Judges and Social Media: Disclosure as Disinfectant

Benjamin P. Cooper

Follow this and additional works at: https://scholar.smu.edu/scitech

Recommended Citation
Benjamin P. Cooper, Judges and Social Media: Disclosure as Disinfectant, 17 SMU Sci. & Tech. L. Rev. 521 (2014)
https://scholar.smu.edu/scitech/vol17/iss4/5

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Science and Technology Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
Judges and Social Media: Disclosure as Disinfectant

Benjamin P. Cooper*

I. INTRODUCTION

After Pennsylvania District Judge Thomas Placey continued a preliminary hearing for a defendant facing criminal charges arising out of a standoff with the police, some observers were unhappy.1 They took to the Internet and quickly found Judge Placey’s Facebook page, which showed that defendant Barry Horn, Jr. was among Judge Placey’s hundreds of Facebook “friends.”2 Judge Placey said that he was only acquainted with Horn because he knew Horn’s father, but he stated that he had never socialized with the defendant and did not consider him a real friend.3 Judge Placey also told the media that he accepts every “friend” request he receives.4 After the case received media attention, Judge Placey recused himself though he never explained why.5

In another Pennsylvania case, Municipal Judge Charles Hayden declined to recuse himself in a drunken driving case against State Representative Cherelle Parker, who was one of Judge Hayden’s 1,316 Facebook friends.6 Judge Hayden claimed that he did not know Representative Parker apart from their Facebook accounts; Parker’s attorney, Joseph Kelly, stated that Facebook friendships “do not necessarily present a potential conflict of interest.”7 After Judge Hayden suppressed evidence in the case, the Attorney

---

* Jessie D. Puckett, Jr. Lecturer and Associate Professor of Law, University of Mississippi School of Law. I would like to thank the members of my faculty writing group (Jack Nowlin, Stephanie Showalter Otts, and Michael Dodge) for their helpful feedback. I am also grateful to Keith Swisher for advising me on sources. Thank you to John Browning and the editors of the SMU Science and Technology Law Review for inviting me to participate in the Social Media Law Symposium and for putting together a fabulous conference.


2. Id.

3. Id.

4. Id.


7. Id.
General's Office appealed,8 arguing that Judge Hayden should have recused himself based on his Facebook connection with the defendant.9 The Philadelphia Court of Common Pleas reversed the decision and held that Judge Hayden's Facebook friendship with the defendant required recusal.10

The judges' conduct in these cases raises many important issues. Among them:

Should judges participate in social media at all?

Should Judge Placey and Judge Hayden have recused themselves based on their social media connections with the defendants?

Should the judges have disclosed these social media connections?

In a previous article, I reviewed the relevant ethics opinions issued to date11 and began to address these issues.12 All of the ethics opinions endorse judges using social media, albeit in a "judicious" way.13 As the opinion from the American Bar Association concluded, such use "can benefit judges in both their personal and professional lives" and also keep them from being "thought of as isolated or out of touch."14 But on the question of whether judges should be able to friend lawyers who appear before them, the ethics

---

8. Brian M. Jones, Legal Ethics and Your Facebook Friends Friend, Foe Both or Neither?, 35 PA. LAW. 40, 42 (Mar./Apr. 2013) (Interestingly, the Pennsylvania Attorney General's Office was handling the case because the Philadelphia District Attorney's Office had recused itself because the district attorney was friends (and a Facebook friend) with Representative Parker).

9. Id.

10. Id. at 42-43.


13. Id. (Unique ethical traps await judges who use social media. Among them: judges should not comment on pending cases on social media; judges should not engage in ex parte communications on social media; judges should not engage in independent investigations on social media; judges should be discreet in what they say on social media in order to avoid expressions of bias or prejudice; judges should monitor comments on their social media pages; and judges should be careful what they "like" on social media).

14. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 1, 4 (2013); see also John G. Browning, Why Can't We Be Friends? Judges' Use of Social Media, 68 U. MIAMI L. REV. 487, 505 (discussing positive uses that judges have made of social media).
opinions are divided.15 I argued that judges should be free to “friend” anybody—and that a social media connection alone should not disqualify the judge16—provided that if judges are connected with lawyers, litigants, or witnesses in the case, those “friendships” should be fully disclosed to the parties.17

This article expands on the tentative thoughts that I previously offered on judges’ obligations to disclose social media connections and argues in favor of a bright line rule that judges should disclose all social media connections with lawyers, litigants, and witnesses. Very little authority addresses the disclosure issue in general18 or the disclosure of social media connections specifically.19

A broad disclosure regime would serve two primary purposes. First, a broad disclosure rule would best serve the primary policy behind disclosure: maintaining the litigants’ and the public’s confidence in the judiciary. Second, it would provide much needed clarity to judges who have been seeking guidance regarding the ethical use of social media.

