

WHY WE CAN'T BE FRIENDS: PRESERVING PUBLIC CONFIDENCE IN THE JUDICIARY THROUGH LIMITED USE OF SOCIAL NETWORKING

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*“Neither privacy nor publicity is dead, but technology will
continue to make a mess of both.”¹*

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INTRODUCTION

Judges occupy a special place in American society. Their actions, both inside and outside the courthouse, play an integral role in the public’s respect for, and confidence in, the legal system. The existence of an independent, fair, and impartial judiciary is the hallmark of the

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1. Danah Boyd, Fellow at Harvard University, Address at South by Southwest Conference in Austin, Texas (March 13, 2010), *available at* <http://www.danah.org/papers/talks/2010/SXSW2010.html>.

American legal system. By necessity, judges are held to a higher standard of professional conduct than other members of the legal profession, and their personal and professional activities are subject to heightened scrutiny by members of the profession and the public. Although judges are members of the larger community, they hold an elevated position as symbols of the law and justice. As a result, a judge's actions and behaviors have ramifications far beyond how members of the public view the judge as an individual. What a judge does or says reflects directly on the integrity of the judicial system.

When a member of the judiciary utilizes social media to communicate with colleagues, friends, and family members, a legitimate risk exists that his or her actions or statements may undermine the public's confidence in, and respect for, the judiciary. In some ways, the use of social media is no different than direct communication because certain acts or statements would be construed as clearly improper regardless of the medium. In either forum, a judge may actually say or do something that undermines the public's confidence in the judicial system, such as divulge confidential information, comment on a pending case, or use the prestige of the bench for personal gain. In clear cases, the method by which the message is delivered is irrelevant. However, there is a more subtle but equally dangerous risk associated with the use of social networking. Unlike direct person-to-person communication, online communication does not offer the benefit of context, emotion, or in many cases visual aids that provide clarity to the meaning and purpose behind a particular communication. Rather, most online communication is static and heavily dependent on the recipient of the communication to discern the meaning, purpose, or intent behind the words used. Thus, when individuals, including judges, post comments online there is a greater risk that those who read the comment will misunderstand the message and form erroneous and unfounded opinions. Whether a judge's words or actions are clearly improper or merely misconstrued, the impact can be substantial and serve to undermine judicial canons employed to promote public confidence in the judiciary.

Members of the legal profession, including judges, continue to embrace social networking in both their personal and professional lives.² In one recent survey, 40% of responding judges reported that

2. Nicole Black, *A Look at Lawyers' Use of Technology in 2011*, SUI GENERIS (Oct. 4, 2011), <http://nylawblog.typepad.com/suigeneris/2011/10/a-look-at-lawyers-use-of-technology-in-2011.html>.

they engage in social media, such as Facebook.³ That number is expected to increase.⁴ Such use can promote the efficient and effective administration of services, but it can also present unique challenges for those individuals seeking to comply with professional rules of conduct. Although the federal judiciary has not issued an ethics opinion on the use of social media by judges, the Committee on Codes of Conduct within the Judicial Conference of the United States has recognized the potential hazards and drafted proposed guidelines on the use of social media by judicial employees.⁵ The Committee acknowledged that the use of social media “raises ethical, security, and privacy concerns for courts and court employees.”⁶ It noted that the limited ability to effectively control or retrieve communication once released poses unique problems for courts.⁷ The inability to ever completely erase or delete comments, coupled with the ability to preserve and replicate posted messages exacerbates the potential risks.⁸ The Committee also noted that due to a perceived sense of anonymity, individuals may engage in conduct online that they might refrain from engaging in in person.⁹ These issues are problematic for judges who must carefully balance their role as members of the community with their elevated status as a symbol of the judicial system.

Technology plays a significant role in the provision of legal services, but its uses are not without risk. As the use and influence of social media continues to grow, it is essential for the legal profession to understand how its members use and share content on these sites. It is equally important to consider how society’s evolving perspective on privacy and online communication should apply to judges. In 2011, the American Bar Association (“ABA”) Commission on Ethics 20/20 examined the use of new technologies in the practice of law and found that with some additional clarification the current rules governing

3. CONFERENCE OF COURT PUB. INFO. OFFICERS, REPORT OF THE NEW MEDIA COMM. OF THE CONFERENCE OF COURT PUB. INFO. OFFICERS 19TH ANNUAL MEETING, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE 7, 9 (released Aug. 26, 2010) [hereinafter CCPIO], available at <http://ccpio.org/wp-content/uploads/2012/02/2010-ccpio-report-summary.pdf>.

4. *Id.* at 10.

5. See generally COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., RESOURCE PACKET FOR DEVELOPING GUIDELINES ON USE OF SOCIAL MEDIA BY JUDICIAL EMPLOYEES (Apr. 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf>.

6. *Id.* at 5.

7. *Id.*

8. *Id.* at 6.

9. See generally CCPIO, *supra* note 3.

attorney conduct are sufficient to address the use of that technology, including online communications.¹⁰ While these rules offer guidance on appropriate judicial behaviors, alone they are insufficient to address the unique challenges posed by social networking.

This Article considers the rapid rise in the use of social media and its use by members of the judiciary, and asserts that judicial canons drafted prior to the advent of social media outlets are inadequate to address the risk posed through the use of social media. Part I provides a brief overview of the rapid emergence of social media as a primary mode of communication and the unique risks it poses for users. Part II provides a brief summary of codes of judicial conduct that are relevant to a judge's use of social media. Part III evaluates recent state judicial ethics opinions addressing the use of social media. Part IV argues that a restrictive approach to the use of social media, which has been adopted by several states, is necessary to protect the integrity of the judicial system. Part V offers recommendations to balance the competing interests of protecting the judiciary and allowing judges to participate in the communities they serve.

