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Judges

Ethics

Does a judge's participation in internet-based social networks such as Facebook and LinkedIn create an appearance of impropriety? While the authors acknowledge that it can, they suggest that whether a particular judge's use of a social network creates an ethical issue should not be addressed with per se bans, as some state ethics opinions have advised, but rather should be addressed on a case-by-case basis.

Judges and Online Social Networking

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Introduction

New technologies pose old questions in new ways. Law enforcement GPS tracking or data mining, for example, present modern intrusions into individual privacy requiring courts to apply developed Fourth Amendment principles to these new technologies. Likewise, internet social networking sites such as Facebook and LinkedIn present questions of early impression on the propriety of a judge's participation in these sites under the Model Code of Judicial Conduct or other obligations to uphold the integrity of the judiciary, avoid impropriety, and avoid the appearance of impropriety. At stake is the right and ethical course, as well as potential judicial discipline or appellate determination that a litigant did not receive a fair trial.

Social networking sites present multiple potential concerns. They require a judge to create some kind of public homepage, permitting her to communicate with the public through written statements, pictures, even videos. For at least Facebook, a visitor to the site may have the right to post items on the site as well. Participants also expressly identify their relationships with each other using the social media network's terms; for Facebook, a judge may be a ''friend,'' for LinkedIn, she may be a ''connection.'' While participants may be family, other judges, or close personal friends, they could

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also be lawyers, witnesses or parties who may appear before the judge.

This topic is pressing and timely. There are approximately 2,000 federal[1] and 17,000 state court judges[2], and an estimated more than 167 million U.S. Facebook participants.[3] We also found that at least one member of the U.S. Supreme Court has a public Facebook page to which she occasionally posts information. A few other Justices appear to have pages as well, although privacy settings make it unclear how active they are.

By our count, at least three courts and 10 judicial ethics bodies have issued public rulings on the propriety of judge involvement with online networking sites. In Florida, a court concluded that a judge's Facebook friendship with a prosecutor ''would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.'' *Domville v. State*, 103 So.3d 184, 185 (Fla. Dist. Ct. App. 2012). A Philadelphia municipal court judge's decision in a criminal case was recently overturned because the judge and the defendant were Facebook ''friends.'' *See Commonwealth v. Cherelle Parker*, MC-51-CR-0018485-2011, Transcript of Proceedings dated January 17, 2012 (Pa. Ct. C.P., 1st Jud. Dist., 2012). Yet, in South Dakota, a judge was not required to recuse himself despite the fact that a major witness for the defendant posted a happy birthday message on the judge's Facebook page during trial but prior to giving testimony. *See Onnen v. Sioux Falls Indep. Sch. Dist. # 49-5*, 801 N.W.2d 752, 757-58 (S.D. 2011).

Some ethics opinions acknowledge that judicial participation in social networking sites generally is allowed, but others say that judges may not associate through social networking sites with attorneys who may appear before them.

Ethics opinions are also divided. Several ethics opinions acknowledge that judicial participation in social networking sites generally is allowed. *See, e.g.*, Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Opinion JE-119 (2010); South Carolina Advisory Committee on Standards of Judicial Conduct Opinion No. 17-2009; New York Judicial Ethics Committee Opinion 08-176. Some are fairly permissive, allowing judges to maintain online connections with individuals appearing before them. *See* Maryland Judicial Ethics Committee, Opinion No. 2012-07; The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion 2010-7.

Other ethics committees have taken more restrictive views. Florida's ethics committee, for example, has concluded that judges may not associate through social networking sites with attorneys who may appear before them. *See* Florida Supreme Court Judicial Ethics Advisory Opinion No. 2009-20; *see also* Massachusetts Judicial Ethics Committee Opinion 2011-6; Oklahoma Judicial Ethics Advisory Panel, Judicial Ethics Opinion 2011-3. A California judicial ethics committee has concluded that judges may participate in such networks with attorneys who may appear before them, but should recuse themselves from any pending case involving an attorney who is a member of her network. California Judges Association, Judicial Ethics Committee Opinion 66 (2010). The ABA has recently suggested a more nuanced, case-by-case approach, advising that, while there may be risks in participating in such networks, there should be no *per se* ban or mandated recusal. ABA Formal Opinion 462 (Feb. 21, 2013).