Because the disclosure obligations in the Code of Judicial Conduct (Code) arise from the requirement that judges provide parties with information relevant to a “possible motion for disqualification,”20 Part II provides necessary background on the disqualification standard and the application of the disqualification standard to judges’ social media connections. That section argues that because people generally understand that social media “friendship” is less significant than traditional friendship, these connections alone should not create the “appearance of impropriety” requiring disqualification. Part III describes the disclosure standard in general and then argues in favor of a bright line rule requiring judges to disclose all relevant social media connections.

15. Cooper, supra note 12, at 7–9.
16. Id. at 9–11; see also N.Y. Advisory Comm. on Judicial Ethics, Advisory Op. 13-39, 1 (2013) (“[T]he mere status of being a ‘Facebook friend’ without more is an insufficient basis to require recusal . . . . Interpersonal relationships are varied, fact-dependent, and unique to the individuals involved”).
19. See Browning, supra note 14, at 507 (Others have written about the topic of judges and social media in general but have not addressed the disclosure issue); see also Nathanael J. Mitchell, Judge 2.0: A New Approach to Judicial Ethics in the Age of Social Media, 2012 UTAH L. REV. 2127, 2133–36; Craig Estlinbaum, Social Networking and Judicial Ethics, 2 ST. MARY’S J. LEGAL MAL-PRACTICE & ETHICS 1, 15–18 (2012).
II. DISQUALIFICATION AND SOCIAL MEDIA CONNECTIONS

Because the disclosure obligations in the Code arise from the requirement that judges provide parties with information relevant to a “possible motion for disqualification,” this Part discusses the disqualification standard and whether judges’ social media connections necessitate disqualification.

A. Disqualification Under the Judicial Code

Rule 2.11 of the Code of Judicial Conduct requires that judges disqualify themselves “in any proceeding in which the judge’s impartiality might reasonably be questioned.” This standard goes beyond cases of actual bias and also prohibits judges from sitting in cases involving the appearance of impropriety. A comment to the Code provides: “The test for appearance of impropriety is whether 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.” The words “reasonably” in the Code provision and “reasonable” in the comments indicate that this is an objective standard.

This standard serves to give both the litigants and the public confidence in the integrity of the courts. As one court put it: “[t]he legal system will

21. Id.
22. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2011). The federal judicial recusal statute is modeled on the Code and provides, in relevant part, that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455 (2012). Although I focus on Rule 2.11(A), judges’ social media connections also implicate at least two other provisions in the Code of Judicial Conduct: (1) MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2011) (“Judges must “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.”); and (2) MODEL CODE OF JUDICIAL CONDUCT R. 2.4(C) (2011) (“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.”).
24. Leslie W. Abramson, Appearance of Impropriety: Deciding When A Judge’s Impartiality “ Might Reasonably Be Questioned”, 14 GEO. J. LEGAL ETHICS 55, 58 (2000) [hereinafter Abramson, Appearance] (“The use of the term ‘reasonably’ suggest that the viewpoint for assessing the presence of an appearance of impropriety is not from the perspective of the judge whose continued control of the case is at issue.”).
25. Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 MARQ. L. REV. 949, 951 (1996) (“The objective of the Code is to maintain both the reality of judicial integrity and the appearance of that reality. The public has confidence in judges who show character, impartiality, and diligence”); see also Samuel Vincent Jones, Judges, Friends and Facebook: The Ethics of Prohibi-
endure only so long as members of society continue to believe that our courts endeavor to provide untainted, unbiased forums in which justice may be found."26 Thus, "the appearance of fairness is as important as fairness itself."27

B. Applying the "Appearance of Impropriety" Standard to Judges' Friendships

A judge's (non-social media) friendship with litigants, lawyers, or witnesses in pending matters certainly can create an "appearance of impropriety." Although friendship is not specifically listed as a basis for disqualification in Rule 2.11, the rule's list of disqualifying circumstances is non-exclusive.28 The comments to the Rule make this clear: "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply."29 Moreover, courts have held that close friendships can require disqualification.30 The specific concern is that the personal relationship will cause "a reasonable person knowing all the circum-

24 GEO. J. LEGAL ETHICS 281, 285 ("The purpose of the Judicial Code is fueled by the imperative to maintain public confidence in the judiciary").