I. PRIVACY AND THE USE OF SOCIAL MEDIA

Social networking has become a global phenomenon and now represents a key mode of communication.¹¹ Combined, Facebook and Twitter, the two largest social networking sites, attract more than one billion unique users each month.¹² Approximately four in five active internet users visit social networks and weblogs.¹³ Worldwide, the United States ranks first in the number of social media users, reaching nearly 80% of U.S. internet users.¹⁴ Americans spend nearly one quarter of their time online engaged in some form of social networking.¹⁵

The primary reason individuals use social media is to maintain connections with family members, colleagues, and friends.¹⁶

10. AM. BAR ASS'N COMM'N ON ETHICS 20/20, *Initial Draft Proposals—Technology and Confidentiality*, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010502_technology.authcheckdam.pdf (last modified May 2, 2011).

11. Nielsen, *State of the Media*, SOC. MEDIA REP.: Q3 2011, 1, 12 (2011), <http://blog.nielsen.com/nielsenwire/social/> (last visited Apr. 21, 2012).

12. *Top 15 Most Popular Social Networking Sites: April 2012*, EBIZMBA, <http://www.ebizmba.com/articles/social-networking-websites> (last visited Apr. 21, 2012).

13. Nielsen, *supra* note 11, at 1.

14. *See id.*

15. *Id.*

16. Aaron Smith, *Why Americans Use Social Media*, PEW RES. CENTER (Nov. 15,

Approximately 60% of social networking site users keep their main profile private so that only those selected as “friends” or contacts can access the private information provided by the user.¹⁷ Other users allow limited or unrestricted access to their profile.¹⁸ By design, social networking sites allow people to communicate and share information.¹⁹ Although each site is different, most social networking sites provide some form of open forum or chat rooms or a place to post personal information and commentary that enables the user to connect with, and share information with, other users.²⁰ This informal, detached mode of communication often manifests changes in how individuals communicate. Compared to the average adult internet user, for example, active adult social networkers are “26% more likely to give their opinion on politics and current events” online.²¹ Moreover, because most users access social network sites from the privacy of their home or office, some can be lulled into a false sense of anonymity.²² The absence of a direct, personal interaction during a typical online session may cause a user to reveal sensitive information that he or she might not otherwise reveal in a face-to-face communication.²³

Even where a user takes steps to limit access to his or her profile page, pictures and comments contained thereon may unintentionally be revealed to others. According to the Federal Bureau of Investigation (“FBI”), “once information is posted to a social networking site, it is no longer private.”²⁴ The more information an individual posts, the more vulnerable that information is to unintended release by “friends” or

2011), <http://www.pewinternet.org/Reports/2011/Why-Americans-Use-Social-Media.aspx>.

17. See Mary Madden, *Privacy Management on Social Media Sites*, PEW RES. CENTER, 1, 2 (Feb. 24, 2012), http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Privacy_management_on_social_media_sites_022412.pdf (reporting that 58% of social networking users say their main profile is set to private so that only “friends” can see it).

18. *Id.*

19. See generally *Internet Social Networking Risks*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/investigate/counterintelligence/internet-social-networking-risks> (last visited Apr. 21, 2012) [hereinafter FED. BUREAU OF INVESTIGATION] (noting that numerous click-jacking scams have employed “Like” and “Share” buttons on social networking sites, and that sites often conceal hyperlinks beneath legitimate clickable content which, when clicked, cause a user to unknowingly perform actions, such as sending a personal identification to a site).

20. *Security Tip (ST06-003): Staying Safe on Social Network Sites*, U.S. CERT. (Mar. 29, 2006, last revised Jan. 26, 2011), <http://www.us-cert.gov/cas/tips/ST06-003.html> [hereinafter U.S. CERT.].

21. Nielsen, *supra* note 11, at 10.

22. U.S. CERT., *supra* note 20.

23. *Id.*

24. FED. BUREAU OF INVESTIGATION, *supra* note 19.

websites connected to the network.²⁵ Many users may unintentionally release information they intended to keep private because they do not understand the technology well enough to prevent such inadvertent disclosure. According to one survey of social networking users, almost half of all users experience “some level of difficulty in managing the privacy controls on their profile;” and ironically, individuals with college degrees are substantially more likely to have difficulty protecting against inadvertent disclosure.²⁶ Once the information is released, it cannot be recaptured. When this happens to a member of the legal profession, the impact can be substantial if the information released relates to confidential legal matters.

The rapid advancement of social media has called into question the relevance of privacy in the online environment. Those who suggest that privacy does not exist online argue that by posting information regarding their physical location, photos, intimate stories of personal activities, and other personal information, users have “abandoned any reasonable expectation of privacy.”²⁷ Even those who argue that privacy is still relevant to social media users acknowledge that such interest is at odds with social media outlets that stand to profit from more widespread dissemination of personal information.²⁸

Some have suggested that social media users are less concerned about privacy and may be more willing to share information because they are unaware of how the information is used and stored.²⁹ Indeed, some research has suggested that there are important differences between intentions and behavior with regard to the personal information users disclose online.³⁰ Studies have shown that some people engage in activities and communication online that they would refrain from engaging in otherwise. Approximately 10% of all social media users have acknowledged some regret over posting personal content to a social networking site.³¹ This is problematic because recent studies show that people are increasingly using social networking sites to keep

25. *Id.*

26. Madden, *supra* note 17, at 3 (reporting that “48 percent of social media users report some level of difficulty in managing the privacy controls on their profile”).

27. *Id.* at 4.