In Part I below, after briefly discussing the emergence of the social networking sites, we highlight the Canons of the Model Code of Judicial Conduct implicated by a judge's involvement with these sites. Part II examines how the Canons have been interpreted in regulating judges' more traditional social conduct and contrasts differences between participation in online social networks with more traditional social activity. Part III then evaluates several different approaches to regulating judges' use of online social networks and emphasizes that a judge's social networking relationship with a party or witness who may appear before the judge likely poses a greater ethical problem than such a relationship with a lawyer who may appear before the judge.

I. Background

A. Emergence of Social Networking Sites. Social networking sites have grown exponentially and are becoming a primary means of communication and connectivity among social groups. As of December 2012, Facebook claims to have ''more than a billion monthly active users'' and ''618 million daily active users''; LinkedIn claims more than 200 million members.[4] While other sites—Friendster and MySpace—appear to be on the wane, there is every reason to think that dozens more are incubating in Silicon Valley, Boise, or elsewhere.

While each social networking site is distinct, most offer opportunities to create a ''home page'' where a participant may post information about herself and publicly communicate with others. Facebook allows a user to invite another to be her ''friend,'' to join public or private ''groups,'' or to send private messages to other users. LinkedIn permits a user to invite others to become

[1] According to the most recent Judicial Facts and Figures available from the Unites States Courts, there are approximately 2,021 federal appellate, district court, magistrate and bankruptcy judges. *See* United States Courts, Judicial Facts and Figures 2010, Table 1.1, available at http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table101.pdf.

[2] K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 Ind. L. Rev. 43, 46 (2013) (noting that data gathered in the American Bench Gender Ratio Summary for 2010 reported 17,108 judges serving in state courts).

[3] The Wall Street Journal reported that, as of January 2013, Facebook had more than 167 million users in the United States and more than one billion users worldwide. *See* Quentin Fottrell, *Facebook loses 1.4 million active users in the U.S.*, The Wall Street Journal, Market Watch, (January 15, 2013), http://articles.marketwatch.com/2013-01-15/finance/36346107_1_active-users-facebook-social-media.

[4] *See* Facebook Key Facts, http://newsroom.fb.com/Key-Facts; LinkedIn Press Center, *LinkedIn Announces Fourth Quarter and Full Year 2012 Financial Results*, http://investors.linkedin.com/releasedetail.cfm?ReleaseID=738977.

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a part of her network, called ''connections.'' These sites permit, through privacy settings of varying degrees, a network member to limit who may see her profile, or her ''friends'' or ''connections.''

The sites offer many benefits. Fundamentally, they permit users to communicate simultaneously and without cost with tens, hundreds or thousands of people, thereby allowing users to stay in touch with larger numbers of people in their lives. Professionally, members use these sites to network and market, sharing professional successes, posting information about current issues and events, or simply reminding prospective employers and clients of the member's existence.

LinkedIn also allows a network member to ''endorse'' the member for particular skills. The sites allow users to search for others, creating opportunities to develop new personal and professional relationships. More broadly, these sites are replacing other forms of communication for many users. A hundred years ago, the telephone replaced handwritten notes; it is now common for many, particularly younger users, to ''talk'' over these sites, rather than over the telephone.

Increasingly, judges, too, are joining these social networks. A 2012 study of the Conference of Court Public Information Officers found that nearly half of the responding state court judges reported using social media sites. *See* 2012 CCPIO New Media Survey, p. 5 (July 31, 2012), available at http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf.

What's more, the study noted that this number is gradually increasing. While we are not aware of any data on federal judge participation in social media sites, our anecdotal internet searching reveals that Justice Sonia Sotomayor has a Facebook page on which she occasionally posts information. *See* https://www.facebook.com/SoniaSotoAlex?fref=ts.