26 Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 384 (W. Va. 1995); Sargent Cnty. Bank v. Wentworth, 500 N.W.2d 862, 877-78 (N.D. 1993) (explaining that public confidence "can only be maintained if justice satisfies the appearance of justice").

27 Abramson, Appearance, supra note 24, at 66; Debra Lyn Bassett & Rex R. Perschbacher, The Elusive Goal of Impartiality, 97 IOWA L. REV. 181, 181 (2011) ("The notion of an impartial trial under the direction of an unbiased judge is a central tenet of our system of justiceFalse"); id. at 202 ("If the appearance-of-impropriety standard disregards public perception, the standard is converted to one of requiring actual bias"); MODEL CODE OF JUDICIAL CONDUCT R. 1.3, cmt. 2 (2011) ("Conduct that compromises or appears to compromise the independence, integrity and impartiality of a judge undermines public confidence in the judiciary").

28 MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2011) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including but not limited to the following circumstances.").

29 Id. cmt. 1.

30 United States v. Kelly, 888 F.2d 732, 746 (11th Cir. 1989) (holding that trial judge, who was close friends with a key defense witness, improperly failed to disqualify himself under the federal disqualification statute); United States v. Murphy, 768 F.2d 1518, 1540 (7th Cir. 1985) (explaining that trial judge who was close friends with prosecuting attorney improperly failed to disqualify himself).
stances [to] believe that the judge will accord different credibility to the testimony or statements of the person known to the judge.”

Distinguishing which social relationships are impermissible under the “appearance of impropriety” standard, however, is challenging, particularly in the context of friendship; thus commentators have justifiably criticized the standard. The Code does not define the level of friendship that would require a judge to recuse himself. Moreover, judges are certainly permitted—if not encouraged—to maintain a social life and certainly do not have to, as one court put it, “withdraw from society and live an ascetic, antiseptic and socially sterile life.” The Code itself accepts that judges may have a social life by recognizing that judges who accept “ordinary social hospitality” do not run afoul of the prohibition on receiving gifts.

Of course, because of their shared interests and backgrounds, judges are likely to have social relationships with lawyers. There is obviously nothing wrong with such a relationship per se, but at some point that relationship becomes so close that allowing the judge to sit in a case where his friend is counsel creates an impermissible “appearance of impropriety” that requires the judge to recuse himself. The courts and ethics authorities have struggled to determine what constitutes permissible “ordinary social hospitality,” versus an impermissible “appearance of impropriety.”

31. Abramson, Appearance, supra note 24, at 96.
32. Jeremy M. Miller, Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance), 33 Pepp. L. Rev. 575, 577 (2006) (criticizing the “glaring gap in the law on the issue of when a judge must recuse himself or herself because a party or advocate in the case is a friend”).
33. Id. at 612 (defining friendship as “more than ordinary social intercourse”).
36. See Miller, supra note 32, at 578–79 (criticizing the lack of standard and suggesting the addition of a new standard: “Friendship between the judge and a named party or attorney of record, that exceeds ordinary and reasonable social intercourse between acquaintances and business associates mandates judicial recusal.”).
37. Abramson, Appearance, supra note 24, at 97 (“Social contact between a judge and counsel for a party during the pendency of a case before the judge is discouraged. However, courts correctly refuse to promulgate per se rules that ‘every chance meeting or a public social discussion between judge and lawyer[ ] requires judicial disqualification for the appearance of partiality. In order to prove a negative appearance of partiality, evidence of the duration of the encounter, the content of any conversation, the circumstances of the meeting, and the frequency of meetings are necessary elements of proof.’”); see Miller, supra note 32, at 595–607 (noting the paucity of precedent on the issue of judicial recusal on the basis of friendship). The difficulty in applying this standard is reflected by the significant public debate that ensued after Justice
C. Applying the “Appearance of Impropriety” Standard to Judges’ Social Media Connections

The next question is whether judges’ social media connections with lawyers and litigants who may appear before them create an “appearance of impropriety” requiring disqualification. As set forth in this section, conflicting ethics opinions fail to provide clarity on whether a judge’s social media connections require disqualification. In my view, there is nothing inappropriate per se about such a connection, and a social media connection alone should not require recusal.