28. *Id.*

29. *Id.*

30. See generally Patricia A. Norberg, Daniel R. Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41 J. CONSUMER AFF. 100 (2007).

31. Madden, *supra* note 17, at 3.

up with close social ties.³² Approximately 40% of users have “friended” their closest confidants, which may provide some with a false sense of security that what they say online is safe.³³

Despite its numerous advantages, social networking poses significant privacy risks for users. Members of the legal profession who are bound by professional codes of conduct that prohibit the dissemination of confidential information are at increased risk.

II. SOCIAL MEDIA AND CODES OF JUDICIAL CONDUCT

The ABA Model Code of Judicial Conduct was adopted in 1990 “to preserve the integrity and independence of the judiciary.”³⁴ It has undergone several revisions, but none of those revisions have directly addressed the use of social networking.³⁵ The revisions were intended to emphasize a judge’s most general, but overarching, obligations to “uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office.”³⁶

In its current form, the ABA Model Code of Judicial Conduct consists of four Canons, followed by explanatory rules and comments.³⁷ Judges may only be disciplined for violating a rule, but each Canon provides aspirational goals of judicial ethics that provide context for interpreting the rules.³⁸ Most states have initiated or completed review of their judicial codes in light of revisions to the ABA Model Code of Judicial Conduct and have either adopted the Code in full or in part.³⁹

32. *See id.* at 2.

33. *See* Press Release, Pew Research Ctr., Social Networking Sites and Our Lives (June 16, 2001) (on file with author), *available at* <http://www.pewinternet.org/Press-Releases/2011/Social-networking-sites-and-our-lives.aspx>.

34. *See generally* MODEL CODE OF JUDICIAL CONDUCT (2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/2004_CodeofJudicial_Conduct.authcheckdam.pdf.

35. Since its 1990 adoption, the Model Code has been amended three times: August 6, 1997; August 10, 1999; and August 12, 2003. *See id.* In 2007 and 2010 additional changes were adopted, none of which directly apply to the use of social networking by judges. *See* AM. BAR ASS’N, *Overview of ABA Model Code of Judicial Conduct 2007*, 1 (Feb. 12, 2007), http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/overview_gak_030707.authcheckdam.pdf.

36. *Id.* at 1, 3.

37. *See generally* MODEL CODE OF JUDICIAL CONDUCT (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_mclc_final_for_website.authcheckdam.pdf.

38. *Id.* § 2.

39. *See* AM. BAR ASS’N, *Status of State Review of ABA Model Code of Judicial Conduct*, 1,

The provisions most relevant to a judge's use of social media are Canons 1 and 2 and their associated rules and comments.

Canon 1 of the Model Code of Judicial Conduct provides that “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”⁴⁰ Rule 1.2 requires a judge to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary,” and to “avoid impropriety and the appearance of impropriety.”⁴¹ Comment 1 adds that “public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety” and that the rule applies to both the professional and personal conduct of a judge.⁴² Comment 2 notes that judges “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed”⁴³ Comment 5 adds that 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.”⁴⁴

Canon 2 provides that a judge “shall perform the duties of judicial office impartially, competently, and diligently.”⁴⁵ Rule 2.2 mandates that “a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”⁴⁶ Rule 2.3 mandates that “a judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”⁴⁷ Comment 1 notes that “bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute,” and Comment 2 adds that “a judge must avoid conduct that may reasonably be perceived as prejudiced or biased.”⁴⁸ Rule 2.4(B) mandates that “[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment,” and

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judicial_status_chart.authcheckdam.pdf (last modified Nov. 19, 2012).

40. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010).

41. *Id.* at Canon 1, R. 1.2.

42. *Id.* at Canon 1, R. 1.2 cmt. 1.

43. *Id.* at Canon 1, R. 1.2 cmt. 2.

44. *Id.* at Canon 1, R. 2 cmt. 5.

45. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2010).

46. *Id.* at Canon 2, R. 2.2.

47. *Id.* at Canon 2, R. 2.3.

48. *Id.* at Canon 2, R. 2.3 cmt. 1-2.

Rule 2.4(C) mandates that “[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.”⁴⁹ Rule 2.9 prescribes ex parte communication and mandates that “[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter,” unless otherwise authorized.⁵⁰ Rule 2.10(A) mandates that “[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.”⁵¹ Each of the preceding canons, rules, and comments are implicated in the use of social media. Indeed, some members of the legal profession have already violated these requirements based on their online activity.

In North Carolina, a district court judge was publicly reprimanded by the Judicial Standards Commission (“the Commission”) for his improper activities on Facebook.⁵² There, the judge, who was presiding over a child custody and child support hearing, had “friended” the defendant’s attorney on Facebook.⁵³ The judge posted a note on the attorney’s Facebook indicating that the judge had “two good parents to choose from” and that he felt that “he w[ould] be back in court,” to which the attorney replied, “I have a wise Judge.”⁵⁴ In response to a post by the attorney that read, “I hope I’m in my last day of trial;” the judge responded, “[y]ou are in your last day of trial.”⁵⁵ The Commission reviewed this information and issued a public reprimand to the judge after determining that the judge had improperly engaged in ex parte communication with counsel for a party, and that the communication amounted to “conduct prejudicial to the administration of justice that brings the judicial office into disrepute.”⁵⁶

In Georgia, a chief superior court judge resigned after being accused of using Facebook to contact a female criminal defendant who

49. *Id.* at Canon 2, R. 2.4(B), (C).

50. MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.9 (2010).

51. *Id.* at Canon 2, R. 2.10(A).

52. N.C. Judicial Standards Comm., *Public Reprimand of B. Carlton Terry*, Inquiry No. 08-234, 4-5 (Apr. 1, 2009), *available at* <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

53. *Id.* at 2, ¶ 3.

