Face-Off on Facebook: Judges and Lawyers as Social Media "Friends" in a Post-Herssein World

William F. Hamilton*, David Hazouri, Jan L. Jacobowitz***, Meenu Sasser****, Ralph Artigliere*******

Abstract:

Should a judge be disqualified from a case based solely on a Facebook friendship with one of the attorneys?

The Florida Supreme Court recently answered the question in the negative in Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n, Case No. SC17-1848, 2018 Fla. LEXIS 2209 (Fla. Nov. 15, 2018), when it held that "an allegation that a trial judge is a Facebook 'friend' with an attorney appearing before the judge, standing alone, is not a legally sufficient basis for disqualification."

The decision brings Florida in line with the majority view in other states that "have adopted an attitude of, 'it's fine for judges to be on social media, but proceed with caution." However, the opinion's implications are multifaceted for Florida judges and the lawyers who appear before them.

Rezumat:

Ar trebui un judecător să fie descalificat dintr-un caz exclusiv pe baza unei prietenii pe Facebook cu unul dintre avocați?

*** William F. Hamilton** is a legal skills professor at the University of Florida Levin College of Law. He also serves as the executive director of the law school's International Center for Automated Information Retrieval. He is widely published and the co-author, with Ralph Artigliere, of the LexisNexis Practice Guide Florida e-Discovery and Evidence available from The Florida Bar.

**** David Hazouri** practices family law and commercial litigation in Miami with Rafool, LLC, and is the current chair of the Electronic Discovery and Digital Evidence Committee of The Florida Bar's Business Law Section.

***** Jan L. Jacobowitz** is a lecturer in law and the director of the Professional Responsibility & Ethics Program at the University of Miami School of Law where she also teaches professional responsibility for lawyers in the digital age and social media and the law. She is the co-author of Legal Ethics and Social Media – A Practitioner's Handbook. She speaks on social media throughout the country and is widely quoted on the topic. Professional e-mail: jjacobowitz@law.miami.edu.

****** Meenu Sasser** is a circuit judge in the 15th Judicial Circuit, Palm Beach County. She presides over complex litigation cases and often speaks on topics involving ESI and social-media discovery. The authors collectively teach social media for judges at the Florida College of Advanced Judicial Studies. Professional e-mail: msasser@pbcgov.org.

******* Ralph Artigliere** was a trial lawyer and circuit judge in Florida for more than 30 years. He currently writes and teaches trial practice, procedure, legal ethics, and e-discovery to lawyers and judges around the country. Professional e-mail: artiglierer@gmail.com.

Curtea Supremă din Florida a dat recent un răspuns negativ la această întrebare în cauza Law Offices of Herssein & Herssein, P.A. c. United Servs. Auto. Ass'n, Cauza nr. SC17-1848, 2018 Fla. LEXIS 2209 (Fla. 15 noiembrie 2018), când a hotărât că „o afirmație că un judecător de primă instanță este „prieten" pe Facebook cu un avocat care apare în fața judecătorului, în sine, nu este o bază suficientă din punct de vedere legal pentru descalificare."

Decizia aliniază Florida la opinia majoritară din alte state care „au adoptat atitudinea că este în regulă ca judecătorii să fie pe rețelele de socializare, dar să acționeze cu precauție." Cu toate acestea, implicațiile acestei opinii sunt multiple pentru judecătorii din Florida și avocații care apar în fața acestora.

Keywords: judges, social media, judicial canons, appearance of impropriety, disqualification

The Scope and Impact of the *Herssein* Decision

Determining the legal significance of a social media relationship between trial judges and lawyers is not easily susceptible to a bright line or per se analysis.[151] Moreover, the *Herssein* ruling is based upon a narrow record and only addresses whether a Facebook friendship between a trial judge and a lawyer appearing before the judge, standing alone, would merit an automatic disqualification.