There is a split of authority on whether the Code allows social media connections: some states take a “restrictive” view on the issue, while others have issued “permissive” opinions. States, such as Florida, that adhere to a restrictive view forbid a judge from friending lawyers who may appear before the judge. The Florida Committee reasoned that when a judge

Antonin Scalia went on a hunting trip with Vice President Dick Cheney while Cheney was a defendant in a high profile case that was pending before the Supreme Court. See Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004) (Scalia, J.) (rejecting the recusal motion); Lawrence J. Fox, A.B.A., “I Did Not Sleep with That Vice-President”, 15 PROF. LAW. 15, no. 2 (2004) (arguing that Justice Scalia should have recused himself).

38. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011).
39. See Cooper, supra note 12, at 31, 34.
41. See, e.g., id. at 2 (A social media connection “by itself, does not reasonably convey to others an impression that such person are in a special position to influence the judge.”); Cooper, supra note 12. In discussing social media friendships, most of the ethics opinions issued to date do not specifically address disqualification. Rather, they discuss whether judges and lawyer can be friends, usually discussing whether such friendships give the appearance that the lawyer is in a special position to influence the judge.

42. See Browning, supra note 14, at 489.
43. Id.; see also Samuel Vincent Jones, supra note 25, at 287 (describing the two views as “integrative” and “restrictive”).
44. See, e.g., Fla. Judicial Ethics Advisory Comm., Advisory Op. 2009-20 (2009); see also Browning, supra note 14, at 489 (describing this approach as the “restrictive approach”).
“friends” a lawyer, he is selecting a special class of accepted individuals while rejecting others.\textsuperscript{45} That preference is then publicly communicated through social networking, which conveys the impression that the lawyer is in a special position to influence the judge.\textsuperscript{46} Thus, the Florida Committee has consistently found that a social media friendship between a judge and a lawyer violated the Code.\textsuperscript{47} Massachusetts, Oklahoma, and Connecticut have largely followed Florida’s restrictive approach.\textsuperscript{48} 

On the other hand, states in the “permissive” camp—New York, Kentucky, South Carolina, Maryland, and Ohio—generally allow judges to be friends with lawyers who may appear before them.\textsuperscript{49} For example, the Kentucky Ethics Committee concluded that a judge does not violate the Judicial Code simply by connecting with a lawyer on social media.\textsuperscript{50} Similarly, the New York Committee concluded that social network connections are allowed, but judges must consider whether the circumstances of each case would indicate a “close social relationship” and require disclosure, recusal, or both.\textsuperscript{51} 

The California Committee took a middle ground approach.\textsuperscript{52} The Committee did not answer whether there is a “per se prohibition on social networking” but instead considered a variety of factors to determine whether the connection created an appearance of impropriety.\textsuperscript{53} Although the committee used a permissive, fact-specific approach, it concluded that a judge cannot “interact with attorneys who have matters pending before the judge” and that any such lawyers should be “unfriended.”\textsuperscript{54}

\textsuperscript{46} \textit{Id}.
\textsuperscript{49} See, e.g., Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2010-7 (2010).
\textsuperscript{50} Ethics Comm. of Ky. Judiciary, Formal Op. JE-119 at 2 (2010) (Social media connection “by itself, does not reasonably convey to others an impression that such person are in a special position to influence the judge.”).
\textsuperscript{53} \textit{Id}.
\textsuperscript{54} \textit{Id}.
Finally, the ABA's recent opinion, like the California opinion, did not clearly answer whether it is a violation per se for judges to connect on social media with lawyers and litigants who may appear before them.55 Instead the ABA mentioned that state committees "have expressed a wide range of views" on the issue and noted that "designation as [a social media] connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person." The opinion concluded that "context is significant."56

The problem is that the ABA's opinion, and most of the state ethics opinions, do not provide judges with clear guidance on what social media connections are permissible.57 Some of the ambivalence in the opinions undoubtedly reflects uncertainty about what it means to "friend" someone on social media.58 For example, some users "friend" only friends they know in the nonvirtual world, but other users "friend" anybody, even those they do not know. As the Ohio Committee opinion artfully stated: "A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily. A social network 'friend' may or may not be a friend in the traditional sense of the word."59 With the confusion regarding the meaning of friendship on social media, a "digitally enlightened or realist approach" could provide needed guidance to judges.60

A better approach would be to provide two bright-line rules. First, judges should be able to connect with anyone on social media, even lawyers who may appear before them. Social media connections sometimes mean very little, because being "friends" with somebody on social media is much different from our traditional notions of friendship.61 As such, social media connections sometimes mean very little and do not, by themselves, create an "appearance of impropriety."62 That being said, a second bright line rule is appropriate in these circumstances: as set forth below, if judges are connected with lawyers, litigants, or witnesses in the case, those "friendships" should be fully disclosed to the parties.