54. *Id.* at 2, ¶ 5.

55. *Id.* at 2, ¶ 7.

56. *Id.* at 4.

was appearing before him.⁵⁷ Through online posts, the judge offered to give her advice on strategy for her case that he presided over.⁵⁸ The district attorney chose not to prosecute the judge after finding no illegal activity, but the Georgia Judicial Qualifications Commission initiated an investigation to determine whether the judge's actions violated the Georgia Code of Judicial Conduct.⁵⁹ Before the inquiry was complete, the judge resigned from the bench.⁶⁰

In 2010, a public records review traced anonymous comments about a murder suspect's case posted on a newspaper's website to the personal e-mail account of the judge overseeing the trial.⁶¹ The comments included statements that, "[a]ll of these criminals committing crimes against women must stop," and "[n]one of them should get out of prison, EVER."⁶² Although the judge denied writing the posts, the defense attorney did not believe the judge and took steps to address what he deemed "personal bias."⁶³

While these actions may seem egregious and obvious violations of the ethical rules governing judges, these only represent those individuals who have been caught. This is not to suggest that the majority of judges engage in improper behavior online, but to make clear that the risks of misuse are real and may increase without clear guidance on what constitutes appropriate behavior.

III. SOCIAL MEDIA AND IMPLICATIONS FOR JUDGES

To date, there have been few judicial discipline cases involving social networking sites, but several state judicial ethics committees have provided advice for judges looking for guidance on what they can and cannot do with social media. Each ethics panel that has issued an opinion on whether a judge may use social networks has concluded that membership alone does not represent a per se violation of that state's existing codes of judicial conduct. However, the opinions differ on how the judge may use social media.

57. *Georgia Judge Resigns in the Wake of Facebook Scandal*, LAWUPDATES.COM (Jan. 12, 2010), http://www.lawupdates.com/industry_news/entry/georgia_judge_resigns_in_the_wake_of_facebook_scandal/.

58. *Id.*

59. *Id.*

60. *Id.*

61. Thomas J. Sheeran, *Online Posts on Murder Trial Suspect Traced to Judge in Case's Computer*, CITIZENS FOR JUD. ACCOUNTABILITY (Mar. 26, 2010), <http://www.judicialaccountability.org/articles/judgewhoneedsjury.htm>.

62. *Id.*

63. *Id.*

In 2011, the Judicial Ethics Advisory Panel of Oklahoma (“Panel”) issued an opinion on two questions: (1) may a judge maintain an internet social account, such as Facebook, Twitter, or LinkedIn without violating the Code of Judicial Conduct; and (2) may a judge, who maintains an internet-based social media account, add court staff, law enforcement officers, social workers, attorneys, and others who may appear in his or her court as “friends” on the account?⁶⁴ The Panel answered yes, with restriction, on the first question and no on the second.⁶⁵ In reaching its decision on the first question, the Panel acknowledged that there is no per se violation of any of Oklahoma’s judicial canons governing a judge’s behavior and that the judge may add as “friends” “any person who does not regularly appear or is unlikely to appear in the Judge’s court.”⁶⁶ In answering no to the second question, the Panel noted that such an action may violate rules of judicial conduct that do not allow a judge to “convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”⁶⁷ The restriction imposed extends to attorneys, law enforcement officers, social workers, and others who may appear before the judge.⁶⁸ The Panel took a restrictive approach based on its belief that “public trust in the impartiality and fairness of the judicial system is so important that [it] is imperative to err on the side of caution where the situation is ‘fraught with peril.’”⁶⁹

The Massachusetts Supreme Judicial Court Committee on Judicial Ethics (“Committee”) issued a similar opinion in 2011.⁷⁰ There, the Committee was asked to define the parameters of appropriate use of the social networking site Facebook by members of the judiciary.⁷¹ The Committee first noted that it is unwise to take steps to isolate a judge from the community in which he or she lives, and implied that use of Facebook represented a reasonable integration into the community.⁷²

64. Okla. Judicial Ethics Advisory Panel, Judicial Ethics Op. 2011-3, ¶¶ 1-2 (July 6, 2011) [hereinafter Okla. Op. 2011-3], *available at* <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147>.

65. *Id.* ¶¶ 3-4.

66. *Id.* ¶ 7.

67. *Id.* ¶ 6 (citing OKLA. CODE OF JUDICIAL CONDUCT Canon 2, R. 2.4(c) (2010), *available at* <http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=461662>).

68. Okla. Op. 2011-3, *supra* note 64, ¶ 8.

69. *Id.* ¶ 9.

70. Mass. Judicial Ethics Comm., CJE Op. No. 2011-6 (Dec. 28, 2011) [hereinafter Mass. Op. 2011-6], *available at* <http://www.mass.gov/courts/sjc/cje/2011-6n.html>.