The court did not analyze the extent or nature of the Facebook friendship between the trial judge and attorney because there were no record facts detailing the scope of Facebook activities between the trial judge and attorney. In other words, the court did not have a record disclosing their respective number of Facebook friends, the type and quality of their postings, likes, comments, shares, messages, or other activity. On this record, the court addressed only the narrow issue of whether the existence of a Facebook friendship, *without more,* mandates disqualification of a trial court judge.[152]

Still, there are important ramifications of the court's holding and its conclusion that "there is no reason that Facebook 'friendships' – which regularly involve strangers – should be singled out and subjected to a per se rule of disqualification."[153] An adversary's Facebook relationship with the judge might require disqualification, but it will depend on the extent of the "friendship" between the trial judge and attorney. And, as noted in the *Herssein* dissent, the court's ruling may make it hard for parties

[151] *Herssein*, 2018 Fla. LEXIS 2209 at *22-23 (Labarga, J., concurring) and *26-28 (Pariente, J., dissenting).

[152] The Supreme Court wrote: "On review of the petition, the Third District explained the basis for the motion to disqualify that is relevant here: 'The motion [to disqualify] is based in part on the fact that [Israel] Reyes [— an attorney appearing before the trial judge on behalf of a potential witness and potential party in the pending litigation —] is listed as a "friend" on the trial judge's personal Facebook page. In support of the motion, Iris J. Herssein and Reuven Herssein, president and vice president of the Herssein Firm, signed affidavits in which they swore, "[b]ecause [the trial judge] is Facebook friends with Reyes, [the executive's] personal attorney, I have a well-grounded fear of not receiving a fair and impartial trial. Further, based on [the trial judge] being Facebook friends with Reyes, I…believe that Reyes, [the executive's] lawyer has influenced [the trial judge]."'…The Third District framed the issue as 'whether a reasonably prudent person would fear that he or she could not get a fair and impartial trial because the judge is a Facebook friend with a lawyer who represents a potential witness and party to the lawsuit.'" *Id*. at *2-3.

[153] *Id*. at *21.

to challenge social media relationships between their assigned trial judge and opposing lawyers "because it is difficult and intrusive for a litigant to determine with whom the judge has connected, with whom the judge has declined to connect, and what type of communication the judge engages in on these [social media] platforms."[154]

Traditional Standards for Reasonable Basis for a Motion to Disqualify

The *Herssein* court begins its analysis with the premise that Florida courts and the Florida Supreme Court have "long recognized the general principle of law that an allegation of mere friendship between a judge and a litigant or attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification."[155] The reasonableness of a litigant's belief, therefore, depends on something more than mere friendship. Indeed, the court noted that "'friendship' in the traditional sense of the word does not necessarily signify a close relationship."[156] Turning its attention to Facebook "friends," the court similarly holds that something more than a mere online social media connection is required to establish a reasonable basis for disqualification. This is in line with "the majority of state judicial discipline bodies and judicial ethics advisory committees…."[157]

The court's decision diverges from Florida Judicial Ethics Advisory Committee (JEAC) opinions that a judge's selection of Facebook friends necessarily "conveys or permits others to convey the impression that they are in a special position to influence the judge" in violation of Canon 2(B) of the Florida Code of Judicial Conduct.[158] The *Herssein* dissent disagrees with the majority's comparison of Facebook to traditional friendships[159] and expresses the view that a Facebook friendship could undermine a litigant's confidence in the ability of the trial judge to be impartial.[160]

However, the *Herssein* court is *not* saying that all social media relationships are permissible.[161] Like traditional friendships, the quality, quantity, and nature of the friendship may give rise to legitimate concerns about the fairness of the judge. The majority concludes that traditional friendship, Facebook friendship, or some other social media or analog relationship may present circumstances requiring disqualification. Standing alone, those relationships do not.[162] The devil is clearly in the details. So how do the bench and bar conduct themselves online in a manner that protects litigants and preserves the public confidence in our judicial system while allowing judges and lawyers to avail themselves of the utility of social media? What special challenges does the social media revolution create for lawyers and judges? Can the court system, the judicial canons, and rules of professional conduct evolve in a manner that permits lawyers and judges to fully engage in today's digital social and business landscape?