56. Id.
57. See Mitchell, supra note 19, at 2137; see also Estlinbaum, supra note 19, at 6 (criticizing the extant opinions for "provid[ing] no clear guidance or consensus").
59. Id.
60. Browning, supra note 14, at 490.
61. Id. at 495.
62. See id.
III. Judges' Duty to Disclose Social Media Connections

This Part first discusses the disclosure obligations imposed by the Code of Judicial Conduct before turning to the application of that standard to judges' social media connections. After reviewing the limited authority addressing the issue, I propose a broad disclosure regime that would serve two primary purposes: (1) maintaining the litigants' and the public's confidence in the judiciary; and (2) providing much needed clarity to judges who have been asking for guidance about how to use social media ethically.

A. Judges' Disclosure Obligations Under the Code of Judicial Conduct

The Code requires that a "judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." In other words even if the judge himself does not believe that the relationship is significant enough to create an "appearance of impropriety, the judge must disclose a social relationship—including a social media connection—if reasonable people might disagree.

Like the disqualification standard, the disclosure standard is objective. It focuses on what a reasonable person might consider relevant to disqualification, a notable shift from the prior version of the Code, which did not include the word "reasonably." The new standard "appears to change the reference point for judicial disclosure. Formerly, the judge ought to have disclosed information that the judge believed the actual parties and counsel might think to be relevant. The new language allows the judge to bypass the personal qualities of the parties and focuses the judge’s belief about disclosure on information that the reasonable person would consider pertinent to a disqualification motion."

63. MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 5 (2011).
64. Id. A judge might also disclose social media connections when he is seeking a waiver of a disqualifying conflict under Rule 2.11(C), which states that a judge "[s]ubject to disqualification . . . may disclose on the record the basis of the judge’s disqualification and may ask the parties and their lawyers to consider . . . whether to waive the disqualification."
66. Id. R. 2.11 cmt. 5.
68. Abramson, Judicial Disclosure, supra note 18, at 305–06.
Very little has been written about the meaning and application of the disclosure standard. The language of the disclosure requirement makes clear that it is broader than the disqualification requirement, and the limited authorities construing the disclosure requirement have reached the same conclusion. As noted, the text of the comment requires disclosure “even if the judge believes there is no basis for disqualification.” As one court put it, this comment “reveals a separate obligation to disclose that is broader than the duty to disqualify.”

B. Limited Authority Addressing Judges’ Duty to Disclose Social Media Connections

Commentators have largely failed to address judges’ obligations to disclose social media, and only a few ethics opinions speak to the issue. Those opinions are split on whether judges should disclose online friendships as part of their obligation to “disclose on the record information that the judge might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”

The New York, Kentucky, and ABA ethics opinions all concluded that judges should decide whether to disclose online friendships on a case-by-case basis. The ABA Opinion, for example, said that a “judge should conduct the same analysis [of a social media connection] that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally.” It then advised that judges

69. A notable exception is Leslie W. Abramson. See, e.g., Abramson, Judicial Disclosure, supra note 18.

70. MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 5 (2011).

71. In re Edwards, 694 N.E.2d 701, 711; (Ind. 1998); see also In re Frank, 753 So. 2d 1228, 1239 (Fla. 2000) (explaining that a judge should disclose information in circumstances even where disqualification may not be required, because the “standard for disclosure is lower.”); O’Neill v. Thibodeaux, 709 So.2d 962, 967–68 (La. Ct. App. 1998) (finding that trial judge correctly disclosed that he occasionally played cards with one of the parties, even though the judge was not required to disqualify himslef from presiding over the case on that basis); Collier v. Griffith, 1992 WL 44893 at *4–5 (Tenn. Ct. App. Mar. 11, 1992) (basing the broader duty on “the seminal importance of impartiality”); Leslie W. Abramson, The Judge’s Relative Is Affiliated with Counsel of Record: The Ethical Dilemma, 32 HOFSTRA L. REV. 1181, 1188 (2004) [hereinafter Abramson, Ethical Dilemma] (noting the consensus that the duty to disclose is broader than the duty to disqualify).

72. See generally, Browning supra note 14 (offering thoughtful insight on the issue).

73. Cooper, supra note 12, at 31–32.

should “very carefully consider whether [social media] connections must be disclosed” if the judge and the lawyer engage in “current and frequent communication.” But the Opinion went on to say that the judge need not review all social media connections “if a judge does not have specific knowledge of an electronic social media [ESM] connection” that may potentially or actually be problematic. In those circumstances, the judge should consider a number of factors: the number of friends that a judge has, whether the judge has a practice of accepting all friend requests, and other factors.