71. *Id.*

72. *Id.*

The Committee added that a judge may “post” media or comments on his or her Facebook and may “like” posts that others have made, so long as the judge’s actions are consistent with the judicial codes of conduct.⁷³ According to the Committee, a judge would violate the judicial rules if he or she: (1) posted comments or material that negatively impacted the integrity and impartiality of the judiciary; (2) commented on, or permitted others to comment on, cases currently pending before the judge; (3) joined any online groups; (4) engaged in political endorsements; or (5) identified himself or herself as a judge or permitted others to do so.⁷⁴ The Committee took a much stricter position on the ability of a judge to “friend” an individual who may appear before the judge.⁷⁵ The Committee opined that the Code of Judicial Conduct prohibits a judge from “associating in any way on social networking web sites with attorneys who may appear before them.”⁷⁶ Recognizing the impact this may have on a judge’s social behavior, the Committee stated, “[t]he pervasiveness of social media in today’s society makes this situation one which requires a judge to ‘accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen.’”⁷⁷

The Oklahoma and Massachusetts ethics opinions follow Florida’s approach. In 2009, Florida’s Judicial Ethics Advisory Committee was asked: (1) whether a judge may post comments and other material on the judge’s page on a social networking site; and (2) whether a judge may add lawyers who may appear before the judge as “friends” on a social networking site, or permit such lawyers to add the judge as their “friend.”⁷⁸ The Committee noted that Florida’s Code of Judicial Conduct does not address or restrict a judge’s method of communication but rather addresses its substance.⁷⁹ Thus, the use of social media to communicate did not constitute a violation of the Code.⁸⁰ However, where a judge seeks to identify as “friends,” those lawyers who may appear before the judge or to permit those lawyers to identify the judge as a “friend” on their profile pages, the judge runs

73. *Id.*

74. *Id.*

75. Mass. Op. 2011-6, *supra* note 70.

76. *Id.*

77. *Id.*

78. Fla. Sup. Ct., Judicial Ethics Advisory Comm., Op. No. 2009-20 (Nov. 17, 2009) [hereinafter Fla. Op. 2009-20], *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2009/2009-20.html>.

79. *Id.*

80. *Id.*

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afoul of the rules.⁸¹ Since other people may view the “friend” acknowledgement, the Committee believed that this act would violate a state judicial canon that: (1) prohibits a judge from using the prestige of the judicial office to advance personal interests; and (2) prohibits a judge from conveying, or allowing another to convey, the impression that he or she has some special relationship that may influence the judge.⁸² The Committee placed importance on the fact that a judge is required to consent to listing someone, or being listed by someone, as a “friend.”⁸³

Judicial ethics committees in other states have issued less restrictive opinions. In Kentucky, the Ethics Committee of the Kentucky Judiciary issued an opinion announcing that judges may participate in social networking and “friend” attorneys, social workers, law enforcement officials, or other individuals who may appear before the judge.⁸⁴ The Committee noted that because any person on a site such as Facebook can be linked as a “friend,” that action alone does not violate the rules because it does not necessarily convey to others the impression that the friend is in a special position to influence the judge.⁸⁵ However, the Committee noted that it struggled with its decision and clarified that social networking sites are “fraught with peril for judges,” and that judges should recognize that they cannot engage others via social networking in the same way that other members of the general public are allowed.⁸⁶ The Committee also noted that because judges in the state run for public re-election on a periodic basis, isolating them from the community in which they live is not appropriate.⁸⁷ That fact tipped the decision in favor of allowing expanded use.⁸⁸

In New York, the Advisory Committee on Judicial Ethics (the

81. *Id.*

82. *Id.* (quoting FLA. CODE OF JUDICIAL CONDUCT Canon 2B, 7 (2008), available at http://www.floridasupremecourt.org/decisions/ethics/09-15-2008_Code_Judicial_Conduct.pdf (“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 influence the judge.”)).

83. See Fla. Op. 2009-20, *supra* note 78.

84. Ethics Comm. of the Ky. Judiciary, *Judges’ Membership on Internet-Based Social Networking Sites*, Formal Judicial Ethics Op. JE 119, 1 (Jan. 20, 2012) [hereinafter Ky. Op. JE 119], available at http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_119.pdf.

85. *Id.* at 2.

86. *Id.* at 4.

87. *Id.* at 5.

88. *Id.*

“Committee”) found that there is nothing inherently inappropriate about a judge joining and making use of a social network.⁸⁹ The Committee equated such communication with other forms of communication such as cell phones or internet pages.⁹⁰ The Committee placed no express restrictions on who the judge could communicate with online.⁹¹ Instead, the Committee warned that the judge must recognize that anything he or she places on a social network is open to the public and should be considered carefully.⁹² It recognized that unless privacy controls are used appropriately, a judge’s comments to one “friend” can be viewed by all “friends” in the network.⁹³ It also recognized that the increased access a contact would have to the judge’s personal information on the judge’s profile page could establish the appearance of a stronger bond between the judge and the other party that may require either disclosure or recusal in the event that person appears before the judge.⁹⁴ The Committee charged judges with the responsibility to stay abreast of new features of, and changes to, any social networks they use and to seek guidance in the event changes present potential ethics issues for the judge.⁹⁵

In 2010, the Ohio Board of Commissioners on Grievances and Discipline (“the Board”) considered whether a judge may be a “friend” on a social networking site with a lawyer who appears as counsel in a case before the judge.⁹⁶ The Board took the same position that Kentucky adopted regarding the meaning of “friend” in the context of social networking, and opined that a judge may be “friends” with an attorney who appears before the judge.⁹⁷ The Board noted that there is nothing inherently wrong with a judge being “friends” with such attorney in an online environment because such friendship is acceptable in real life, but added that the judge’s actions and interactions must at all times promote confidence in the judiciary.⁹⁸ The Board added that at all times a judge should consider how his words and actions apply to

89. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (Jan. 29, 2009) [hereinafter N.Y. Op. 08-176], *available at* www.nycourts.gov/ip/judicialethics/opinions/08-176.htm.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. N.Y. Op. 08-176, *supra* note 89.

95. *Id.*

96. Sup. Ct. of Ohio, Bd. of Comm’rs on Grievances & Discipline, Op. 2010-7, 1 (Dec. 3, 2010) [hereinafter Ohio Op. 2010-7], *available at* http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/default.asp.

97. *Id.* at 8.

