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To Friend or to Unfriend?: It's Time to Update the Status on What it Means to be Facebook Friends

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TO FRIEND OR TO UNFRIEND?: IT'S TIME TO UPDATE THE STATUS ON WHAT IT MEANS TO BE FACEBOOK FRIENDS

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I. INTRODUCTION

Since its inception in 2004, the number of active users on Facebook has grown from 1 million to the current 2.2 billion in 2018.[1] Facebook has evolved from a basic social networking site, into a tool that professionals can use in their everyday life.[2] As a result, judiciaries and ethical committees across the nation have needed to implement new laws and regulations to address the growing issues brought forth by these social networking sites.[3] However, although several states have worked towards modernizing their views as to what Facebook use encompasses, some ethical committees continue to enforce stringent regulations that reflect

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1. *See Facebook Fast Facts*, CNN (Feb. 15, 2019, 2:20 PM), https://www.cnn.com/2014/02/11/world/facebook-fast-facts/index.html (providing a timeline of the milestones Facebook has reached since its launch in 2004); *see also* Christina Newberry, *23 Facebook Marketing Statistics That Matter Most*, TARGET MEDIA PARTNERS INTERACTIVE (April 12, 2018), https://www.targetmediapartners.com/23-facebook-marketing-statistics-that-matter-most/ (finding "that U.S. adults spend an average of 25.29 minutes per day on Facebook").

2. *See* Judi Sohn, *12 Ways to Use Facebook Professionally*, GIGAOM (July 24, 2007, 6:30 AM), https://gigaom.com/2007/07/24/12-ways-to-use-facebook-professionally/ (discussing how Facebook allows users to form connections with former colleagues, participate in groups related to businesses, and donate to charitable causes); *see also* Elizabeth Grieco, *More Americans are Turning to Multiple Social Media Sites for News*, PEW RES. CTR. (Nov. 2, 2017), http://www.pewresearch.org/fact-tank/2017/11/02/more-americans-are-turning-to-multiple-social-media-sites-for-news/ (stating that "Americans are more likely than ever to get news from multiple social media sites" and that Facebook is the leading network to provide such news).

3. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (finding that judges may participate on social networking sites, but must proceed with caution as to not appear biased); *see also* Mark C. Palmer, *Can Lawyers and Judges Be Social Media Friends?*, ATT'Y AT WORK (Oct. 24, 2017), https://www.attorneyatwork.com/lawyers-judges-social-media/ (discussing the two approaches states have taken when deciding whether judges can be Facebook friends with attorneys, either allowing the action or not allowing with strict restrictions).

outdated ideas.[4]

In a controversial decision from Florida's Third District Court of Appeal, an attorney's motion to disqualify a judge, based on a Facebook friendship between the judge and another attorney, was denied.[5] Although this decision went against the precedent set by other district courts in the state, those holdings were based on opinions from the Florida Judicial Ethics Committee instead of binding law.[6] Prior to Florida's first decision regarding Facebook friendships, there was some leeway in requiring judges to recuse themselves in regards to their real-life friendships with the attorneys that appeared before them.[7] Yet, it was the unfavorable opinion of the Florida Judicial Ethics Advisory Committee that led to judicial decisions that went against the more modernized views other states had already adopted.[8] As a result, the Florida Supreme Court decided to review the issue to resolve the district split and, ultimately, ruled in favor of the Third District Court of Appeal by adopting a more modernized approach to the law that views a Facebook friendship, without more, as insufficient grounds for disqualification.[9]

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4. *See* John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487, 513–27 (2014) (citing different state opinions regarding a judge's presence on social media and how each ethical committee views their use of Facebook); *see also* Palmer, *supra* note 3 (listing the names of the more lenient and more stringent ethics committees across the nation).

5. *See* Law Offices of Herssein & Herrsein, P.A v. United Servs. Auto. Ass'n, 229 So. 3d 408, 412 (Fla. Dist. Ct. App. 2017) (holding that not all Facebook friendships are close relationships); *see also* Marc Freeman, *Do People Get Justice When Judges and Lawyers are Facebook Friends?*, SUN SENTINEL (Dec. 15, 2017, 7:30 PM), http://www.sun-sentinel.com/local/palm-beach/fl-pn-judges-attorneys-facebook-friends-20171215-story.html (reviewing the differing district court decisions in Florida regarding a judge's electronic friendship).