---

[154] *Id.* at *32.

[155] *Id.* at *10.

[156] *Id.* at *9.

[157] *Id.* at *16-17.

[158] *Id.* at *18-19 (quoting Fla. JEAC Op. 2009-20 (Nov. 17, 2009)). *See also Domville*, 103 So. 3d 184; Fla. JEAC Op. 2013-14 (July 30, 2013) (extending the reasoning of Fla. JEAC Op. 2009-20 to Twitter); Fla. JEAC Op. 2012-12 (May 9, 2012) (extending the reasoning of Fla. JEAC Op. 2009-20 to LinkedIn); Fla. JEAC Op. 2010-06 (Mar. 26, 2010) (reaffirming the Fla. JEAC Op. 2009-20 position).

[159] *Id.* at *27.

[160] *Id.* at *24.

[161] Nor is the dissent saying that responsible Facebook use by a judge is problematic. *Id.* at *30.

[162] *Id.* at *21.

The Social Media Explosion

Social media, like many evolving communication methods involving technology and the internet, defies specific definition, but it may be basically and broadly described as "[i]nternet applications which permit individuals or organizations to interactively share and communicate."[163] Social media is playing an exponentially increasing role in our lives and now pervades society. In a single internet minute, there are 973,000 Facebook logins, 4.3 million YouTube videos viewed, 481,000 tweets, and 2.4 million snaps created. In a month, there are more than 42 billion Facebook logins.[164] Facebook has succeeded in connecting users by shared likes, dislikes, concerns, and even cultural prejudices and biases. Social media has quickly become a valuable, if not essential, tool for individuals, businesses, politicians, and governmental entities, including Florida's court system.[165]

In fact, use of social media in Florida courts is on the rise,[166] and the Florida court system has published guidelines for the use of social media by judges and courts.[167] Judges are encouraged to use social media to engage the public and convey information. The official Twitter account of The Florida Bar (@TheFlaBar) covers bar association news and other interesting topics and garnered recognition from the ABA as one of the "Best Legal Twitter Accounts" in 2018.[168] Despite this encouragement, many judges are reluctant to dip their toes into the social media waters for fear of what lurks below.

In fact, judges may be compelled to actively engage in social media to gain a better understanding of how the vast majority of those who appear before them are communicating.

Nonetheless, as millions turn to social media for information and connections with others, using social media as a tool to connect and communicate has become increasingly compelling to judges who feel the need to connect for personal,

[163] *The Sedona Conference Glossary: E-Discovery & Digital Information Management (4th ed.)*, 15 The Sedona Conference J. 305, 355 (Fall 2014).

[164] Jeff Desjardins, *What Happens in an Internet Minute in 2018*, Visual Capitalist (May 14, 2018), https://www.visualcapitalist.com/internet-minute-2018/.

[165] Florida Courts Communications Plan calls for the use of communications technology, including social media to the extent appropriate in judicial settings. Florida Supreme Court Public Information Office, *Delivering Our Message*: *Court Communication Plan for the Judicial Branch of Florida, Year One Implementation Report* at 3 (May 22, 2017), *available at* https://www.flcourts.org/content/download/216628/1965714/2016-Judicial-Branch-Court-Communication-Plan.pdf. The Supreme Court itself is on Facebook and recently began showing its oral arguments on Facebook. In 2018, the court began streaming its oral arguments on Facebook Live at **https://**www.facebook.com/floridasupremecourt/.

[166] "Florida Courts are more frequently using social media for communication, education and outreach, crisis management, and case-related postings." Florida Supreme Court Public Information Office, *Delivering Our Message*: *Court Communication Plan for the Judicial Branch Year Two Report* (July 12, 2018), *available at* https://www.flcourts.org/content/download/216628/1965714/2016-Judicial-Branch-Court-Communication-Plan.pdf.