The ABA Opinion concludes, however, that “because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection.”

The problem with the ABA’s case-by-case approach is that it fails to provide clear guidance to judges. Further, it fails to support the Code’s policy behind the disqualification and disclosure rules: maintaining the public’s confidence in the judiciary. For example, a judge applying the ABA’s case-by-case approach might conclude that he does not have to disclose his social media connection with the prosecutor in the case, but that does not change how the criminal defendant in the case (or his lawyer or a member of the public) who discovers the “friendship” might feel about the connection. Indeed, the failure to disclose might make the criminal defendant and his lawyer even more suspicious. Relatedly, without a broader disclosure rule, litigants and the public will be left to wonder whether judges who are on social media are hiding connections behind privacy settings.

The California Committee, on the other hand, opined that judges should disclose all online friendships. The Committee found that the nature of online social networking creates the need for more disclosure. As the Committee noted, while the connection is publicly known, the nature of the “friendship” is not. Therefore, the Committee supported broad disclosure to “dispel any concerns that the attorney is in a special position to influence the judge or that the judge would not be impartial.”

76. Id.
77. Id.
78. Id.
79. Cooper, supra note 12, at 32.
80. Id.
82. Id.
83. Id.
C. Arguments in Favor of a Broad Disclosure Standard

Ethics committees should draw a bright-line rule as the California committee did: judges should be forced to disclose to the litigants any relevant social media connections (i.e., "friendships" with lawyers, parties, or witnesses).84 A bright-line rule like California's would serve two principal goals. First, a broad disclosure rule would help maintain the litigants' and the public's confidence in the judiciary by ensuring that everybody shares the same information concerning social media connections. Second, it would provide much needed clarity to a judiciary that has been asking for clear rules.

i. Disclosure as Disinfectant

Justice Louis Brandeis famously said that "Sunlight is . . . the best of disinfectants,"85 and although he said it many years before the invention of Facebook, his concept applies to judicial disclosure of social media connections. Broad disclosure serves the critical policy behind the disqualification and disclosure rules: enhancing the litigants' and the public's confidence in the judicial system.86 As the California Judicial Conduct Handbook states: "Nothing provides stronger evidence to the parties of [judicial] impartiality than open disclosure."87 Open disclosure "advances the integrity of the judiciary and the public's trust in the judge."88

Broad disclosure is an especially good idea in the particular context of social media because it requires the application of an ambiguous standard to ambiguous conduct. First, the disqualification standard that drives the need for disclosure is vague. As discussed in Part II, this "appearance of impropriety" standard is difficult to apply and requires a careful analysis of all the facts in order to determine which relationships are permissible "ordinary social hospitality" as opposed to those that rise to the level of an impermissible "appearance of impropriety."89 Courts have had a difficult time applying this standard to social relationships.90

Second, the disclosure standard, which provides that a "judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualifi-
fication, even if the judge believes there is no basis for disqualification,”91 is also ambiguous. The use of the terms “might” and “reasonably” in the standard create significant uncertainty. Moreover, several ethics opinions have correctly concluded that social media connections are significant, even though they are not disqualifying by themselves. They are one piece of information that parties need to have in order to determine whether to move to disqualify the judge.92

Relatedly, the fact that both the disqualification standard and the disclosure standard are objective creates ambiguity. The judge’s own subjective belief about the relevance of the information is irrelevant. Instead, the judge needs to focus on what the parties and lawyer “would consider pertinent to a disqualification motion.”93 The standard requires the judge to disclose information that a reasonable person might find relevant to disqualification even if the judge does not believe that the information is relevant.

To this point, my argument in favor of a robust disclosure standard has focused on the vagueness of the standard itself and could serve as an argument for broader disclosure of all information. The argument in favor of broad disclosure is even stronger, however, when it comes to social media: the unique attributes of social media create yet another layer of ambiguity. Specifically, the social meaning of social media connections remains uncertain. For example, when a Facebook user posts a news article about a violent earthquake or an obituary of somebody who has died, what does it mean when the user’s friends “like” the post? Presumably, it does not mean that the user’s friends are happy about the earthquake or death. Facebook tells us that “[w]hen you click Like on a Facebook Page, in an advertisement, or on content off of Facebook, you are making a connection.”94 Of course, what Facebook tells us is largely meaningless because users are free to “like”

91. MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 5 (2011).

92. See N.Y. State Advisory Comm. on Judicial Ethics, Advisory Op. 13-39, at 1 (2013) (concluding that “the mere status of being a Facebook friend without more is an insufficient basis to require recusal. False interpersonal relationships are varied, fact-dependent, and unique to the individuals involved.”); see also Ky. Formal Judicial Ethics Op. JE-119, at 2 (2010) (concluding that “not every one of these relationships necessitates a judge’s recusal from a case.”); Md. Judicial Ethics Comm. Op. 2012-07, at 5 (2012) (concluding that “the mere existence of a friendship between a judge and an attorney does not, in itself, disqualify the judge from cases involving that attorney . . . . The Committee sees no reason to view or treat ‘Facebook friends’ differently.”).