6. *See* Domville v. State, 103 So. 3d 184, 185 (Fla. Dist. Ct. App. 2012) (granting a defendant's motion to disqualify a judge based on the judge's social media friendship); *see also* Chace v. Loisel, 170 So. 3d 802, 803–04 (Fla. Dist. Ct. App. 2014) (ruling that a judge's attempt to become Facebook friends with an interested party, prior to the final judgment of the case, was legally sufficient to warrant disqualification).

7. *See* Mackenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1338 (Fla. 1990) (concluding that if a judge's relationship with an interested party is mere acquaintances, then there are insufficient grounds for disqualification); *see also In re* Estate of Carlton, 378 So. 2d 1212, 1220 (Fla. 1979) (stating that a justice's friendship with a former judge, who was one of the attorneys on the case before them, did not require disqualification).

8. *See* Fla. Judicial Ethics Advisory Comm., Op. 2010-06 (2010) (addressing the Committee's concern of the "unique medium in which internet social networking sites" allow users to interact). *But see* N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009) (finding various reasons as to why a judge interacts with social networks and that this interaction was not inappropriate).

9. *See* Law Offices of Herssein & Herrsein, P.A. v. United Servs. Auto. Ass'n, No. SC17-1848, 2018 Fla. LEXIS 2209, at *2 (Fla. Nov. 15, 2018) (approving the Third District's ruling

This comment analyzes what a Facebook friendship encompasses in the legal profession and focuses on what courts, specifically Florida, recognize this relationship to mean.[10] Part II provides an overview of the process for judicial disqualification and reviews the opinions released by the Florida Judicial Ethics Committee regarding judicial participation on social media.[11] Part III discusses how traditional friendships have been considered in regards to judicial disqualification and compares what other states have understood a Facebook friendship to encompass versus what Florida has concluded.[12] Lastly, Part IV proposes a new Judicial Ethics Opinion that reflects a more modernized understanding of the definition of Facebook friendships and that echoes what the Florida Supreme Court has decreed.[13]

II. BACKGROUND

A. OVERVIEW OF JUDICIAL DISQUALIFICATION

Under 28 U.S.C. § 455, a judge is responsible to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[14] This process requires judges to make a determination, not as to whether they believe they will be biased, but as to whether a reasonable person, who understands that facts surrounding the case, will view the judge as being impartial.[15] However, if a judge does not recuse themselves and a litigant has a reasonable belief that they will not receive a fair and impartial trial, then they may file a motion for disqualification.[16]

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and disapproving the Fifth District's ruling); *see also* Jacqueline Zote, *65 Social Media Statistics to Bookmark in 2019*, SPROUT SOC. (Feb. 1, 2019), https://sproutsocial.com/insights/social-media-statistics/ (asserting that Facebook remains "the most popular social media networking site" with "over 2 billion active users").

10. *See infra* Part II.

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. 28 U.S.C. § 455(a) (2018) (providing examples of instances in which a judge may be viewed as bias); *see also* CHARLES G. GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 17 (Kris Markarian ed., 2nd ed. 2010) (stating that a judge may need to recuse himself if there is an "appearance of partiality").

15. *See* GEYH, *supra* note 14, at 17–18 (emphasizing that the decision of disqualification is not subjective, but objective); *see also* U.S. COMM. ON CODES OF CONDUCT, Advisory Op. 70 (2009) (requiring recusal when a judge's impartiality is "reasonably . . . questioned").

16. *See* Fla. R. Jud. Admin. 2.330(b) (allowing a party to file a motion for disqualification if a judge does not recuse himself). *But see* GEYH, *supra* note 14, at 20 (noting that a litigant may only move to disqualify a judge if there is a factual basis for his motion and it is not based on "uninformed speculation and criticism").

