is connected to one of your first-degree connections.

13. You can endorse a first-degree connection’s skills on LinkedIn by visiting that connection’s page and clicking “endorse” and picking specific skills that person has listed they possess to endorse. Once you have endorsed a skill, your name and profile picture will appear along with everyone else who has endorsed that particular skill in that person’s “Skills” section.

14. The LinkedIn homepage functions much like the Facebook newsfeed, which allows users to see their connections activity on the site. This activity includes things like updating a new job, posting an article or opinion, adding a new resume, and changing profile pictures. Users’ activity can be seen by all of their first-degree connections.

15. LinkedIn allows others to see who have viewed their profile, unless the viewer has specifically changed the privacy settings to indicate an anonymous viewer.

16. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011).

enforcement officer. Rule 1.2 of the Model Code of Judicial Conduct states that a “judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”¹⁷ How can the public be confident that a judge is independent and impartial when that judge is friends on Facebook with the lawyers or law enforcement officers involved in pending cases? Rule 1.3 states that a judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.¹⁸ If a judge endorses a lawyer’s skills or writes a recommendation for a lawyer on LinkedIn, that lawyer may benefit economically or personally from potential employers seeing that the judge, a person of power, endorsed or recommended that lawyer, thereby inducing the potential employer to hire said lawyer.

B. Canon 2

Canon 2 of the Model Code of Judicial Conduct states, “a judge shall perform the duties of judicial office impartially, competently, and diligently.”¹⁹ A judge’s impartiality is subject to question if he or she is engaged in ex parte communications over Facebook messenger with an attorney involved in a pending case before that judge. This activity would also violate Rule 2.2, which states, “a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”²⁰ Additionally, a judge’s connection to an attorney on Facebook or LinkedIn could violate Rule 2.4(c), which prevents judges from conveying or permitting others to convey the impression that any person or organization is in a position to influence the judge.²¹ If a judge takes an online social media relationship one step further by communicating over the social media platform with an attorney about a case that attorney has pending before him, the judge would be violating Rule 2.9 against ex parte communications.²² Another rule implicated is Rule 2.10, which states, “a judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.”²³ A judge posting a status giving his opinion on a case or posting an article about a case on Facebook or LinkedIn could violate this rule because all of the judge’s connections would be able to see this activity. Additionally, judges should be wary of Rule 2.11, which prescribes when judges must disqualify

17. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 1.2 (2011).

18. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 1.3 (2011).

19. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2011).

20. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 2.2 (2011).

21. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 2.4(c) (2011).

22. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 2.9 (2011).

23. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 2.10 (2011).

themselves.²⁴ A judge is supposed to disqualify himself in “any proceeding in which the judge’s impartiality might reasonably be questioned.”²⁵ A judge’s impartiality could be questioned as a result of the connections he or she maintains on social media sites. Judges should also be careful not to take part in activities that would warrant frequent disqualification.²⁶

C. Canon 3

Canon 3 of the Model Code of Judicial Conduct states, “a judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.”²⁷ At issue are specific provisions within Rule 3.1, which regulate extrajudicial activities in general. Judges are not to participate in activities that would lead to frequent disqualification of the judge;²⁸ participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality;²⁹ or engage in conduct that would appear to a reasonable person to be coercive.³⁰ All of these provisions could easily be violated from improper judicial use of social networking sites. To help come up with a working guideline that judges can use when trying to decide what activity may be proper on social media, we must look at what other jurisdictions are doing.

III. CURRENT APPLICATION

Eleven states, along with the American Bar Association (“ABA”), have issued advisory ethics opinions examining and advising on the judicial use of social media sites. The opinions offer varied guidance on what conduct is permitted and on what sites. Several states have also decided disciplinary actions against judges relating to social media use. The analysis, which follows, will break up the different opinions and disciplinary actions into strict, moderate, and liberal approaches to acceptable judicial use of social media sites.

A. Strict Approaches

Several states take a strict approach to judicial use of social media. States like Florida, Oklahoma, and Massachusetts forbid judges from connecting with people on Facebook or LinkedIn who *may* appear in their courtroom. The states vary on whether this prohibition just applies to

24. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 2.11 (2011).

25. *Id.*

26. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 3.1(b) (2011).

27. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2011).

28. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 3.1(b) (2011).

29. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 3.1(c) (2011).

30. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 3.1(d) (2011).

adding lawyers or anyone who *may* appear in the judge's courtroom, such as law enforcement officers and social workers.