B. Preserving Judicial Integrity Without Isolating Judges. In multiple ways, the Model Code of Judicial Conduct properly obligates judges to preserve the integrity and impartiality of the Judiciary. Canon 1 provides: ''A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.'' Rule 1.2 explains: ''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.''

Notably these standards govern a judge's personal life, not just her professional actions as a judge. *See* Rule 1.2, Comment 1 (''Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.''). The appearance of impropriety standard has been extensively criticized as indeterminate and circular, but it presently governs nearly all judges in the United States.[5]

Such an appearance is created where ''the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.'' Rule 1.2, Comment 5. Relatedly, Canon 3 provides: ''A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.''

We think it important, however, that these restrictions should not be interpreted to isolate judges unduly. As Justice Oliver Wendell Holmes noted, ''[t]he life of the law has not been logic; it has been experience.'' THE COMMON LAW 1 (1881).

Reflecting the notion that judges should not lead monastic existences, the Model Rules expressly permit judges to participate in more than just ''activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice'' but also ''those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit.'' Model Rule 3.7(A). As one commentator explains, a ''judge is likely to be a better dispenser of justice if he is aware of the currents and passions of the time, the developments of technology, and the sweep of events.'' *See James J. Alfini, et al., Judicial Conduct and Ethics* § 10.03D (4th ed. 2007) (quoting Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 12 (1970)).

Judges genuinely conversant with modern technology and the internet will likely make better decisions involving such technology.

By extension, we strongly believe that judges genuinely conversant with modern technology and the internet will likely make better decisions involving such technology. Of course, judges learn in any given case about the technology that is squarely the subject of the case, say about the technologies involved in a patent dispute. In many other kinds of cases, however, because the internet or a social networking site presents a context for the dispute but not the focus of the dispute, the evidence before the court may not directly bear on the technology.

Applying traditional Fourth Amendment principles to the internet, e-mail, and social networking sites is a good example. Our courts are grappling with whether disclosure of private, confidential information to third party service providers or other intermediaries ''under a promise of confidentiality'' is subject to Fourth Amendment protections. *See* Stephen J. Schulhofer, THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY: MORE ESSENTIAL THAN EVER 126-34 (2012) (arguing that it should); Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1007 (2010) (analyzing application of traditional Fourth Amendment principles to cyberspace). Understanding well and having a nuanced feel for how people now transmit information over the internet, e-mail and social networking sites would greatly inform a court in considering whether someone has a reasonable expectation of privacy in, say, her e-mail communications. *See United States v. Warshak*, 631 F.3d 266, 283-88 (6th

[5] The Judicial Conference of the United States adopted the Code of Conduct for United States Judges, which provides the ethical standards governing federal judges. Code of Conduct for United States Judges, *available at* http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx. Canon 2 states: A judge should avoid impropriety and the appearance of impropriety in all activities.''

Cir. 2010) (concluding that Fourth Amendment protections extend to e-mail and that a warrant is required for Government to obtain e-mail files from a user's internet service provider); *United States v. Wheeler*, No. 12-cr-0138-WJM, 2013 WL 105200 (D. Colo. Jan. 16, 2013) (upholding warrant to search user's Facebook profile).

In 1967, when the Supreme Court considered whether the government would need a warrant for tapping a telephone, all the Justices were no doubt well familiar with using the telephone. *See Katz v. United States*, 389 U.S. 347 (1967) (concluding individuals have reasonable expectations of privacy in their telephone communications). That personal familiarity and use likely played an important role in that ruling; and so we should hope that those addressing similar questions regarding the internet, e-mail and social networking sites will be as familiar with these technologies.[6]

No doubt a judge will have the opportunity to learn about emerging technologies through individual cases. But, we think judges' personal use of social networking sites would be valuable. Perhaps to overstate only somewhat, just as a judge who has little or no experience with the telephone would be out of touch with the second half of the twentieth century, so a twenty-first century judge may well make better decisions if she is experienced with the internet. Thus, to the extent social networking sites increasingly dominate other forms of communication and social interaction, judges—and judging—could benefit from joining these networks.