Similarly, Florida specifies that this motion must be accompanied by a sworn affidavit of the party requesting the disqualification, a certification of good faith signed by the presenting attorney, and a list of dates that reflect previous decisions on any other motions to disqualify filed on the case.[17] Once the motion is filed, the presiding judge will then review the allegations and determine if there are sufficient legal justifications for disqualification.[18] When reviewing these allegations, the judge must apply an objective standard that determines "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial."[19]

Among the instances in which a judge may be disqualified is if the judge has a special relationship to an interested party and whether such relationship will have a substantial effect on the outcome of the case, but in the age of social media, what constitutes a close relationship has become more difficult to distinguish and less clear to define.[20]

B. ABA FORMAL OPINION 462

Due to the growing popularity of social networking sites, the American Bar Association ("ABA") addressed the issue as to whether judges should engage in social media and how they should conduct themselves on these networking sites.[21] In their opinion, they determined that as long as judges conduct themselves in a manner appropriate to the level of dignity required by their position in office, then they were allowed to engage and participate in "electronic social media" ("ESM").[22] Their

17. *See also* FLA. STAT. § 38.10 (2018) (specifying that a movant must file an affidavit detailing the reasons for his fear of an impartial trial); Fla. R. Jud. Admin. 2.330(c) (detailing the requirements for filing a motion for disqualification.

18. *See* FLA. STAT. § 38.10 (noting that if the allegations are legally sufficient, another judge will preside over the case); *see also* Fla. R. Jud. Admin. 2.330(h) (allowing the initial review of the motion to be evaluated by the judge who is facing disqualification).

19. Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983) (contending that the allegations must be reviewed as a whole when determining if there are grounds for recusal); *see also* Mackenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1335 (Fla. 1990) (stating that the "legal sufficiency of the motion is purely a question of law").

20. *See In re* Estate of Carlton, 378 So. 2d 1212, 1220 (Fla. 1979) (stating that judges do not need to recuse themselves from every situation in which they have a friendly relationship with an attorney); *see also* U.S. COMM. ON CODES OF CONDUCT, Advisory Op. 70 (expressing that the extent of the relationship at issue is a question only the judge may answer).

21. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (concluding that judges may participate in internet activity); *see also* Browning, *supra* note 4, at 510–11 (commenting that the ABA is "pro-social media").

22. *See* Barbara A. Jackson, *To Follow or not to Follow: The Brave New World of Social Media*, AM. BAR ASS'N: THE JUDGES' J. (Nov. 1, 2014),

decision further emphasized that judges should be mindful of the actions they take on these sites and ensure that their interaction properly reflects the respect and integrity of the judiciary.[23] Furthermore, a judge's actions must not convey an impression that they can be easily influenced or coerced, and must maintain an appearance of impartiality.[24]

In regards to the connections made on social media, the opinion reflects the belief that social interaction with the community can be beneficial to judges and can diminish the impression that judges are isolated figures that are out of touch with the community's wants and needs.[25] Judges can use these sites to help bolster their reputation and community outreach when running for office and allows them to take advantage of the opportunities provided by these sites for their campaigns.[26] Moreover, when considering the personal relationships between judges and their peers, the ABA emphasized that if a judge and an attorney are "friends" on one of these ESM sites, the context of the relationship is important to determine whether the friendship requires disqualification in a matter where both parties are involved.[27] However, the opinion notes that a simple connection on a social networking site "does not, in and of itself, indicate the degree or intensity of a judge's relationship

https://www.americanbar.org/groups/judicial/publications/judges_journal/2014/fall/to_follow_or_not_to_follow_thebrave_new_world_of_social_media.html (arguing that courts should make the necessary efforts to understand new technology and remain open to learning how the "various forms of ESM work"); *see also* ABA Comm'n on Ethics & Prof'l Responsibility, *supra* note 3 (understanding that as technology advances, so do the codes of conduct).

23. *See* ABA Comm'n on Ethics & Prof'l Responsibility, *supra* note 3 (warning judges that while they are allowed to interact with social media, they should proceed with caution); *see also* Jackson, *supra* note 22 (commenting on her own experience of the dangers social media can pose).