93. Abramson, Judicial Disclosure, supra note 18, at 305.

things for any reason at all. At a minimum, it is safe to say that "liking" something on Facebook is different than "liking" something offline and that there is not yet universal agreement about its social meaning.

Similarly, the meaning of social media "friendship" is ambiguous. In some cases, users become social media "friends" with people whom they would describe as friends in the non-virtual world, but in other cases, social media "friends" would not even qualify as real world acquaintances. Some people are picky about whom they will "friend" on social media, but others, like Judge Placey, will friend anybody, even people whom they have never met. This makes it difficult to ascribe meaning to social media.

Trying to apply a vague standard to ambiguous conduct creates uncertainty. Broad disclosure eliminates the likelihood that a party, or a lawyer, will later learn about [a social media] affiliation and conclude that the judge improperly failed to disqualify sue sponte. In other words, disclosure "avoids any hint that the judge concealed important information from them." Ultimately, the goal is to reduce the "appearance of impropriety," and a broad disclosure rule best serves that goal.

Finally, a transparent approach putting everybody on a level playing field will also reduce shenanigans intended to evade regulation. Take, for example, judges who have social media connections with lawyers, tell those lawyers to "de-friend" them when they appear before the judge, and then reconnect after the case is over.

ii. The Advantages of a Clear Rule

The other major advantage of the disclosure rule that I propose is that it provides clarity. Specifically, a "bright-line rule serves people notice of the


96. Mary-Rose Papandrea, Social Media, Public School Teachers, and the First Amendment, 90 N.C. L. Rev. 1597, 1606 (2012) ("Although most social media connections reflect pre-existing offline connections, social media also brings together strangers with similar hobbies, interests, and political views.").

97. Ohio Bd. of Commr's on Grievances & Discipline Op. 2010-7, at 1 (2010) ("A rose is a rose is a rose. A friend is a friend is a friend? Not necessarily. A social network 'friend' may or may not be a friend in the traditional sense of the word.").

98. Browning, supra note 14.

99. Abramson, Ethical Dilemma, supra note 73, at 1189.

Providing standards so that people know how to behave is usually a good thing, but it is particularly important in this context. First, judges themselves have requested more guidance on recusal issues. Judges desire greater guidance so they can use social media and still comply with ethical obligations under the Code. Currently, judges in California are the only ones with clear guidance on the disclosure of social media connections, while judges in the rest of the country are left without any clear direction.

iii. Anticipating the Objections

One of the primary arguments against a broad disclosure rule is that it may deter judges from using social media at all because of the hassle of making disclosures which may invite disqualification motions. But the current regime in most states—where judges don’t know whether they can friend lawyers, and, if they do, whether they have to disclose those connections—already has a chilling effect on judges’ social media activity, to the extent that judges lack clear guidance and therefore may be discouraged from participating.

Moreover, the open disclosure regime that I advocate is preferable to the two primary alternatives (aside from the status quo). First, judges could be banned from social media altogether. Although some judges decide of their own accord not to participate in social media, all of the ethics opinions have recognized the value of social media to judges. As the ABA opinion recognized, judges should not become “isolated” from the community in which they live, and social media “has become an everyday part of worldwide culture.” Further, “[J]udicious use of [social media] can benefit judges in both their personal and professional lives” and also keep them from being “thought of as isolated or out of touch.” As one commentator wrote,

101. J. Harvie Wilkinson III, Toward A Jurisprudence of Presumptions, 67 N.Y.U. L. REV. 907, 908 (1992); see also Florrie Young Roberts, “Off-Site Conditions and Disclosure Duties: Drawing The Line At The Property Line,” 2006 B.Y.U. L. REV. 957, 982 (“One major benefit of rules that are certain is that their clarity results in predictability. People will know in advance what the law expects of them and can model their behavior in accordance with the rule.”).