1. Florida

Florida prohibits judges from adding lawyers who *may* appear before them as friends on any networking sites, such as Facebook.³¹ The Florida Professional Ethics Committee issued an opinion stating that “lawyers who may appear before the judge as ‘friends’ on a judge’s social networking page reasonably conveys to others the impression that these lawyer ‘friends’ are in a special position to influence the ‘judge’ and that therefore these connections should not be permitted.”³² The committee noted that many people who view these social media pages are not aware of the judicial code and of rules of judicial conduct, which prohibit impartiality and impropriety in the courtroom.³³ The committee looked to Florida’s Code of Judicial Conduct Canon 2(B) which in part states that a judge shall not “convey or permit others to convey the impression that they are in a special position to influence the judge.”³⁴ This rule is the same as Rule 2.4(c) in the Model Code of Judicial Ethics. The committee stated that the test for whether Canon 2(B) is violated is “not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge.”³⁵ Using this test, the committee concluded that being able to view these social connections on the Internet violated Canon 2(B).³⁶

2. Massachusetts

Like Florida, Massachusetts prohibits judges from associating in any way on social networking sites with attorneys who *may* appear before them; however, Massachusetts states that judges should not be restricted from having social media accounts, such as Facebook.³⁷ The Massachusetts Committee on Judicial Ethics came up with a bright-line test, which requires that judges recuse themselves when attorneys whom they have “friended” appear before them.³⁸ The committee pointed specifically to Section 2(B) of the Massachusetts Judicial Code of Ethics, which states that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to

31. Fla. Sup. Ct., Ethics Advisory Comm., Op. 2009-20 (November 2009).

32. *Id.*

33. *Id.*

34. FLA. MODEL CODE OF JUDICIAL CONDUCT Canon 2(B).

35. *Id.*

36. *Id.*

37. Mass. Comm. on Judicial Ethics, Op. 2011-6 (Dec. 28, 2011).

38. *Id.*

influence the judge.”³⁹ This section of the Massachusetts Judicial Code is the same as Florida’s Canon 2(B) analysis and Rules 1.3 and 2.4(c) of the Model Code of Judicial Conduct.

3. Oklahoma

Oklahoma takes the restriction one step further than Florida and Massachusetts by stating that judges can have social media accounts, but cannot “friend” or “link” law enforcement officers, social workers, attorneys, and others who *may* appear in their court in an adversarial role.⁴⁰ Like Florida and Massachusetts, the Oklahoma Judicial Ethics Advisory Panel pointed to the judicial canon that prohibits judges “from conveying an impression, or allow[ing] others to convey the impression, that a person is in a special position to influence the judge.”⁴¹ The panel also emphasized that it does not matter whether the social connections would really mean that the party was actually in a special position to influence the judge.⁴² What matters is that the social connection “could convey that impression.”⁴³ The panel explained it was necessary to err on the side of caution as they believed that public trust in the impartiality and fairness of the judicial system was the most important consideration.⁴⁴ In response to the argument that these rules may be too restrictive on the rights and privileges of judges, the panel stated that judges should freely and “voluntarily accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen.”⁴⁵

B. Moderate Approaches

Several states that have spoken on the matter take a more moderate approach. The states that fall in the middle agree that judges are allowed to have social media sites and only restrict judges from “friending” lawyers who have cases pending before them in their court. Rather than just looking at the fact that the judge is connected to a lawyer on a social media, these states take a more in depth look into the connections and the judge’s social media site. These states include California, Arizona, Utah, Texas, North Carolina, and Florida.

1. California

California allows judges to be members of social media sites but does not allow judges to have social media connections with lawyers who have

39. *Id.*

40. Okla. Judicial Ethics Advisory Panel Op. 2011-3 (July 6, 2011).

41. *Id.*

42. *Id.*

43. Judicial Ethics Opinion 2011-3, 2011 OK JUD ETH, ¶8.

44. *Id.* at ¶9.

45. *Id.* at ¶10.

cases pending before them.⁴⁶ When asked whether judges may add lawyers on social media who may appear before the judge in court, the California Judges Association answered with a qualified “yes.”⁴⁷ The association uses several factors to decide whether it is permissible for a judge to interact with an attorney on a social media site.⁴⁸ First, the association looks to the nature of the networking site.⁴⁹ “The more personal the nature of the page, the greater the likelihood that including an attorney would create the appearance that the attorney would be in a special position to influence the judge, or cast doubt on the judge’s ability to act impartially.”⁵⁰ The second factor to consider is the number of friends on the page.⁵¹ The association reasoned that the more friends a judge has on the page, “the less likely it is that someone could perceive that any individual friend is in a position to influence the judge.”⁵² A judge with hundreds of attorney Facebook friends is less troublesome than a judge with ten attorney Facebook friends. Third, the association looks to the judge’s practice in determining whom to include, stating that “the more inclusive the page, the less likely it is to create the impression that any individual member is in a special position to influence the judge.”⁵³ The last factor to consider is how regularly the attorney appears before the judge.⁵⁴ “If the likelihood that the attorney will actually appear before the judge is low, the more likely it is that the social media connection would be permissible.”⁵⁵

The association’s rationale for its qualified “yes” answer emphasizes that, just as judges may join social and civic organizations that include attorneys who may appear before them, the same considerations apply to interacting with lawyers in a virtual medium on social media networks.⁵⁶ However, the association commented that it was important to note “a judge’s interactions on social media with attorneys who may appear before that judge will very often create appearances that would violate the Canons.”⁵⁷

2. Arizona

The Arizona Supreme Court Judicial Ethics Advisory Committee has created separate rules for appropriate Facebook and LinkedIn activity.⁵⁸ The committee states that a judge cannot recommend a lawyer on LinkedIn

46. Cal. Judges Ass’n Judicial Ethics Committee, Op. 66 (2011) at 11.

47. *Id.*

48. *Id.* at 7.