[167] Florida Court Public Information Office, *Florida Courts Social Media Policy and Guidelines Adopted by FCPIO* (Mar. 23, 2017), *available at* http://www.fcpio.org/documents/FCPIO-Social-Media-Guidelines-2017.pdf.

[168] Sarah Mui, *Best Legal Twitter Accounts of 2018*, ABA J. (Dec. 1, 2018), *available at* **http://**www.abajournal.com/magazine/article/best_law_twitter_2018 (Georgia's chief judge of the court of appeals also made the elite list).

professional, or political reasons.[169] Of course, many lawyers engage in social media before becoming judges, and it follows that an increasing number of new judges will remain active on social media for personal and professional purposes, including reelection.

Some judges and commentators consider social media as an inevitable and essential method to disseminate information and connect with people and organizations.[170] Social media, while presenting practical, social, ethical, and security hurdles,[171] has become virtually impossible to ignore for many judges, who view social media as a tool for implementing the judicial ethical responsibility to stay connected to the community.[172] John Browning, a Dallas litigator and SMU Law School adjunct professor, explains:

"[W]hile a judge's misuse of such new media can violate canons of ethics and focus the harsh glare of public perception, so can other, more traditional communications or relationships formed by judges. Depriving judges of technical familiarity that can inform their handling of cases is hardly desirable, and neither is isolating judges from something viewed as so vital to the community they serve. Judges should be encouraged to embrace social media, albeit with caution, education, and guidance."[173]

Facebook, the specific social media platform at issue in the *Herssein* case, came on the scene in 2004[174] and rather quickly exploded into a communication and networking service for millions of people and organizations around the world.[175] While it is not the only service of its kind, with more than 2 billion users, it is one of the most popular online networking sites.[176] The majority opinion accurately describes Facebook and the many ways in which users may establish connections with friends and communicate with friends and the broader set of internet users.[177]

---

[169] Choosing all non-internet tools for communicating in an election campaign against a social-media savvy opponent is akin to shopping at a local flea market instead of online. Fortunately, the JEAC provides pre-election education for candidates that includes detailed guidance on use of social media in the campaign.

[170] Jan L. Jacobowitz & John G. Browning, Legal Ethics and Social Media — A Practitioner's Handbook 236-239 (ABA 2017).

[171] Improvident or less than scrupulous use of social media can be counter-productive to a judge, judicial candidate, or lawyer's career and reputation. *See* C. Anderson, *Judicial Candidate's Facebook Page "Liked" Racially Insensitive Posts*, The Sarasota Herald-Tribune, Dec. 6, 2018, *available at* https://www.heraldtribune.com/news/20181205/judicial-candidates-facebook-pageliked-racially-insensitive-posts.

[172] Fla. Code of Jud. Cond., Canon 4A, *available at* http://www.floridasupremecourt.org/decisions/ethics/canon4.shtml (encourages judges to engage in activities to improve the law, the legal system, and the administration of justice subject, of course, to the other requirements of the code).

[173] John G. Browning, *The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media*, 8 Faulkner L. Rev. 131, 137 (2016).

[174] *Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610 (N.Y. App. Div. 2015).

[175] Anne Sraders, *History of Facebook: Facts and What's Happening in 2018*, The Street (Oct. 11, 2018), https://www.thestreet.com/technology/history-of-facebook-14740346 .

[176] *Id.*

[177] *Herssein*, 2018 Fla. LEXIS 2209 at *11-13. While beyond the scope of this article, it is important to note that all is not well in the social media world. The revelations of the past few years regarding the business model of most social media companies has tarnished the early halo. Additionally, business ethics and protection of customer data by social media companies have come under scrutiny in the wake of abusive use during the 2016 election and various hackings and thefts of customer data. In a short time, social media companies have slid in public opinion from helpful social platforms to surveillance predators. Suddenly, we are all quite aware that social media companies are in the business of selling targeted advertising. The advertising targets are the social media account holders and the targeting is accomplished by analyzing the social media posting and content of the account holder, the account holder's friends and other similar próles. Additionally, because the goal is to sell third-party advertising, social media companies have designed their products to provide incentives for users to continually engage with and stay on the platform. The psychological impact of social media is only beginning to be understood. The only immediate certainty is that social media is not a benign force.