103. See Conference of Court Public Information Officers, CCPIO New Media Survey (2013), at 1.


105. Id.; see also S.C. Bar, Advisory Op. 17-2009, at 1 (2009) (concluding that “complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives”); N.Y. State Advisory Comm. on Judicial Ethics, Advisory Op. 08-176, at 1 (2009) (concluding that “the Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social net-
“While judges should proceed with caution when using social networking platforms—as they should with any communication platform—they should still proceed.”

Second, we could allow judges to have social media connections with attorneys but require them to keep their “friends” private, thereby avoiding, in theory, an improper appearance. There are at least two problems with this solution. First, it would “require judges to master their privacy settings and to be vigilant for changes made by Facebook and other social networking sites to their privacy policies . . . .” Moreover, attorneys who have social media connections with judges would also need to keep their “friends” private in order to keep that information from being publicly available. Second, and more importantly, this solution will not fulfill the goal of maintaining the public’s confidence in the integrity of the legal system and the impartiality of the judiciary. One commentator opined that:

If anything, such a policy is only likely to erode public confidence and generate distrust of both the process and the outcome of a particular proceeding. It is a fact of life that relationships exist between judges and lawyers that are not public knowledge, such as golfing, hunting, or other social relationships, but it is another thing entirely to have a policy or mandate to keep these relationships hidden.

Another potential objection is that in most instances, judges decide their own recusal motions, so requiring disclosure is useless because the judge has already considered the social media connection (and other potential disqualifying information) and determined that recusal is not necessary. The primary problem with this argument is that the Code explicitly requires disclosure of potentially disqualifying information “even if the judge believes

work. A judge generally may socialize in person with attorneys who appear in the judge’s court, subject to the Rules Governing Judicial Conduct”); John Schwartz, For Judges on Facebook, Friendship Has Limits, N.Y. Times, Dec. 10, 2009, at A25 (quoting Professor Stephen Gillers, “Judges do not ‘drop out of society when they become judge . . . . The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.’”.

106. Browning, supra note 14, at 533.
107. Id. at 529.
108. Id.
109. Id.
110. Leslie W. Abramson, Deciding Recusal Motions: Who Judges the Judges?, 28 Val. U. L. Rev. 543 (1994) (“In the majority of states, the decision of whether to grant or deny a motion to recuse is within the sound discretion of the challenged judge.”).
there is no basis for disqualification," and there are good reasons for this requirement. First, if a party decides to bring a motion for disqualification, the judge may ultimately be swayed by arguments and authority that he initially failed to consider; parties should have the opportunity to present those arguments to the judge. Parties will only have a full and fair opportunity to do so if they are given the relevant facts. Although social media connections alone should not be sufficient to disqualify a judge, they are one piece of the puzzle. Further, most judges’ disqualification decisions are subject to appellate review, and lawyers should have the opportunity to build an appellate record.

Admittedly, this disclosure proposal will put a burden on judges. First, in order to comply, they will need to keep careful track of their social media connections. They could assign a staff member to do this or, if that is impractical, they could use a standing order to put a burden on the lawyers who appear before them to identify relevant social media connections. In addition, disclosure of social media connections may increase the number of disqualification motions, but that is a small price to pay for the benefits of broad disclosure. Moreover, although greater disclosure could produce more disqualification motions, there remains a significant deterrent to such motions: lawyers still fear making the judge mad.

IV. CONCLUSION

Although they lag behind the general population, an increasing number of judges are using social media. Yet judges report that they are concerned about whether they may do so without running afoul of judicial ethics codes. This article has argued in favor of providing judges with clear guidance concerning their social media use. Judges should be able to friend anybody who they choose if they disclose all social media connections with lawyers, litigants, and witnesses in pending matters.

How would Judge Placey and Judge Hayden have fared under such a regime? Both were “friends” with defendants in the case but apparently had no further connection with them. There is nothing inherently wrong with their participation in social media or being “friends” with the defendants, but both should have disclosed that connection. Judge Placey ultimately recused himself without providing any explanation, while the appellate court ordered Judge Hayden off the case. Their social media connections alone should not have led to their disqualification, and the court in Judge Hayden’s case erred

112. See supra note 16 and surrounding text.
113. See Conference of Court Public Information Officers, CCPIO New Media Survey (2013).
114. Id.
115. See Ganim, supra note 1; see also Moselle, supra note 5.
in reaching that conclusion. The strongest argument in favor of their disqualification is that the failure to disclose the social media connection itself arguably created an appearance of impropriety. Under the broad disclosure regime, however, disclosure would give the parties and the public confidence in the integrity of the judges, and the judges would have been able to continue serving in those cases.