24. *See* ABA Comm'n on Ethics & Prof'l Responsibility, *supra* note 3 (maintaining that judges should always act with integrity); *see also* Browning, *supra* note 4, at 513 (stating that the ABA opinion is a well-reasoned approach at handling the implications social media can pose).

25. *See* ABA Comm'n on Ethics & Prof'l Responsibility, *supra* note 3 (stating that "[s]ocial interactions of all kinds, including ESM, can be beneficial to judges"); *see also* Jackson, *supra* note 22 (explaining that, as a judge, her reason for creating a Facebook account was to not only participate in the planning of her class reunion, but to have some presence on social media when she ran for re-election in the future).

26. *See* ABA Comm'n on Ethics & Prof'l Responsibility, *supra* note 3 (acknowledging the benefits of ESM and how these sites can be used "as a valuable tool for public outreach"); *see also* Jackson, *supra* note 22 (discussing her decision to create a Twitter account to use as a platform for her ideals and values when she ran for the Supreme Court of North Carolina).

27. *See* Daniel Smith, *When Everyone is the Judge's Pal: Facebook Friendship and the Appearance of Impropriety Standard,* 3 CASE W. RES. J.L. TECH. & INTERNET 66, 82 (2012) (noting that not "every friendship gives rise to the inference of impropriety" and that this determination must be case specific); *see also* ABA Comm'n on Ethics & Prof'l Responsibility, *supra* note 3 (advising judges to carefully evaluate their internet friends and take the appropriate precautions when determining whether a friendship with a lawyer should be disclosed).

with a person."[28] Therefore, although judges are cautioned to conduct themselves in a manner reflective of the values of the judiciary, their interaction with social media is allowed.[29]

C. FLORIDA JUDICIAL ETHICS ADVISORY COMMITTEE

Although the ABA is accepting of judicial presence on social media, Florida has taken a more stringent approach when determining whether a judge should participate on these social networking sites.[30] The Florida Judicial Ethics Advisory Committee has released multiple opinions throughout the years that reflect the belief that a judge should have minimal interaction with social media because their engagement on these sites may give an appearance of impropriety.[31] As a result, although the ABA may have been more understanding of judicial presence on social media, the Florida Ethics Committee continues to stand behind more outdated beliefs and have failed to adapt to the modern understanding of what these networking sites are and what they encompass.[32]

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28. Bradley Shear, *The Legal Definition of a Facebook Friend*, SHEAR ON SOC. MEDIA L., LIFE, & TECH (Jan. 9, 2010), http://www.shearsocialmedia.com/2010/01/the-legal-definition-of-a-facebook-friend.html (discussing the different degrees of Facebook friendships and how it can be comparable to handing out a business card); *see also* ABA Comm'n on Ethics & Prof'l Responsibility, *supra* note 3 (emphasizing that a connection on a social networking site alone is not enough to question a judge's impartiality).

29. *See* Bethany Leigh Rabe, *Can Judges "Friend" Attorneys on Social Media?*, AM. BAR ASS'N: LITIG. NEWS (Jan. 14, 2013), https://apps.americanbar.org/litigation/litigationnews/top_stories/011413-judicial-ethics-social-media.html (suggesting that judges should approach what they post on social media "with the same attention as he or she would give to a prepared statement or a speech at the bar association"); *see also* Jackson, *supra* note 22 (outlining several factors judges should consider when interacting with social media).

30. *See* John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES (Dec. 10, 2009), https://www.nytimes.com/2009/12/11/us/11judges.html (stating that Florida took a "hypersensitive" approach when dealing with the issue of whether judges should be friends with lawyers on Facebook); *see also* Browning, *supra* note 4, at 491 (citing Florida as "the most draconian of jurisdictions when it comes to judges and social media").

31. *See* Fla. Judicial Ethics Advisory Comm., Op. 2012-12 (2012) (finding that, although the site mentioned was for professional use, a judge could not form connections on LinkedIn with other attorneys because it can give the appearance that the judge may be influenced by the party); *see also* Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009) [hereinafter Fla. Op. 2009-20] (stating that although judges "cannot be expected to avoid all friendships outside of their judicial responsibilities," some restrictions are expected on judicial conduct).