II. Judicial "Friendships" On and Off-Line

A. Friendships Prior to Online Social Networking. Let's put the general question of judicial friendships in a historical perspective. While Aaron Burr was on trial for treason, the trial judge, Chief Justice John Marshall, reportedly continued to play chess with him. *See* 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). According to Justice Antonin Scalia, a close social relationship between Justices and governmental officials have been frequent and not triggered recusal. He notes, for example, that Justice Holmes regularly dined at the White House with President Theodore Roosevelt; Justice William O. Douglas regularly played poker with President Franklin Roosevelt and Chief Justice Vinson played poker with President Harry S. Truman; Justice Robert Jackson maintained a "close personal relationship" with President Franklin D. Roosevelt; and Justice Byron R. White went on ski trips with Attorney General Robert Kennedy and Secretary of Defense Robert McNamara.[7]

Largely because the inquiry is so contextual, there is relatively little case law and there are few ethics opinions addressing precisely how close a personal friendship between a judge and an individual appearing before her (*i.e.*, counsel, party, witness) must be to trigger an impropriety or the appearance of impropriety.[8] The Model Rules acknowledge this, noting that Rule 1.2 is "necessarily cast in general terms" because "it is not practicable to list all such conduct." Rule 1.2, Comment 3. The Rules only prohibit, *per se*, a judge from hearing a case involving a family member as a party, witness or lawyer. Model Rule 2.11(A)(2) (a judge should disqualify herself, inter alia, when the "judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is" a lawyer, has an interest or is a material witness in the proceeding).

Mere friendship does not trigger an appearance of (or actual) impropriety.

Relevant case law makes clear that mere friendship does not trigger an appearance of (or actual) impropriety. Courts understandably employ a case-by-case inquiry in part because "social relations take so many forms that it would be imprudent to gauge all by a single test." *See United States v. Murphy*, 768 F.2d 1518, 1538 (7th Cir. 1985).

Generally, courts consider the closeness of the friendship in determining whether recusal is appropriate. *See James J. Alfini, et al., Judicial Conduct and Ethics* § 4.09 (4th ed. 2007); *Daniel Smith, When Everyone is the Judge's Pal: Facebook Friendship and the Appearance of Impropriety Standard*, 3 Case W. Reserve J. L. Tech & Internet 66, 81-88 (2012). For example, recusal may not be appropriate in cases involving a judge who may play cards or otherwise socialize with a defendant "several times a year." *O'Neill v. Thibodeaux*, 709

[6] A sensitive understanding of the internet has underpinned important First Amendment decisions as well. More than 15 years ago, for example, a panel of judges in the Eastern District of Pennsylvania concluded that the Communications Decency Act of 1996 ("CDA") was unconstitutional after applying longstanding first amendment principles to the new and unique attributes of the internet. *ACLU v. Reno*, 929 F. Supp. 824, 872-883 (E.D. Pa. 1996). In his opinion, Judge Stewart Dalzell presciently noted that the Supreme Court jurisprudence required the court to consider "the special qualities of this new medium in determining whether the CDA is a constitutional exercise of governmental power." *Id.* at 872.

[7] A public interest group filed a motion to recuse Justice Scalia from a matter in which Vice President Cheney was a party because he flew to Louisiana on Air Force Two with the Vice President to go duck hunting for several days with him and a dozen others. Justice Scalia denied the motion, reasoning "while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer." *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 916, 924-28 (2004).

[8] *See* Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 Pepp. L. Rev. 575, 591-92 (2006). Cases addressing these issues in federal court typically consider the question pursuant to the disqualification requirements of 28 U.S.C. § 455(a), which require a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Though not identical to the "appearance of impropriety" standard, this disqualification provision is functionally similar and therefore these cases remain helpful in analyzing circumstances involving judges and their friends.