49. *Id.* at 8.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 7.

57. *Id.*

58. *See generally* Ariz. Sup. Ct. Judicial Ethics Advisory Comm. Op. 14-01 (2014).

who regularly appears in his court.⁵⁹ The committee reasoned that such activity violates Rule 1.2, a prohibition on creating the appearance of impartiality, and Rule 1.3, which states that judges cannot use the prestige of judicial office to advance their personal or economic interests.⁶⁰

The opinion states that when it comes to Facebook, there is no “per se disqualification requirement” when someone who appears in the judge’s court is connected with the judge on Facebook.⁶¹ However, the opinion urges judges to be careful not to violate Rule 3.1(b), which states that judges must “avoid activities that will lead to frequent disqualification.”⁶² The opinion states that another option is for judges to disclose the social media connection to the parties and then have the parties decide whether to ask for recusal; however, if the judge’s impartiality could be reasonably questioned, then he does have to recuse himself from the case.⁶³ Additionally, in Arizona judges cannot be friends with law enforcement officers on social media sites.⁶⁴ The committee also set out guidelines for judges dealing with elected officials on Facebook.⁶⁵ The opinion states that a judge can be the Facebook friend of an already elected official, but if the individual is currently running for office, then the judge cannot be a Facebook friend with that individual.⁶⁶ Furthermore, a judge cannot be a Facebook friend with or like another judge’s reelection campaign Facebook page.⁶⁷

3. Utah

The Utah Ethics Advisory Committee’s opinion provides an in depth analysis as to which modes of social media use are acceptable, dealing both with Facebook and LinkedIn. When asked whether a judge may be Facebook friends or accept friend requests from lawyers who appear before the judge, the committee says yes.⁶⁸ The opinion stated,

Being friends with someone is not a violation of the Code of Judicial Conduct. Furthermore, the designation of someone as a “friend” on a website such as Facebook does not indicate that the person is a friend under the usual understanding of the term. Many Facebook users have hundreds and even

59. *Id.* at 2.

60. *Id.*

61. *Id.* at 4.

62. *Id.*

63. *Id.* at 5.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Utah Ethics Advisory Comm. Informal Op. 12-01 (August 31, 2012).

thousands of “friends.” Whether someone is truly a friend depends on the frequency and the substance of contact, and not on an appellation created by a website for users to identify those who are known to the user.⁶⁹

The opinion went on to state that judges do not necessarily need to recuse themselves from a case just because they are Facebook friends with a lawyer on the case and that further inquiry is needed before recusal is warranted.⁷⁰ The opinion stated that “being a ‘friend’ of a judge on Facebook does not automatically create the appearance that the lawyer is in a special position to influence the judge.”⁷¹ The opinion compared a judge’s interactions with a lawyer on Facebook to any other interaction between a judge and a lawyer in public and private settings.⁷² There are always countless opportunities for misconduct, but just because there is an opportunity for misconduct does not “necessarily create, or appear to create, special positions of influence.”⁷³ Being Facebook friends is just one of the factors to consider when deciding if recusal is necessary.⁷⁴ Another factor to consider is how frequently the lawyer and judge interact on Facebook.⁷⁵ If the interactions are more frequent, then that may warrant recusal because “by communicating frequently, a judge may create the appearance that the lawyer has a special position in relation to the judge.”⁷⁶ Utah also allows judges to be “friends” with elected officials and individuals running for office on Facebook.⁷⁷

When it comes to LinkedIn, the rules are a little more complicated. When asked whether a judge can recommend someone on LinkedIn either at the judge’s initiation or at the individual’s request, the committee answered with a maybe.⁷⁸ According to the opinion, a judge is not automatically prohibited from recommending someone on LinkedIn; however, a judge may not recommend someone who regularly appears before the judge.⁷⁹ The opinion explains that that a recommendation on LinkedIn is different from liking an attorney’s Facebook page or being friends with the attorney on Facebook because the recommendation can be perceived as an endorsement.⁸⁰ “LinkedIn is a professional networking site and the purpose of recommendations is to promote the professional careers

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

of members.”⁸¹ Judges are, however, allowed to recommend someone who has worked for the judge, such as a law clerk.⁸²