Judicial Disqualification Historically

Litigants have a right to a fair and impartial judge, and a judge must avoid impropriety and the appearance of impropriety in all of the judge's activities.[178] Under Canon 2B of the Florida Code of Judicial Conduct, a judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. However, the Code of Judicial Conduct recognizes the need for judges to engage the community and encourages judges to do so, albeit with express limitations and guidance. [179]

Unfortunately, interaction between judges and the public – and lawyers in particular – is declining. When several of this article's authors began their practices, the courthouse chambers for judges and their judicial assistants were unrestricted and open. Lawyers with business in the courthouse could visit with judges and judicial assistants. There were common break areas for counsel and judges. Judges, lawyers, and the public used the same entrances and exits to the courthouse and elevators. Pleadings were filed at the courthouse. Today, much court business and all court filings are conducted electronically, further decreasing opportunities for encounters between lawyers and the judiciary. Our legal environment has not found a replacement for this lost common physical space and its beneficial access and interaction.

The loss of interaction, however, means that judges must adapt to the changing cultural milieu and cannot, and probably should not, isolate themselves. Judges cannot be expected to avoid all friendships and human contact outside of their judicial responsibilities. Social media offers a new engagement opportunity, but how may a judge remain both open and available in a manner that does not appear to be unfair to any party appearing before the judge? Because irresponsible or improper conduct by judges will erode public confidence in the judiciary, judges are required to avoid even the appearance of impropriety and should anticipate constant public scrutiny.[180] Judges must willingly accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen.[181] Numerous Judicial Ethics Advisory Opinions address the tangled circumstances created when judges engage others in professional, social, business, and political discourse or transactions.[182]

The Florida Supreme Court favors a bright-line interpretation of rules when the language of the rule is plain, and a bright-line interpretation serves the purpose of the rule.[183] However, when reviewing the legitimacy of a motion to disqualify a judge, numerous layers of competing policy concerns complicate the

[178] Fla. Code of Jud. Cond., Canon 2.

[179] *See* Fla. Code of Jud. Cond., Canon 4 ("A Judge Is Encouraged to Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.").

[180] *See* Commentary to Fla. Code of Jud. Cond., Canon 2A, *available at* http://www.floridasupremecourt. org/decisions/ethics/canon2.shtml.

[181] *Id.*

[182] *See* the table of JEAC opinions on disclosure/recusal/disqualification created by the Sixth Judicial Circuit found at http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/subjectopinions/DisclosureRecusal/disclosure.html.

[183] *See Wilson v. Salamon*, 923 So. 2d 363, 367 (Fla. 2005) (holding that plain-meaning interpretation of the language of the rule sanctioning dismissal for failure to prosecute, Fla. R. Civ. P. 1.420(e), furthers the purpose of decreasing litigation and fosters the smooth administration of the trial court's docket).

determination. The traditional standards for showing a wellfounded fear of bias are not easily applied to the new and ever-changing relationships engendered by social media.[184] Various individuals using social media platforms like Facebook may have markedly different levels of interaction, engagement, and connection to others on Facebook, including their Facebook "friends." Parties who are Facebook users would typically rely on their own Facebook experience when considering the implications of learning that the opposing counsel and presiding judge are long-time Facebook friends. Although the friendship may be innocuous, it will likely be initially considered in the context of the litigant's own experience. Thus, the vast spectrum of Facebook conduct among users is a challenging variable in any analysis that attempts to determine the actual nature of the Facebook involvement between a judge and lawyer who are Facebook friends.