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So.2d 962, 968 (La. Ct. App. 1998). Similarly, a judge's familiarity with a witness may not necessarily require recusal. *Roybal v. Morris*, 100 P.2d 1100, 1103 (N.M. 1983) (holding that recusal was not necessary in case where judge knew witness who provided testimony consistent with other witnesses). But, a judge may violate ethics rules by presiding over a case involving a close friend of the judge's family. *See, e.g., Wallace v. Wallace*, 352 So.2d 1376, 1379 (Ala. Civ. App. 1977).

The closeness analysis appears to apply equally to a judge's relationship with an attorney appearing before her. For example, the Supreme Court of Colorado has explained that a judge was not required to recuse himself where a friend with whom he ''has little present social involvement'' may appear once on behalf of the prosecution team in a pending criminal case. *Schupper v. People*, 157 P.3d 516, 520-21 (Colo. 2007). But, if a judge hears a case litigated by a friend with whom he plans to take a personal vacation immediately following the trial, then such circumstances likely will raise concerns regarding the judge's impartiality. *See Murphy*, 768 F.2d at 1538.

Courts may be more lenient if the judge's relationship is with the attorney rather than a party or witness given the professional reasons why lawyers and judges may interact.

As some cases suggest, courts may be more lenient if the judge's relationship is with the attorney rather than a party or witness given the professional reasons why lawyers and judges may interact. *See State v. Whitlow*, 988 S.W.2d 121, 122-123 (Mo. Ct. App. 1999) (''That judges know attorneys and even are members of the same organizations do not, in themselves, create the appearance of impropriety.''); *In re Marriage of Click*, 523 N.E.2d 169 (Ill. Ct. App. 1998) (finding recusal unnecessary where judge and attorney appearing before him belonged to same professional association for matrimonial lawyers).

Very generally, therefore, the appearance of impropriety and actual impropriety standards appear to be interpreted to permit judges to hear cases involving lawyers with whom they regularly see at bar association events, Inns of Court meetings, social legal clubs, as well as those with whom they serve on boards of community or education organizations. It may also allow judges to hear cases involving lawyers, witnesses or parties with whom they may occasionally, but not often, socialize.

B. ''Friendships'' Through Online Networking. If the above social relationships between judges and lawyers do not create an appearance of impropriety, then why would judicial online social networking relationships? There are several potentially different aspects of participating in an online social network. *First*, some online networks would permit another member to post content to a judge's site. This is unlike a judge's participation in a social event or non-profit board where she can control what she says and how she acts. Depending upon a judge's privacy settings, Facebook, for example, permits others with certain rights, to ''post'' pictures, statements and even videos on the judge's site. This poses the substantial risk that a judge could be endorsing inappropriate content, though that risk can be eliminated by a privacy setting prohibiting others to post on the judge's site.

It could be argued, *second*, that a judge participating in a social networking site loses control over the privacy of her own communications with others. If a judge ''chats'' with another member of the network or a group, for example, what she says can be forwarded without her permission to others. But that argument proves too much as the same is true for e-mail. When a judge sends an email, the recipient may forward it to others without the permission or knowledge of the judge. And because, we think, no one would contend that a judge should be prohibited from using e-mail, this argument should not trigger a particular ethical concern.[9] Rather, to the extent judges engage in such activity, they should remain aware of such risks.

A *third* concern flows from the label that a social networking site uses to name members and relationships among members. On Facebook, a judge may be a ''friend'' with another member; on LinkedIn, a ''connection.'' A literalist might simply turn to the dictionary definition of these terms and, on that basis alone, determine whether the relationship determined by the dictionary definition creates an impropriety or appearance of impropriety. Such an approach, not based on a genuine understanding of the network, ignores the context of members' real relationships on a network.