4. Texas

While Texas does not have a formal ethics opinion addressing judicial use of social media, Texas has a few cases that demonstrate its moderate stance on the subject. In 2013, a Texas appellate court held that a trial court did not err by denying a defendant's motion for a new trial based on alleged judicial bias due to the fact that the trial judge was friends with the victim's father on a social media website.⁸³ The court stated that evidence of a social media connection, with no other context, provided no insight into any relationship that would influence the trial judge.⁸⁴

Another case in 2013 involved the reprimanding of Judge Lee Johnson who wrote a Facebook status mocking Johnny Manziel after the Heisman Trophy winner was given a speeding ticket in Ennis, Texas.⁸⁵ Judge Johnson was a judge in Ennis.⁸⁶ Judge Johnson wrote:

Too funny. So it seems that a certain unnamed (very) recent Heisman Trophy winner from a certain unnamed “college” down south of here got a gift from the Ennis P.D. while he was speeding on the 287 bypass yesterday. It appears that even though the OU defense couldn't stop him, the City of Ennis P.D. is a different story altogether. Time to grow up/slow down young 'un. You got your whole life/career ahead of you. Gig Em indeed.⁸⁷

While the Judge did not mention Manziel by his name, his comment left no doubt as to whom he was referring to. In a separate comment under his Facebook status, Judge Johnson then added: “I meant to say ‘allegedly’

81. *Id.*

82. *Id.*

83. *Id.*

84. *Youkers v. State*, 400 S.W.3d 200, 203 (Tex. Ct. App. 2013).

85. Graham Watson, *Dallas-area judge receives a reprimand for mocking Johnny Manziel's speeding ticket*, YAHOO! SPORTS (Jan. 21, 2013), <http://sports.yahoo.com/blogs/ncaaf-dr-saturday/dallas-area-judge-receives-reprimand-mocking-johnny-manziel-205653435--ncaaf.html> (last visited May 7, 2015).

86. *Id.*

87. Paul Myerberg, *Texas judge posts on Facebook about Manziel's speeding ticket*, USA TODAY SPORTS (Jan. 17, 2013), <http://www.usatoday.com/story/gameon/2013/01/17/judge-texas-manziel-ticket-facebook/1842877/> (last visited May 7, 2015).

speeding. My bad.” Judge Johnson received a public reprimand as a result of his actions.

A more recent case in April of 2015 in Texas has a judge in hot water for posting Facebook updates about her trials.⁸⁸ The Texas State Commission on Judicial Conduct ordered Judge Michelle Slaughter to enroll in a four-hour class on the proper and ethical use of social media by judges.⁸⁹ The panel concluded that the Judge's posts cast reasonable doubt on her impartiality.⁹⁰ The case the Judge was presiding over was a high-profile trial where a father was accused of keeping his nine-year-old son in six-foot by eight-foot wooden box.⁹¹ While the Judge instructed jurors not to discuss the case with anyone including texting, e-mailing, talking in person or on the phone or on Facebook, the Judge failed to do the same.⁹² The Judge's Facebook updates about the case eventually led to her removal from the case and a mistrial.⁹³ The panel noted that the Judge's comment about the case “went beyond providing an explanation of the procedures of the court and highlighted evidence that had yet to be introduced at trial.”⁹⁴ The Judge also posted a Reuters article about the case, stating that it was an objective story about the case.⁹⁵ The panel in its ruling stated that “[j]udges have a duty to decide every case fairly and impartially. Judicial independence, impartiality, and integrity must be seen in order for the public to have confidence in the legal system.”⁹⁶

5. North Carolina

North Carolina, like Texas, has no formal ethics opinions on judicial use of social media. North Carolina does have one case that suggests it takes a middle of the road approach. In this case, Judge B. Carlton Terry Jr. was publicly reprimanded by the North Carolina Judicial Standards Commission for Facebook friending a lawyer in a pending case and posting and reading messages about the litigation.⁹⁷ The commission stated that the ex parte communications and the independent gathering of information indicated a disregard of the principles of judicial conduct.⁹⁸

88. David Kravets, *Texas admonishes judge for posting Facebook updates about her trials*, ARS TECHNICA (April 27, 2015), <http://arstechnica.com/tech-policy/2015/04/27/texas-admonishes-judge-for-posting-facebook-updates-about-her-trials/> (last visited May 7, 2015).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer and Googling Litigant*, ABA JOURNAL (June 1, 2009), http://www.abajournal.com/news/article/judge_reprimanded_for_friending_lawyer_and_googling_litigant/ (last visited May 7, 2015).