32. *See* Schwartz, *supra* note 30 (explaining how the minority view of the Florida Ethics Committee is more understanding, and how this may be a result of a "generational gap"); *see also* Shear, *supra* note 28 (arguing for a legal definition for "Facebook Friends" so that it reflects the modern view of what this type of friendship may encompass).

i. Opinion 2009-20

In one of their earliest opinions regarding social media and the issue it poses for judges, the Florida Judicial Ethics Committee found that by "permit[ting] lawyers who may appear before the judge to be identified as 'friends' on the judge's social networking page," the judge would be violating the Florida Code of Judicial Conduct.[33] The Committee stated that under Canon 2B of the Code of Conduct, judges should not allow any personal or social relationships to affect any decisions made in their capacity as a judge.[34] Therefore, if a judge is friends with an attorney on social media, this not only violates 2B but Canon 2A, as there may be an appearance of impropriety if it is believed that the attorney may have some form of influence on the judge through their internet friendship.[35] However, although the Committee notes that the term "friend" in the context of social media is not necessarily used in its traditional sense, the issue "is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct . . . conveys the impression that the lawyer is in a position to influence the judge."[36]

However, a minority of the Committee disagreed with the majority

33. Fla. Op. 2009-20, *supra* note 31 (listing three elements that must be present for a judge's social networking site to violate the Judicial Code of Conduct: the judge must create the page, the judge must be able to accept or reject the "friends" that appear on the page, and the list of "friends" on the judge's page can see who the other friends are). *But see* Raymond J. McKoski, *Florida's Judge-Lawyer 'Friends' Dilemma: Facebook, No; Reality, Yes*, ORLANDO SENTINEL (Jan. 17, 2018, 5:50 PM), https://www.orlandosentinel.com/opinion/os-ed-facebook-friends-judges-lawyers-florida-supreme-court-20180117-story.html (identifying the hypocrisy behind the Florida Judicial Ethics Committee Opinion as no ethics rule bars a judge from being friends with an attorney who appears before them).

34. *See* FLA. CODE JUD. CONDUCT, Canon 2B ("A judge shall not allow family, social or other relationships to influence the judge's judicial conduct or judgment."); *see also* Fla. Op. 2009-20, *supra* note 31 (determining that the selection process of choosing who can and cannot be a judge's friend on these social networking sites is the main issue that violates the Code of Conduct).

35. *See* FLA. CODE JUD. CONDUCT, Canon 2A (ordering that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"); *see also* Dan Macsai, *Objection! Florida Bans Judges From "Friending" Lawyers on All Social-Networking Sites,* FAST COMPANY (Dec. 10, 2009), https://www.fastcompany.com/1483933/objection-florida-bans-judges-friending-lawyers-all-social-networking-sites (questioning what exactly is the type of influence the Committee is concerned about and whether a judge would actually be influenced by what their friends post on social media).

36. Fla. Op. 2009-20, *supra* note 31 (commenting that the main issue is whether an outside party would reasonably believe that a Facebook friendship would affect a judge's bias). *But see* McKoski, *supra* note 33 (arguing that "[t]he rule permitting judges to preside over cases involving real friends simply cannot be reconciled with the proposition that virtual friendships require a judge's automatic disqualification").

opinion and believed that simply being friends on social media does not necessarily mean that the attorney can influence a judge's decisions or that the attorney has a close relationship with that judge.[37] The minority acknowledged that in today's culture, the word "friend" on social media does not necessarily signify a close relationship between the two parties, but can merely show a connection between contacts or acquaintances.[38]

ii. Opinion 2010-06

Following their opinion in 2009, the Florida Judicial Ethics Committee addressed a similar issue that questioned whether a judge must "de-friend" lawyers that are members of the same bar association page.[39] The Committee also addressed whether a judge can "friend" attorneys if they leave a permanent disclaimer on their main page that outlines what the term "friend" means and how it should be interpreted as simply acquaintances.[40]

In considering the first issue, the Committee concluded that judges and attorneys can be connected through organization pages because the organization, not the judge, is the one who controls who may have access to the page and who can be members of the organization.[41] The Committee

37. *See* Erin Geiger Smith, *Florida Judges May Not Friend Local Lawyers on Facebook*, BUS. INSIDER (Dec. 10, 2009, 8:35 AM), https://www.businessinsider.com/florida-judges-may-not-friend-local-lawyers-on-facebook-2009-12 (questioning whether the Committee's decision applies to all social networking sites, such as Twitter, where the connections are not classified as "friends" but "followers"); *see also* Fla. Op. 2009-20, *supra* note 31 (disagreeing with the majority opinion's understanding of the type of influence a Facebook friendship may have on a judiciary's decisions and conduct).