Thus, as for ''friend'' or ''connection,''[10] it is important to understand not just a dictionary definition of those words, but also what membership in the network actually means and how its members view their network relationships. For example, the Philadelphia municipal court judge in *Commonwealth v. Cherelle Parker* had over 1,300 Facebook ''friends''; in that context, ''friends'' surely reflects, at most, mere acquaintance and not the kind of close friendship that creates an appearance of impropriety. *See* Miriam Hill & Robert Moran, *Facebook friendship of judge, politician an issue*, PHILADELPHIA INQUIRER, Nov. 9, 2011, http://articles.philly.com/2011-11-09/news/30359888_1_facebook-friendship-social-media-parker.

The *fourth* concern is that social network relationships are much more public than traditional social engagements, and, so the argument goes, are more prone to create an appearance of impropriety. It is probably true that what a judge posts on her site, or with whom she is a ''friend'' or ''connection,'' is likely more public

[9] It is true that technology may introduce some kinds of enhanced risk of inadvertent, errant communications. *See In re Complaint of Judicial Misconduct*, 575 F.3d 279, 283-85 (3d Cir. 2009) (federal appellate judge criticized for, *inter alia*, possessing sexually explicit and offensive material and carelessly failing to safeguard it.)

[10] As between a Facebook Friend and a LinkedIn Connection, the latter may pose a greater problem because being ''connected'' to a judge comes closer to implying or conveying that the lawyer has the ability to improperly influence the judge. *See* Model Rules of Professional Conduct 8.4 (it is misconduct for a lawyer to ''state or imply an ability to influence improperly a government agency or official''); Model Code of Judicial Conduct, Rule 2.4(C) (''A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.'').

than, say, membership in a social legal group that meets for dinner monthly. This concern strikes us, however, as off-base and paradoxical; rather than the sunlight of the social network serving as a disinfectant,[11] it in this view, literally, creates an appearance that is not present in the more traditional social communications.

But this concern distracts from the central, proper focus of the ethical inquiry; what is the real relationship between the judge and the individual before her, and whether that relationship is so close that it poses a problem or the appearance of one. The degree to which the relationship is public should not matter. That concern cannot be correct because it would counsel prohibiting all sorts of public disclosures, such as campaign contributions to judges, which would be plainly incorrect.

III. Judicial Use of Social Networking Sites.

With these considerations in mind, let's turn to three possible ways to regulate judicial participation in social networks: (a) judges are prohibited from participating in online social networking sites; (b) judges may engage in online social networking, but they may not hear any cases involving their online ''friends'' or ''connections''; and (c) judges may engage in online social networking and may hear cases involving members of their online networks, but should be mindful of the ethical standards regarding the appearance of impropriety and the obligations to avoid bias just as a judge must in all cases involving in-person relationships.

A. Ban Use of Online Social Networking. This first approach, which would ban judges from any use of online social networking, is unwarranted for multiple reasons. First, there is nothing inherently improper about participating in a social network and there is no ethical rule that directly or implicitly forbids such conduct. Properly understood, membership alone in a social network should not trigger even an appearance of impropriety.

Second, as emphasized above, online social networking is an increasing part of our culture and technological infrastructure. Greater judicial understanding of social networking sites should provide for a more informed judiciary and better judicial decisions. *See Murphy*, 768 F.2d at 1537 (''A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions.'').

Given the restrictive nature of this approach, it is not surprising that no ethics body to date appears to have taken this dramatic view.

B. No Case Involvement With 'Friends,' 'Connections.' The second approach would allow judges to participate in online social networks, but prohibit them from hearing any cases involving an online social connection. For example, the Florida Supreme Court Judicial Ethics Advisory Committee concluded that judges may not be Facebook ''friends'' with lawyers who may appear before them if that ''friendship'' is viewable by others. Florida Supreme Court Judicial Ethics Advisory Opinion No. 2009-20.

The Florida committee explained, ''listing 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.'' *Id; see also* Florida Supreme Court Judicial Ethics Advisory Opinion No. 2012-12 (applying same reasoning to ''connections'' on LinkedIn); Massachusetts Judicial Ethics Committee Opinion 2011-6 (concluding that judges are prohibited from ''associating in any way on social networking web sites with attorneys who may appear before them''); Oklahoma Judicial Ethics Advisory Panel, Judicial Ethics Opinion 2011-3 (concluding that judges may not have social network connections with individuals who regularly appear before the judge in an adversarial role).