98. *Id.*

6. Florida

In Florida, it is generally accepted that a judge's social networking connection with an attorney in a pending case before that judge is sufficient to create a well-founded fear of not receiving a fair and impartial trial.⁹⁹ A Florida appellate court recently dealt with this generally accepted rule when deciding whether disqualification of a judge was warranted for Facebook friending a party in a pending case.¹⁰⁰ The court expressed reservations regarding the rule, stating that the word "friend" on Facebook is a term of art.¹⁰¹ The court stated that just because a virtual friendship exists "does not necessarily signify the existence of a close relationship. Other than the public nature of the Internet, there is no difference between a Facebook 'friend' and any other friendship a judge might have."¹⁰² Despite its reservations the court went along with the precedent and stated that the judge's actions could warrant disqualification.¹⁰³ In the court's view, friending a party in a pending case raises far more concern than a judge's Facebook friendship with a lawyer.¹⁰⁴ The court stated that a judge's effort to initiate ex parte communications over the social media site was a violation of the Code of Judicial Conduct and that judges must avoid the appearance of partiality.¹⁰⁵

C. Liberal Approaches

A majority of the states that address judicial use of social media take a more liberal approach in stating that there is no conflict created from solely the existence of a social media connection between a judge and a lawyer. Many of these states agree that more factors need to be considered when looking at whether a social media connection is appropriate and whether such a connection would warrant recusal. These states include Maryland, New York, Kentucky, Ohio, South Carolina, Georgia, and Tennessee. Furthermore, the ABA itself takes a liberal stance on the matter by stating that judges may be connected on social media with lawyers who have cases pending before them as long as the judges comply with the Code of Judicial Conduct.

1. Maryland

The Maryland Judicial Ethics Committee states that a connection between a judge and a lawyer on a social media platform does not create a

99. *Domville v. State*, 103 So. 3d 184, 186 (Fla. Dist. Ct. App. 2012).

100. *Chace v. Loisel*, No. 5D13-4449, 2014 Fla. App. LEXIS 750, at *1 (Fla. Dist. Ct. App. 2014).

101. *Id.* at 4.

102. *Id.*

103. *Id.* at 6.

104. *Id.* at 5.

105. *Id.* at 6.

conflict in and of itself.¹⁰⁶ Judges are allowed to have friends and personal relationships in non-virtual life, so the committee saw no reason why Facebook friends should be treated differently, providing that none of the other rules of judicial conduct are violated.¹⁰⁷ However, the committee expressed concern “that being designated as a friend of a judge on a social networking site may be perceived as indicating both that the person is in a position to influence the judge, and may have ex parte communications with the judge via that medium.”¹⁰⁸ The Maryland opinion urges judges to proceed with care due to the possibility of violating the Judicial Code of Conduct.¹⁰⁹

2. New York

When asked whether it was appropriate for a judge to join a social networking site, the New York Advisory Committee on Judicial Ethics stated that there was nothing “inherently inappropriate” about a judge joining and using a social media site.¹¹⁰ However, the committee did caution that “[w]hat a judge posts on his/her profile page or [posts] on other users’ pages could potentially violate the Rules in several ways.”¹¹¹ The opinion reasoned that judges “should be mindful of the appearance created” and that judges must “consider whether any online connections, alone or in combination with other facts, rise to the level of a “close social relationship” requiring disclosure and/or recusal.”¹¹²

Additionally, the committee looked specifically at a judge’s question of whether the judge must, at the request of the defendant and/or the defendant’s attorney, recuse himself in a criminal matter because he was “Facebook friends” with the parents or guardians of certain minors who allegedly were affected by the defendant’s conduct.¹¹³ The judge involved in the matter stated that, “despite the Facebook nomenclature (i.e., the word ‘friend’) used to describe these undefined relationship,” he was merely acquainted with the parents and that he could be fair and impartial.¹¹⁴ The opinion states that the “mere status of being a ‘Facebook friend,’ without more, is an insufficient basis to require recusal.”¹¹⁵ Nor did “the committee believe that a judge’s impartiality may reasonably be questioned or that there is an appearance of impropriety based solely on having previously ‘friended’ certain individuals who are now involved in some manner in a pending action.”¹¹⁶

106. Md. Judicial Ethics Advisory Op. 2012-07 (June 12, 2012).

107. *Id.*

108. *Id.*

109. *Id.*

110. N.Y. Advisory Comm. on Judicial Ethics Op. 08-176 (Jan. 29, 2009).

111. *Id.*

112. *Id.*

113. N.Y. Advisory Comm. on Judicial Ethics Op. 13-39 (May 28, 2013).

114. *Id.*

115. *Id.*

116. *Id.*

3. Kentucky

When asked whether a judge may “participate in an internet-based social networking site, such as Facebook, LinkedIn, MySpace, or Twitter, and be ‘friends’ with various persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials,” the Ethics Committee of Kentucky Judiciary responded with a qualified yes.¹¹⁷ In Kentucky, judges can be connected to lawyers, law enforcement, and social workers on social media sites; however, judges should ensure that they do not violate the Judicial Code of Conduct.¹¹⁸ When coming to this conclusion, the committee pointed to the fact that Kentucky judges are elected and should not be forced to separate from the community.¹¹⁹ Additionally, the committee commented that the “designation of a ‘friend’ on a social networking site does not, in and of itself, indicate the degree or intensity of a judge’s relationship with the person who is the friend.”¹²⁰