38. *See* Ashby Jones, *Why You Shouldn't Take it Hard If a Judge Rejects Your Friend Request*, WALL ST. J.: L. BLOG (Dec. 9, 2009, 6:14 PM), https://blogs.wsj.com/law/2009/12/09/why-you-shouldnt-take-it-hard-if-a-judge-rejects-your-friend-request/?ns=prod/accounts-wsj (expressing how "friendship" on social media does not, by itself, display any level of intimacy between the two parties as the relationship can range from close friendship to complete strangers); *see also* Fla. Op. 2009-20, *supra* note 31 (disagreeing with the majority opinion's understanding of the type of influence a Facebook friendship may have on a judiciary's decisions and conduct) (criticizing the majority's outdated views that do not reflect the modernization of technology and social media).

39. *See* Fla. Judicial Ethics Advisory Comm., *supra* note 8 (discussing the widespread attention their previous decision garnered and their intent to clarify matters for inquiring judges); *see also* Fla. Op. 2009-20, *supra* note 31 (concluding that judges may not accept attorneys as friends on their social media).

40. *See* Fla. Judicial Ethics Advisory Comm., *supra* note 8 (considering whether attorneys can access a judge's personal social networking page if the judge includes a notation on their page that "friend" means acquaintance); *see also* Browning, *supra* note 4, at 523–24 (noting that the 2010 opinion presented an opportunity to "scale back the draconian implications" of the Committee's previous decisions).

41. *See* Christina Newberry, *Everything You Need to Know About Using Facebook Groups*

further stated that if the organization's page is primarily attorneys or other member of the legal community, "it would be illogical to suggest [that] the judge would remain a member of the organization's Facebook page and all lawyer members would be 'de-friended.'"[42] However, in considering whether inserting a disclaimer on a judge's page would allow the judge to accept attorneys as friends, the Committee found that the disclaimer would be ineffective as there is no way of guaranteeing that the observers scrolling through the judge's page would locate and read the disclaimer.[43] Therefore, although judges and attorneys may be members of the same group page, the majority opinion remains the same and judges cannot be friends with attorneys on their personal social media site.[44]

III. DISCUSSION

In 2012, Florida's Fourth District Court of Appeal was the first in the state to address the issue as to whether or not attorneys and judges should have any form of connection on social networking sites.[45] Since there was no precedent regarding the issue, the court based its decision on the Florida Judicial Ethics Advisory Committee's opinions and held that judges may not be friends with attorneys on social media.[46] However, Florida's Third

for Business, HOOTSUITE (Dec. 11, 2017), https://blog.hootsuite.com/facebook-groups-business/#vs (explaining how Facebook pages are controlled by official brand representatives); *see also* Fla. Judicial Ethics Advisory Comm., *supra* note 8 (expressing that the Code of Conduct violation arises when a judge has control over who can be members of a particular page).

42. Fla. Judicial Ethics Advisory Comm., *supra* note 8 (stating that a judge's participation of a bar association page on Facebook would not violate Canon 2B of the Florida Code of Judicial Conduct); *see also* Jackson, *supra* note 22 (speaking on her own experience with social media and the different ways she has used social networking pages for her personal and professional life as a judge).

43. *See* Fla. Judicial Ethics Advisory Comm., *supra* note 8 (claiming that a disclaimer "fails to cure any impermissible impression that the judge's attorney 'friends' are in a special position to influence the judge"); *see also* Browning, *supra* note 4, at 523 (describing how this disclaimer was a judge's suggestion to minimize the idea that being Facebook friends had any special meaning behind the relationship).