Information-rich social media differs from personal "data" that an individual might glean from a benign passing relationship in a community organization. Facebook friends may have access to a plethora of information about their Facebook friends. Subject to certain privacy settings, friends see each other's posts, likes, comments, pictures, commentary, and significantly the same information about friends of friends. While most social-media websites provide optional permissions that may limit data access, the default settings almost always allow expansive disclosure of personal information. An attorney Facebook friend of a judge may have access to often voluminous and important – indeed intimate – information about the judge that the opposing counsel and party may not have. As the *Herssein* dissent noted: "[T]he ease of access to the 'friend's' information allows Facebook 'friends' to be privy to considerably more information, including potentially personal information, on an almost daily basis." Equating a traditional friend to a Facebook friend is indeed a "false equivalence."[185] In short, social-media friendships[186] may enable an information disequilibrium creating the appearance of unfair access.

Compounding the complexity of social media relationships is the lack of a

[184] The operative facts may become unusual and even outlandish if the motion to disqualify involves the Facebook pages of persons other than the judge and a lawyer appearing before the court. In *Joshua v. State*, 205 So. 3d 851 (Fla. 4th DCA 2016), the defendant alleged at trial that he reasonably believed that he would not receive a fair trial because a detective witness was Facebook friends with the trial judge's wife, and that the detective was also Facebook friends with the assigned assistant state attorney. The trial court denied the motion, and the determination was summarily affirmed on appeal on the grounds that the absence of Facebook friendship with the judge rendered the case distinguishable from the allegations found legally sufficient in *Domville*. Given the disapproval of the *Domville* reasoning in *Herssein*, it follows that Facebook friendship between a witness and the judge's wife should not merit disqualification.

[185] *Herssein*, 2018 Fla. LEXIS 2209 at *27.

[186] The majority's decision regarding Facebook relationships also applies to facially accepting other social media relationships, such as LinkedIn and Twitter unless further factual circumstances establish the criteria for disqualification. In referring to the now rejected "minority position" held by the Florida courts and JEAC, the majority notes that "[t]he JEAC has since reaffirmed its support of the minority position and extended the reasoning of the minority position to other social media and social networking services including LinkedIn and Twitter. *See* Fla. JEAC Op. 2013-14 (July 30, 2013) (extending the reasoning of the minority position to Twitter); Fla. JEAC Op. 2012-12 (May 9, 2012) (extending the reasoning of the minority position to LinkedIn); Fla. JEAC Op. 2010-06 (Mar. 26, 2010) (reaffirming its support of the minority position)." *Id*. at *19. The opinion then holds: "The JEAC's position simply cannot be reconciled with this [c]ourt's longstanding treatment of disqualification motions based on mere allegations of traditional 'friendship.'" *Id*. at *21.

practical method to discover sufficient information about the involvement between the judge and lawyer without potentially invading privacy and creating a burdensome, timeconsuming foray unrelated to the case merits. The complexity of discovering underlying social media facts and unpacking the true nature of online relationships – plus the quality and quantity of available information – makes the formulation of disqualification guidelines difficult. Adding to the difficulty is the rapidly changing culture of social media and platforms for internet interaction.[187] Keeping up with the ongoing evolution in use and types of social media will be a challenge for court systems and their ethics and advisory committees trying to promulgate consistent and persistent guidelines, not to mention educating judges and lawyers as guidelines may change.[188]

Guidance for Lawyers and Judges Post-*Herssein*

While the *Herssein* case clearly establishes that a Facebook friend relationship between a judge and a lawyer before the court, *without more,* is not disqualifying, the majority opinion contains no guidance on what factors in a social media relationship would rise to the level of reasonable belief of unfairness or how such information might be obtained. The concurring opinion recommends that judges avoid Facebook altogether.[189] While many judges will weigh the complexities of a social media presence and its value and decide to stay away as suggested by the concurring opinion, many others will feel compelled to connect with others as social media continues to evolve and expand in importance in our society.

Judges need guidance and information on how they may ethically connect with others via social media. Those who decide to use social media must learn and remain current as to conduct that complies with the judicial canons, as well as social media relationships that may lead to recusal or disqualification from cases. Lawyers must also remain current so that they may determine both whether to engage in social media contact with judges before whom they may appear and whether to challenge a relationship between a judge and an opposing counsel.