A recent incident in Kentucky draws to light the complications caused when a judge posts on Facebook. In this incident, Judge Olu Stevens criticized the victim impact statement of two parents who claimed that a home invasion and robbery had left their three-year-old daughter with a fear of black men.¹²¹ Judge Stevens posted this statement as his Facebook status: “Do 3-year-olds form such generalized, stereotyped and racist opinions of others? I think not. Perhaps the mother had attributed her own views to her child as a manner of sanitizing them.”¹²² “The victims and their friends responded with their own Facebook page urging Judge Stevens” removal from the case.¹²³ While Judge Stevens claims that this did not affect his sentencing of the two defendants, some ethics experts are criticizing the Facebook post.¹²⁴ These experts are saying that judges should not comment on pending cases and that they “should not use the prestige of [their] office to further their own interests.”¹²⁵ Additionally, the experts fear that criticism, such as Judge Steven’s on Facebook, “could discourage other victims from participating in the criminal justice system.”¹²⁶ This case has not yet been brought before any disciplinary committees, but if the case is brought, it is likely that Kentucky will look to the Code of Judicial Conduct to see if any violations occurred. While

117. Ethics Comm. of Ky. Judiciary Op. JE-119 (Jan. 20, 2010).

118. *Id.*

119. *Id.*

120. *Id.*

121. Debra Cassens Weiss, *Offended by victim-impact statement, judge comments on Facebook; is it an ethics violation?*, ABA JOURNAL (April 13, 2015), http://www.abajournal.com/news/article/offended_by_victim_impact_statement_judge_comments_on_facebook_is_it_an_eth/?utm_medium=email&utm_campaign=weekly_email&utm_source=maestro&job_id=150416AX (last visited May 7, 2015).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

Kentucky does have a lax policy regarding judges becoming Facebook friends with those who appear in their court, Kentucky did urge that judges should be mindful not to violate the Code of Judicial Conduct.¹²⁷ An ethics disciplinary committee could find that Judge Steven's did violate the Code by using the prestige of his office to advance his own interests in deterring racism in his courtroom.¹²⁸ Arguably, Judge Stevens should have disqualified himself from the case based on his strong emotional reaction to the victim impact statement.¹²⁹

4. Ohio

An Ohio advisory opinion posits that judges may participate in social networking sites and allows judges to be friends on a social networking site with lawyers who appear as counsel in cases before them.¹³⁰ Ohio's Board of Commissioners on Grievances and Discipline found no ethical prohibition or requirement for mandatory recusal or disclosure; however, the commissioners did emphasize the need for caution and compliance with the ethical rules in the Code of Judicial Conduct by any judge who elects to participate on social networking sites.¹³¹

5. South Carolina

South Carolina's Advisory Committee on Standards of Judicial Conduct stated that Magistrate judges can be members of Facebook and can "be 'friends' with law enforcement officers and employees of the Magistrate as long as they do not discuss anything" on the social media site related to the judge's position.¹³² The committee reasoned that "[a]llowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge."¹³³

6. Georgia

Georgia has no advisory opinions on record instructing a judge's use of social media sites, but there is a case that shows its liberal stance on the subject. A Judge resigned after evidence came out of an inappropriate Facebook relationship with a defendant.¹³⁴ The Judge initiated the

127. Ethics Comm. of Ky. Judiciary Op. JE-119 (Jan. 20, 2010).

128. *Id.*

129. Weiss, *supra* note 121.

130. Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline Op. 2010-7 (Dec. 3, 2010).

131. *Id.*

132. S.C. Advisory Comm. on Standards of Judicial Conduct Op.17-2009 (October 2009).

133. *Id.*

134. Debra Cassens Weiss, *Ga. Judge Resigns After Questions Raised About Facebook Contacts*, ABA JOURNAL (Jan. 7, 2010),

relationship with the defendant when he contacted her through Facebook and said he noticed that she worked at a hair salon and was looking for someone new to cut his hair.¹³⁵ The defendant responded she would refer the judge to a colleague, since she did not cut hair.¹³⁶ Later, the two agreed to meet, and the defendant asked to borrow money from the Judge for her rent.¹³⁷ In other messages, the Judge and defendant discussed strategy in her case involving a charge of theft, and a drug case of one of the defendant's friends.¹³⁸ The District Attorney said this was not a criminal violation and no formal charges were brought.