98. *Id.* at 2.

canons governing judicial ethics.⁹⁹

In South Carolina, the Advisory Committee on Standards of Judicial Conduct (“the Committee”) addressed the use of social networking sites by magistrate judges.¹⁰⁰ There, the Committee considered whether it was appropriate for the judge to be “friends” with law enforcement officers and employees of the magistrate’s office.¹⁰¹ In a brief opinion, the Committee simply noted that the judge could be a member of Facebook and be “friends” with law enforcement officers and employees of the magistrate provided they do not discuss issues related to the judge’s position as magistrate.¹⁰²

The California Judicial Ethics Committee (“the Committee”) took a middle ground, finding that a judge may be a member of an online social networking community and include lawyers who may appear before the judge in the judge’s online social networking, but the judge may not include lawyers who have a case pending before the judge.¹⁰³ It noted that appearance issues associated with maintaining such communication during the pendency of a case were significant enough to require judges to “unfriend” such individuals.¹⁰⁴ In reaching its decision, the Committee noted that a judge’s use of social networking, without more, does not “cast reasonable doubt on the judge’s ability to act impartially, demean the judicial office, or interfere with the proper performance of the judge’s judicial duties” any more than other social activity in which a judge may engage.¹⁰⁵ Like the Committees in Kentucky, New York, and Ohio, the California Committee was concerned with the impact of isolating the judge from his or her community, which increasingly includes an online component.¹⁰⁶ However, it acknowledged that special risks exist for social networking that are distinct from other modes of communication.¹⁰⁷ Among these are the loss of control one experiences when interacting in cyberspace

99. *Id.* at 8.

100. S.C. Advisory Comm. on Standards of Judicial Conduct, *Propriety of a Magistrate Judge Being a Member of a Social Networking Site Such as Facebook*, Op. No. 17-2009, (Oct. 2009) [hereinafter S.C. Op. No. 17-2009], available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

101. *Id.*

102. *Id.*

103. Cal. Judges Ass’n, Judicial Ethics Comm., *Online Social Networking*, Op. 66, 1 (Nov. 23, 2010) [hereinafter Cal. Op. 66], available at <http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>.

104. *Id.* at 10-11.

105. *Id.* at 4.

106. *Id.*

107. *Id.*

rather than in person, and the accessibility and permanence of private matters posted publicly on the Internet.¹⁰⁸ It recognized that there are considerable ethical concerns that can arise when judges participate in online social networking communities, including the possibility that the judge may inadvertently comment on pending matters; for example, something that may cast doubt on his or her impartiality, demean the judicial office, or act in a way that negatively affects the public's trust in the judiciary.¹⁰⁹ The Committee opined that because there is no ethical rule prohibiting judges from social interactions with lawyers who appear before them, there should be no such prohibition for online communications.¹¹⁰

IV. THE ARGUMENT FOR RESTRICTED USE OF SOCIAL NETWORKING

To date, each state that has addressed a judge's use of social networking has found that a judge may engage in social networking without violating judicial canons and rules governing behavior. Those states that have not placed restrictions on who the judge may interact with online have done so primarily based on two considerations: (1) a belief that there is no fundamental difference between communications made online or in-person between an individual and a judge; and (2) restricting a judge from integrating into the social fabric of the community he or she represents poses greater harm than would result from an improper comment or inadvertent disclosure. These arguments fail to support unrestricted communication authorized by those states. Moreover, those opinions fail to recognize that a new generation of attorneys, raised in an age of declining privacy, is ascending to the bench with distinct notions of privacy and the dissemination of information.

A. *Online Communication Poses Greater Risk than In-Person Communication*

In a recent study of 269 active Facebook users, it was found that the average user has 245 "friends."¹¹¹ Although these users have the ability to unsubscribe from content contributed by "friends," less than 5% of users actually did so.¹¹² Through their "friends," Facebook users

108. Cal. Op. 66, *supra* note 103, at 4, 18.

109. *Id.* at 4-6.

110. *Id.* at 6, 7.

111. PEW INTERNET, PEW RESEARCH CTR., WHY MOST FACEBOOK USERS GET MORE THAN THEY GIVE: THE EFFECT OF FACEBOOK 'POWER USERS' ON EVERYBODY ELSE 3, 5 (2012), available at <http://pewinternet.org/Reports/2012/facebook-users.aspx>.

112. *Id.* at 4.

can reach on average more than 150,000 other users.¹¹³ These numbers have important implications for judges who use Facebook or similar social networking sites. When sensitive information is inadvertently revealed or controversial comments are posted, the information can spread rapidly in a way that is drastically different from in-person communication. Thus, the argument that there is no substantive difference between in-person and online communication is flawed. The difference is substantial, and it must be recognized when decisions are made regarding whether a judge may freely engage in social networking.

Online communication is distinct. Unlike in-person communication where a person is generally aware of who may hear the dialogue, an online user cannot maintain control over who sees the message. In many instances, a statement posted to one person is also visible to all of the people who have some online association with that person. Even where a user posts a seemingly innocuous message to a “friend,” there exists a substantial risk that others who have access to the message may read it. Moreover, given the static environment of electronic communications, the likelihood that a reader may misconstrue the message when reading it out of context is increased.

B. Limiting Access to Social Networking Improves a Judge’s Position in the Community

A recent poll revealed that the majority of the public views courts as trusted arbiters removed from the power-seeking motives of politics.¹¹⁴ The poll showed that “public trust in judges is one and a half times higher than trust in the president and five times higher than trust in members of Congress.”¹¹⁵ Part of the reason for this trust is based on the public’s general perception that partisanship has no place in a court of law, even though the public acknowledges that public perception and politics permeate some decision-making.¹¹⁶ Yet, despite increasing distrust of other branches of government, trust in the court system persists.¹¹⁷ One commentator has opined that the trust exists in part because “[e]veryone wants to have a neutral and fair system of dispute resolution and everyone also wants to make sure that his or her own side

113. *Id.* at 5.