Starting with Facebook, what are the factors that may be problematic in exclusive lawyer-judge Facebook relationships? Lawyers and judges should know what information is gained by

[187] The social-media landscape evolves daily. Would anyone have imagined just three years ago that a U.S. president would use Twitter all hours of the day and night to feed the media and millions of followers his immediate thoughts on topics from politics, to economics, to national and international issues, and more? Or would legal experts anticipate that a sitting Texas judge would maintain and frequently update a website, a Twitter and an Instagram account, and two Facebook pages replete with personal, social, and professional information to information about her election candidacy? Also in Texas, some 11% of Texas lawyers are engaged in a Facebook group for professional purposes that has more than one million peer-to-peer interactions on issues they encounter in their law practice. This makes the group the largest voluntary bar association in the state. *See* J. Council, *Texas Lawyers Facebook Group, With 1 Million Interactions, Has Become State's Largest Volunteer Bar Association*, Texas Lawyer (Nov. 26, 2018), *available at* https://www.law.com/texaslawyer/2018/11/26/social-media-mentoring-texas-lawyers-facebook-groupwith-1-million-questions-answered-has-become-states-largest-volunteer-bar-association/

[188] A positive aspect of *Herssein*, and the majority position concerning social media nationally, is that judges will have a greater opportunity to learn about social media through increased participation. Understanding the workings of social media may assist judges in resolving discovery and evidentiary issues involving social media in cases on their docket.

[189] *Id.* at *23-24.

Facebook friends. Depending on how the judge conducts his or her social-media presence, a Facebook friend may have access to personal and professional information that may provide insight into the judge's thinking and allow for direct or subtle connection or communication with the judge. Information about the judge, and, perhaps more significantly, what is important to the judge at any given time, may be gleaned from the judge's Facebook postings or postings of others. Knowing about a judge in this way can clearly be an advantage for any lawyer who reviews the judge's personal or professional Facebook accounts and especially those who connect with the judge as a Facebook friend.

Social media, such as LinkedIn, Twitter, Snapchat, and many others may also give insight into the judge's thoughts, likes, dislikes, and desires. Prudent litigators will relish such information. Accordingly, a judge who engages on Facebook or other social media and connects with some lawyers and not with others may create disqualifying circumstances when a party whose attorney does not have a social-media connection with the judge concludes that the situation is inequitable.

Thus, perhaps in the same vein that a judge decides it is necessary to disclose other traditional relationships with counsel, the judge may volunteer social-media information that the judge deems problematic under the common law of disqualification. The amount and nature of the information (*e.g.*, the number of friends, the volume of postings, and the general nature of the posting) would, of course, depend on the circumstances. In other words, a robust factual description of the nature of any specific social-media judicial presence would be a matter of disclosure in the judge's discretion sua sponte or upon request by a concerned party.

While many states have issued ethics opinions that generally discuss judges' use of social media, most of the opinions do not provide specific guidelines; however, the California Judicial Ethics Committee elaborates on social-media guidance in an advisory opinion that Florida judges may find useful:

The California Judicial Ethics Committee considers the following factors in determining whether the attorney is in a special position to influence the judge and cast doubt on the judge's ability to be impartial:

1) The nature of the social networking site

The more personal the nature of the page, the greater the likelihood that including an attorney would create the appearance that the judge would be in a special position to influence the judge, or cast doubt on the judge's ability to act impartially.

2) The number of "friends" on the page

The greater the number of "friends" on the judge's page the less likely it is one could reasonably perceive that any individual participant is in a position to influence the judge.

3) The judge's practice in determining whom to include

As with the number of people on the page, the more inclusive the page the less likely it is to create the impression that any individual member is in a special position to influence the judge.