7. Tennessee

A Tennessee court recently dealt with the issue of whether it was okay for a judge to be Facebook friends with a witness for the prosecution.¹³⁹ In coming to its decision, the court pointed to the Tennessee Supreme Court, which has stated that "[t]he Code of Judicial Conduct does not require judges to remain isolated from other members of the bar and from the community."¹⁴⁰ However, the court stated that when judges engage in on-line contact they must remain conscious of the duties they may be called later to perform and that "[a] judge's online 'friendships,' just like his or her real life friendships, must be treated with a great deal of care."¹⁴¹ The court additionally pointed to a Tennessee ethics opinion from 2013, which permits judges to utilize social media so long as they are mindful of their ethical obligations.¹⁴² Ultimately, the court held that the judge's Facebook friendship with a witness for the prosecution did not by itself require the judge's recusal from the case.¹⁴³ The court stated that while this connection created an appearance of impropriety, that appearance diminished by the judge's action of fully disclosing his ties with the witness and admitting that he had once met the witness in-person and that he had been a Facebook friend with the witness.¹⁴⁴ The court also pointed to the fact that the witness was 1 of 1500 of the judge's Facebook friends.¹⁴⁵

http://www.abajournal.com/news/article/ga_judge_resigns_after_questions_raised_about_facebook_contacts/ (last visited May 7, 2015).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. State v. Madden, No. M2012-02473-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 208, at *2-3 (Tenn. Crim. App. Mar. 11, 2014).

140. State v. Cannon, 254 S.W.3d 287, 308 (Tenn. 2008).

141. State, 2014 Tenn. Crim. App. LEXIS 208, at *31.

142. Tenn. Judicial Ethics Op. 12-01, (October 23, 2012).

143. State, 2014 Tenn. Crim. App. LEXIS 208, at *37-38.

144. *Id.*

145. *Id.*

8. American Bar Association

The ABA issued a formal opinion on judicial use of social media networks in 2013.¹⁴⁶ In the opinion, the ABA states that judges are allowed to participate on social media networks but should comply with all relevant provisions of the Code of Judicial Conduct when doing so.¹⁴⁷ Of particular importance to the ABA was that judges avoid “any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.”¹⁴⁸ The ABA goes on to address whether a judge can have a social media connection with a lawyer or party who has a pending or impending matter before the court stating that the judge “must evaluate that . . . connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court. In this regard, context is significant.”¹⁴⁹ The ABA further states that the existence of a social media connection “does not, in and of itself, indicate the degree or intensity of a judge’s relationship with a person.”¹⁵⁰ The ABA stresses the importance of looking at a multitude of factors when deciding whether or not a particular connection is appropriate.¹⁵¹

IV. RECOMMENDATIONS

The purpose of this note is to provide workable guidance for judges about what constitutes an appropriate presence on social media. While a multitude of states have issued advisory opinions on the matter, the opinions are not always so clear or consistent. There is a wide variation among the jurisdictions and the ABA on whether or not a judge can be connected on a social media site with a lawyer who has a case or may have case pending before that judge. Some jurisdictions go as far as to prevent all social media connections with any person who could appear in the judge’s court, including social workers and law enforcement officers.

Many jurisdictions, such as Florida, Oklahoma, and Massachusetts prevent judges from being connected on social media sites with lawyers who *may* appear in their court. The use of the word “may” is troublesome in these opinions. How is a judge supposed to predict which lawyers *may* appear in his courtroom? Is a judge in violation of the rule if in June he mistakenly adds as a friend on Facebook a lawyer who happens to appear in his courtroom the following year? How can you really know what *may* happen and who *may* appear? This rule places undue burden on judges and in practice effectively prohibits judges from any participation on social media sites. Also troubling is that the fact that Oklahoma chose to include social workers and law enforcement officers in their prohibition of whom

146. ABA Formal Op. 462 (February 21, 2013).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

judges may add as friends on Facebook. Once again it can be impossible to predict all people who *may* have the chance of appearing in a judge's courtroom. If we follow that line of reasoning, a family court judge should refrain from adding any social workers in his jurisdiction for fear that they may one day possibly appear in his courtroom. Additionally, family court judges would be prevented from adding juvenile delinquents whom they are trying to help and keep an eye on. Florida, Oklahoma, and Massachusetts have implemented rules that are far too strict and unduly restrict the rights and privileges of judges. Just as judges are allowed to have personal and professional relationships outside the courtroom, such relationships should be allowed in the virtual forum. While these virtual relationships should be less restricted, there are some important factors to take into account before connecting with someone on a social media site.

All people should be wary of social media use, whether it is whom they are friending or endorsing, what they are posting, and whom they are sharing their information with. Judges, however, need to be especially careful. A judge's position of power, ability to influence, and need to be impartial are important factors to consider when looking at the use of social media both professional and personally.