114. Keith Bybee, *U.S. Public Perception of the Judiciary: Mixed Law and Politics*, JURIST—FORUM (Apr. 10, 2011), <http://jurist.org/forum/2011/04/us-public-perception-of-the-judiciary-mixed-law-and-politics.php>.

115. *Id.*

116. *Id.*

117. *Id.*

prevails.”¹¹⁸ As such, actions that have the potential to erode the public’s confidence in the judiciary should be scrutinized. Because the use of social media by judges is “fraught with peril,” courts should seriously consider placing reasonable restrictions on such use.¹¹⁹

Although limiting a judge’s use of social media may seem somewhat unfair, it is unclear whether judges will object to the limitation. Of those judges surveyed, 34.3% agreed that the use of social media in their personal lives could compromise professional conduct codes of ethics.¹²⁰ Moreover, it is unclear whether the use of social networking is actually needed to improve the integration of judges into their communities. Only about 25% of judges surveyed agreed that use of social media is a necessary tool for public outreach.¹²¹

C. Preserving Privacy: Protecting Next Generation Lawyers

As a new generation of lawyers prepares to don judicial robes, it is critical that courts address the risks that the use of social media pose to the judicial system. Social networking is undergoing an evolution that will undoubtedly make it more difficult to maintain privacy. On Facebook, for example, a user’s name, profile picture, gender, current city, networks, “friends” list, and all the pages the user subscribes to are now publicly available information.¹²² It is searchable and can be seen by anyone online, which is a significant departure from the earlier rules that only allowed user information to be visible by people the user accepted into his or her social network.¹²³ According to Facebook’s founder, Mark Zuckerberg, the change is by design and is meant to reflect a shift in the way society views the dissemination of information—moving from a more restrictive, private control of information to a more open, shared use of information.¹²⁴ Whether his views are accurate for society at-large is unclear, but there is evidence that younger and older individuals do not have the same perspective on what they are willing to share openly with others.¹²⁵ It has been said

118. *Id.*

119. Okla. Op. 2011-3, *supra* note 64, ¶9.

120. CCPIO, *supra* note 3, at 68.

121. *Id.*

122. Marshall Kirkpatrick, *Facebook’s Zuckerberg Says the Age of Privacy Is Over*, READWRITE SOCIAL (Jan. 9, 2010), http://www.readriteweb.com/archives/facebooks_zuckerberg_says_the_age_of_privacy_is_ov.php.

123. *Id.*

124. *See id.*

125. *See* Emily Nussbaum, *Say Everything*, N.Y. MAG., <http://nymag.com/news/features/27341/> (last visited Apr. 21, 2012).

that the younger generation is “archiv[ing] their adolescence” by publicly sharing all aspects of their development online.¹²⁶ The implications of this for future judges may be significant.

Members of the Millennial Generation, those individuals born after 1980, are starting to enter the judiciary and that trend will continue.¹²⁷ They have been described as history’s first “always connected” generation, because they grew up in the internet age and have fully integrated technology into all aspects of their lives.¹²⁸ They far outpace older Americans in their use of social networking sites.¹²⁹ Approximately 75% of all Millennials have a profile page on a social networking site, and such use is more prevalent among those with some college education.¹³⁰ Only 50% of Generation X (thirty to forty-five years of age) and 30% of Baby Boomers (forty-six to sixty-four years of age) have created their own profile on a social networking site.¹³¹ The way the generations use those sites also differs. For example, approximately 20% of Millennials using social networking sites posted a video of themselves online.¹³² Comparatively, only 6% of Generation X and only 2% of Baby Boomers have posed videos of themselves online.¹³³ These differences suggest that the next generation of judges will hold more liberal views on privacy and the public dissemination of information.¹³⁴ Indeed, as one young judge stated in response to the need for access to social media: “[i]t allows you to personalize yourself and reveal facets of your life and personality to a broader range of people, including professional colleagues Judges, I think, are at an unfortunate disadvantage because we are somewhat constrained in taking advantage of reasons to be on a social network.”¹³⁵

While maintaining an open social presence undoubtedly provides some personal and professional benefits to a judge, the potential impact

126. *See id.*

127. PEW RESEARCH CTR., A PORTRAIT OF THE NEXT GENERATION, MILLENNIALS CONFIDENT, CONNECTED, OPEN TO CHANGE 1, 9 (2010) [hereinafter PEW, A PORTRAIT], available at <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf> (noting that the Millennial label refers to those born after 1980—the first generation to come of age in the new millennium).

128. *Id.* at 1.

129. *See id.*

130. *See id.* at 1, 2.

131. *Id.* at 1.

132. PEW, A PORTRAIT, *supra* note 127, at 25.

133. *Id.*

134. *Id.* at 26.

135. Ginny LaRoe, *Judges Walk Tightrope with Online Presence*, RECORDER, May 20, 2011.

of a judge's online activities on the legal system must take precedence. Moreover, there is no compelling need for public access to the personal activities of judges unless those activities have some negative impact on the judge's ability to carry out his or her duties. While it is true that transparency protects the public against decisions that are illegal, unreasonable, or improper and that transparency may bolster judicial independence, there must be limits on what should be revealed.¹³⁶ The need for transparency in the law must be separated from the desire for transparency as to the individuals who administer the law. In an age of declining privacy and open dissemination of information, the public's right to receive information on matters of public concern must be separated from the desire to receive insight into the personal activities and behaviors of those selected to serve as impartial, neutral arbiters of justice. Placing reasonable restrictions on how active judges may use social media in their personal and professional lives is necessary to preserve the integrity of the judicial system.