California's ethics committee has taken a different route to reach a similar conclusion. Like Florida, the California ethics committee believes a judge should not hear a case from an attorney who is within her social network; however, California did not impose a broader ban against all online social relationships with any individuals who may appear before her. Rather, California explained that the judge must ''cease'' the online relationship with the attorney when the attorney appears before her in a particular case. California Judges Association, Judicial Ethics Committee Opinion 66 (2010).

There are two primary problems with the view that judges may not hear cases involving an online social connection. First, it mistakenly assumes that ''friendships'' as identified through online social networking sites hold the same meaning as in-person friendships. Florida, for example, noted Facebook's definition of ''friend'' as follows: ''Your friends on Facebook are the same friends, acquaintances and family members that you communicate with in the real world.'' Florida Supreme Court Judicial Ethics Advisory Committee, Opinion No. 2009-20.

The proper focus of any ethical inquiry should be the real relationship between the judge and the individual before her, and whether that relationship is so close that it poses a problem or the appearance of one.

But, each social networking site identifies its own term for the social relationships and a judge's ethical obligations should not be simplified to these terms. Moreover, many individuals use Facebook or LinkedIn to maintain contact with merely casual acquaintances. Context matters and the approach taken by committees such as Florida and California does not, in our view, sufficiently recognize context.

Second, this approach is premised on the, we think inappropriate, view that the social network's greater publicity of a relationship is problematic. To the contrary, as discussed above, it does not have that paradoxical effect. Just as one should never think it is ethical to do X if no one ever finds out, it should not be unethical to do Y because others will find out about Y.

[11] *See* Louis Brandeis, *What Publicity Can Do*, Harper's Weekly (1913) (''Sunlight is said to be the best of disinfectants.'').

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C. Apply Traditional Social Relationship Standards. The third approach allows judges to hear cases involving online social networking connections but requires them to apply the same ethical standards pertinent to traditional social relationships. Earlier this year, the ABA Standing Committee on Ethics and Professional Responsibility sensibly adopted this approach. *See* ABA Formal Opinion 462 (Feb. 21, 2013).

The Committee concluded that ''[s]imple designation as an [electronic social media] connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person.'' *Id.* Moreover, the Committee explained that ''[b]ecause of the open and casual nature of ESM [Electronic Social Media] communication, a judge will seldom have an affirmative duty to disclose an ESM connection.'' *Id.* The Committee noted, however, that ''[w]hen a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.'' *Id.* In such cases, judges must consider the same analysis that would apply to traditional friendships.

This approach makes good sense for several reasons. First, it properly places on-line social networking relationships in the context of more traditional relationships between judges and others. Just as there are few hard and fast rules in the traditional social context (other than prohibitions against hearing cases involving family members and the like), so there should be few, if any, *per se* rules for social networking

Second, because social network sites are constantly evolving, a *per se* rule concerning the Facebook or LinkedIn of 2013 would make little sense.

Third, the Committee's approach permits judges personally to embrace and understand technological development.

The Committee's Opinion does not, however, address whether there should be a distinction between a judge's connection with attorneys, on the one hand, and her connections with parties or witnesses appearing before her on the other. We think that there may well be important differences across these types of relationships, possibly leading to different results.

While attorneys and judges should be encouraged to socialize with each other because their socializing contributes to a collegial, professional legal community, *see Murphy*, 768 F.2d at 1537 (''In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable.''), that consideration seems weaker when it comes to nonlawyers.

Moreover, because attorneys are better informed of their and the judge's ethical obligations, they may better understand and hew to the limits of that relationship than can a layperson.

Finally, because parties and witnesses may have more at stake in a case than their lawyer, a judge's relationship with the party or witness may be more open to reasonable second-guessing.

We think, therefore, that the ABA's case-by-case approach makes good sense and accounts for the potential differences between a judge's relationship with an attorney, party or witness.