4) How regularly the attorney appears before the judge

If the likelihood that the attorney will actually appear before the judge is low, the more likely it is that the interaction would be permissible. On the other hand, if the attorney appears frequently before the judge the interaction is less likely to be permissible.[190]

[190] *Id.* at *30 (quoting Cal. Jud. Ethics Comm. Op. 66 at 8 (Nov. 23, 2010)). *See* Jacobowitz & Browning, Legal Ethics and Social Media — A Practitioner's Handbook at 139-171 (2017).

In the absence of guidance from Florida courts or JEAC opinions, other questions abound: Should judges be required to maintain only public pages so that anyone may access the judge's posts? Alternatively, should judges be required to accept all friend requests? Do judges need to have some type of disclaimer on their social-media pages? What is the distinction between a judge posting to educate the public in accordance with the canons and a judge's posts that may be deemed to be impermissible violations of the canons that require impartiality, confidentiality, and the avoidance of an appearance of impropriety?

Post *Herssein*, judges seeking a social media presence have a green light, or at least a "proceed with caution" light, but regrettably they lack guidance on the specific social media behavior that complies with ethical requirements. Outlining the scope of required disclosures pertaining to an online relationship between a judge and counsel is not easy but highly prudent. However, efforts to address these issues through the courts and by advisory opinions cannot cover every conceivable scenario and may struggle to keep up with changes in social media and in the ways judges and lawyers use them. Thus, it remains incumbent on judges to engage in the longstanding and fundamental process of avoiding the appearance of impropriety or bias by considering how a relationship or connection with parties or their lawyers would appear to the opposing party.[191] For most, it should not take an ethics opinion to do that – rather it is the straightforward application of traditional judicial guidelines to our contemporary, fast-moving society and the practice of law.

To stay within the lines, judges (and lawyers) must understand the social media they use. While the digital world is challenging to master, it is not really all that mysterious or even complex. Keeping in mind that social media is geared toward disclosure, it is important to understand what will be disclosed and how that disclosure will be conveyed. From "likes" to "user groups" to GPS tags, what is being communicated, who it is being communicated to, and what it says about the communicator as framed by the outlet, itself, may all potentially matter to any analysis of a social media connection. To be sure, it takes time and commitment to learn. But lawyers and judges no longer have the luxury of considering whether to learn about technology and social media. The time has come for all to catch up and stay caught up with these important areas, because behavior, decisions, and conduct, personal and professional, necessarily takes place in the world we live in, not what we would like the world to be. However, if a judge has a legitimate question about proposed social-media activity, requesting an opinion from the Judicial Ethics Advisory Committee may not only be prudent, but also may provide useful guidance for others contemplating a socialmedia presence.

Conclusion

As social media continues to evolve and pervade our society, it becomes increasingly unrealistic and unwise to suggest that judges remain passive observers. In fact, judges may be compelled to actively engage in social

[191] Fla. Code of Jud. Cond., Commentary, Canon 2A ("A judge must avoid all impropriety and appearance of impropriety. 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.").

media to gain a better understanding of how the vast majority of those who appear before them are communicating. Nonetheless, a judges' level of social-media engagement is tempered by ethical constraints, just as judicial involvement in other aspects of society has always been limited for those accepting the mantle of judge.

What differs today is that technology and social media have increased the number and complexity of the circumstances in which judges may interact with others. The relative social-media inexperience of much of the judiciary and the rapid change in perspective exemplified by the Florida Supreme Court's *Herssein* opinion demonstrate that guidance and continuing education in this area for judges and lawyers alike has become increasingly important. Ultimately, we must look to our judiciary to determine whether a friendship on Facebook or other social media involvement creates the appearance of impropriety or a reasonable basis upon which an individual may believe that the judge will not be able to fairly preside over a case. Judges will continue to be compelled to prudently define the parameters of their Facebook friends and online conduct.

Nota redacției: Articolul a fost publicat inițial în *Florida Bar Journal*, 2019, Revista Forumul Judecătorilor primind permisiunea autorilor și a revistei americane în vederea republicării exclusive a studiului în România.