V. RECOMMENDATIONS

A. *Adopt Reasonable Restrictions on the Use of Social Media*

All judicial ethics opinions on the use of social media issued thus far have recognized that the use of social media by judges poses unique and potentially significant problems for the judiciary. However, only Florida, Oklahoma, and Massachusetts have taken appropriate steps to preserve the public's confidence in the judiciary and these opinions should serve as a good starting point for placing reasonable restrictions on a judge's use of social media.¹³⁷ These states have announced that a judge may utilize social media in his or her personal and professional life, but may not engage in social networking with anyone who may appear before the judge; and may not allow those individuals to identify the judge as a "friend" on their profile pages.¹³⁸

These opinions in Florida, Oklahoma, and Massachusetts all implicitly recognize the distinctions between in-person communication and online communication and should be adopted by other states.

136. Justice Angelina Sandoval-Gutierrez, *Transparency in the Supreme Court*, ABS-CBN NEWS (Mar. 21, 2010), <http://www.abs-cbnnews.com/views-and-analysis/03/20/10/transparency-supreme-court>.

137. See generally Fla. Op. 2009-20, *supra* note 78; Okla. Op. 2011-3, *supra* note 64; Mass. Op. 2011-6, *supra* note 70.

138. See generally Fla. Op. 2009-20, *supra* note 78; Okla. Op. 2011-3, *supra* note 64; Mass. Op. 2011-6, *supra* note 70.

Because of increased risk associated with online activities, these courts have adopted restrictions that limit the content of a judge's online communication. While such restrictions impose burdens on the judge, the judge must recognize that his or her personal desires must be subservient to the greater good of the legal institution. States like Kentucky that have placed fewer restrictions on the use of social media have done so based on the view that judges should be allowed to fully engage in their communities, including the online component of that community.¹³⁹ However, even Kentucky recognizes the propriety of placing restrictions on judges' activities. Its own judicial rules provide: "[a] judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."¹⁴⁰

States examining the propriety of placing restrictions on a judge's use of social media should adopt the more restricted approaches taken by Florida, Oklahoma, and Massachusetts. Although these opinions provide some additional protection, alone they are insufficient to fully protect against the inherent dangers associated with social media. As such, additional action is warranted.

B. Institute Mandatory Social Media Training and Policies for Judges

Social media provides opportunities to promote the effective and efficient delivery of information when used properly, but it poses unique risks to members of the judiciary based on their role in society. State and federal court systems must recognize that the phenomenon of social media has the potential to reshape public perception of the judiciary. As new, younger attorneys, bred on social media progress to the bench, the risk will increase. Existing judicial codes of conduct are inadequate to fully apprise judges of the unique ethical issues raised by the use of social media. State judicial ethics opinions issued to date provide limited guidance on how social media works, its inherent risks, and the myriad of ways a judge may directly or inadvertently erode public confidence in the judiciary. As such, given the increasing influence of social media on human communication, it is imperative that federal and states courts develop training programs on the proper use of social media and clear policy statements outlining the parameters of such use.

139. Ky. Op. JE 119, *supra* note 84.

140. Ky. Op. JE 119, *supra* note 84 (citing 36 KY. REV. STAT. ANN. § 4.300(A) cmt. (West 2010 & Supp. 2012)).

To fully protect the judiciary, society must first recognize that despite their lofty professional accomplishments and laudable desire to serve the public, judges, at base, are no different than other members of society. They have the same human frailties that make them vulnerable to the pitfalls of social networking.¹⁴¹ Yet, unlike many other members of society, when a judge makes a mistake online, its effects reach far beyond the individual and can affect the larger legal establishment. As such, judges should be provided with detailed training on how social networking really works, including instruction on how data is stored and retrieved, and how that data can be viewed by unintended parties. Such training should also provide instruction on how seemingly innocent comments may be misconstrued in the static online environment where context is often absent. This need is particularly relevant for younger attorneys, whose views regarding appropriate communication have largely been shaped by relaxed standards that permeate online communication.¹⁴²

Imposing such obligations may actually be welcomed by members of the judiciary. One survey of court personnel found that 97.6% of respondents “agreed that judges and court employees should be educated about appropriate new media use and practices.”¹⁴³ That report predicted that the need to provide training and education will increase because under the current guidance, it is likely that more judges will develop personal and professional presences on social networking sites.¹⁴⁴

CONCLUSION

It has been said that a sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people.¹⁴⁵ To ensure an independent, impartial judiciary and to preserve public confidence in their integrity and impartiality, courts should adopt policies restricting how judges may use social media in their personal and professional lives, and provide training and policy guidance on special risks inherent

141. See, e.g., *List of Judges*, ATLANTA J. CONST., <http://www.ajc.com/news/list-of-judges-stepping-596872.html> (last visited Jan. 23, 2013) (reporting that “since early 2008, at least 16 Georgia judges have resigned or been removed from office either under a cloud of suspicion or after being publicly accused of misconduct”).

142. See *infra* Part V.C.

143. CCPIO, *supra* note 3, at 10.

144. *Id.*

145. Warren Burger, *What's Wrong with the Courts: The Chief Justice Speaks Out*, 69 U.S. NEWS & WORLD REPORT 8, Aug. 24, 1978, at 68, 71 (address to ABA meeting, Aug. 10, 1970).

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in its use. The unrestricted use of social media by judges poses substantial risks that outweigh its potential benefits. The approaches taken by Florida, Massachusetts, and Oklahoma should be adopted as an initial step to address the dangers inherent in the use of social media by the judiciary.