A judge's unique position influences his or her activity on social media sites. While some states argue otherwise, judges should be allowed to connect on social media sites with attorneys, law enforcement officers, and social workers even if those persons *may* appear in their courtroom. Forcing judges to predict who *may* someday appear in their courtroom places an undue burden on the judges. Judges are allowed to have lives outside of their professional obligations and should be entrusted to maintain the same ethical obligations they do outside the virtual forum on social media sites. If, however, the attorney, law enforcement officer, or social worker does happen appear in that judge's courtroom in a pending case, the judge can then take the appropriate steps to remedy the conflict, whether it be recusal, notification to the parties of the relationship, or de-friending the individual involved in the case. Judges should not be Facebook friends with attorneys who have cases pending before them. Doing so would undoubtedly create an appearance of impropriety. A judge has a duty to appear and remain impartial and being Facebook friends with an attorney who has a case pending before that judge could hinder this. If a member of a party in a pending case gets on Facebook and sees that the judge is Facebook friends with a member of the opposing side, that party who discovers the friendship will most likely think the judge has something to hide. This discovery can only lead the party to consider that the judge may not be able to remain impartial, thereby violating the judicial canons. To prevent this type of violation, if a judge is already Facebook friends with an attorney, social worker, or law enforcement officer who subsequently appears in his courtroom, that judge should inform both sides of the matter and then proceed to de-friend that attorney on Facebook. If the friendship goes beyond a Facebook friendship, the judge should take the appropriate steps to see if recusal is necessary.

Beyond social media connections, judges should not post opinions, articles, or status updates about pending cases they are overseeing or pending cases in their jurisdiction. Judges have a duty to appear and remain impartial. A Facebook update commenting on a pending case or an article talking about a pending case could undermine an appearance of partiality.

Facebook and LinkedIn are different in many ways. Facebook is seen as more of a social network for friends and family, whereas, LinkedIn is a professional network for employers and employees alike. This key difference affects what activity should be considered acceptable for judges on LinkedIn. Because LinkedIn is a professional network, judges should be unrestricted when it comes to whom they can be linked with. People tend to have many more LinkedIn connections and may not know their LinkedIn connections as well as their Facebook friends. These facts support a rule where judges can connect on LinkedIn with lawyers, law enforcement officers, and social workers who may appear in their courtroom. There is a less of an appearance of impropriety and less of a chance for someone to doubt a judge's impartiality based on a LinkedIn connection. The only caveat to this rule is endorsing and recommending individuals through LinkedIn. Judges are forbidden from using their position of prestige of judicial office to unduly influence or advance the personal or economic interests of the judge or others.¹⁵² By recommending a lawyer's skills on LinkedIn the judge is using his position of power to advance the personal and economic interests of that lawyer. However, judges should be able to recommend lawyers on LinkedIn who have worked for them, just as judges are allowed to write recommendation letters for law clerks.

Being connected with an individual on a social media does not always mean that the two individuals who share the connection have a close relationship. The younger generation views Facebook in a much different light than the older generation. Often times the younger generation Facebook friends anyone and everyone, even people they have met once for five seconds and will never see again. Twenty-seven percent of 18-29 year old Facebook users have more than 500 friends on Facebook.¹⁵³ While adult users tend to be more selective in whom they add as friends, the average number of friends for adult Facebook users is still approximately 338 friends.¹⁵⁴ The probability that a person knows all 338 of her Facebook friends on a personal level is extremely low. Being Facebook friends is in no way indicative of a close personal relationship and therefore should not be a major factor in determining whether a certain social media connection should be allowed. Jurisdictions must look at the totality of the circumstances when determining what social media connections are permissible between judges, attorneys, and others who may appear in the judge's courtroom. The circumstances to consider are best addressed by the

152. ABA MODEL CODE OF JUDICIAL CONDUCT Rule 1.3 (2011).

153. Aaron Smith, *6 new facts about Facebook*, PEW RESEARCH CENTER (Feb. 3, 2014), <http://www.pewresearch.org/fact-tank/2014/02/03/6-new-facts-about-facebook/> (last visited May 7, 2015).

154. *Id.*

California advisory opinion. A judge should consider these factors and weigh them when deciding what kinds of social media connections are acceptable. Judges should consider the nature of their social media site first. The more personal the page, the greater the chance that any one connection creates the appearance that the connection would be in a special position to influence in the judge. The second factor to consider is the number of friends on the page. The more friends a judge has on the page, the less likely it is that someone could perceive that any individual friend is in a position to influence the judge. Third, judges should look at their practice in determining whom to include. The more inclusive the page, the less likely it is to create the impression that any individual member is in a special position to influence the judge. The last factor to consider is how regularly the attorney, law enforcement officer, or social worker appears before the judge. If the likelihood that the attorney, law enforcement officer, or social worker will actually appear before the judge is low, the more likely it is that the interaction would be permissible.

As social media continues to grow and change, so will what constitutes acceptable judicial use of social media sites. The best advice for judges who chose to use social media is to ensure that they abide by the Judicial Canons and the Judicial Code of Conduct. If a question exists as to whether a social media connection is proper or if recusal is necessary, the judge should disclose the connection to both parties and let the parties decide what they would deem acceptable. Another piece of advice for judges is to have separate social media accounts, one for professional use and one for personal use. Judges can then adjust the privacy settings on each account to ensure that certain connections can only see certain things. Hopefully as social media becomes more widely understood, the jurisdictions can come to an agreement on what constitutes appropriate judicial use of social media sites. For now, judges should abide by the advisory opinions and case law in their jurisdictions.