44. *See* Fla. Judicial Ethics Advisory Comm., *supra* note 8 (concluding that while mere friendship between a judge and attorney, without more, does not violate the Code of Judicial Conduct, appearing as "friends" on a Facebook page does); *see also* Browning, *supra* note 4, at 523–24 (commenting that while the 2010-06 opinion could have started a progression into a more modernized standpoint, the Committee continues to enforce traditional and outdated ideas).

45. *See* Domville v. State, 103 So. 3d 184, 185 (Fla. Dist. Ct. App. 2012) (considering whether a defendant's attempt to disqualify a judge, based on the judge's Facebook friendship with the prosecutor assigned to the case, qualified for recusal); *see also* McKoski, *supra* note 33 (stating that "the Fourth District Court decided that lawyers practicing before a judge cannot ethically be Facebook friends with the judge").

46. *See Domville*, 103 So. 3d at 185 (finding the 2009-20 ethics opinion to be "instructive"); *see also* Fla. Op. 2009-20, *supra* note 31 (assessing whether judges may be friends with attorneys on their social networking sites).

District Court of Appeal disagreed and ruled that a Facebook friendship between a judge and an attorney is insufficient grounds to disqualify a judge.[47] Rather than solely relying on advisory opinions, the Third District considered the parameters in which personal relationships would call for judicial disqualification and applied this rationale to the recent social issue.[48] Since this decision caused a district split, the Florida Supreme Court heard oral arguments regarding this issue and approved the Third District's opinion, providing a decision that has not been reflected by any of the Judicial Ethics Advisory opinions, but that reflects previous case law and creates binding precedent that all districts must follow.[49]

A. WHEN DOES A RELATIONSHIP BECOME TOO PERSONAL?

When an attorney requests that a judge be disqualified on a specific matter, "each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances."[50] If a judge has a personal relationship with one of the parties and the judge's impartiality may be reasonably questioned, then the grounds for disqualification are legally sufficient and the judge must grant the attorney's request.[51] However, because a judge

47. *See* Law Offices of Herssein v. United Servs. Auto. Ass'n, 229 So. 3d 408, 410 (Fla. Dist. Ct. App. 2017) (noting that the Fifth District had reservations about the Fourth District's reasoning in finding a Facebook friendship to be grounds for recusal); *see also* Fla. Op. 2009-20, *supra* note 31 (disagreeing with the majority's opinion that a connection on a social networking site conveys an impression that an attorney may have influence on a judge's decisions).

48. *See Law Offices of Herssein*, 229 So. 3d at 411–12 (basing their decision on a combination of the minority opinion of the Judicial Ethics Advisory Committee, other state laws, and a more modernized approach of viewing social networking sites); *see also* Fla. Op. 2009-20, *supra* note 31 (understanding that the term "friends" on social media does not necessarily mean that the two parties have a close relationship).

49. *See* Law Offices of Herssein v. United Servs. Auto. Ass'n, No. SC17-1848, 2018 Fla. LEXIS 2209, *1–2 (Fla. Nov. 15, 2018) (holding a Facebook friendship as insufficient to require disqualification); *see also* Jim Saunders, *Florida Supreme Court Justices Try to Sort Out Facebook Friends*, DAILY BUS. REV. (June 8, 2018, 10:21 AM), https://www.law.com/dailybusinessreview/2018/06/08/florida-supreme-court-justices-try-to-sort-out-facebook-friends/?slreturn=20180931184140 (commenting that the core issue presented before the Florida Supreme Court is "a basic, but seemingly complicated, question: Are Facebook friends different from other types of friends?").

50. *See In* re Estate of Carlton, 378 So. 2d 1212, 1216–17 (Fla. 1979) (reinforcing the idea that disqualification is a matter that falls under the authority of the judge facing disqualification); *see also* Ervin v. Collins, 85 So. 2d 833, 834 (Fla. 1956) (concluding that the facts alleged in a motion for disqualification were insufficient).

51. *See In re Estate of Carlton*, 378 So. 2d at 1220 (finding that even if the facts alleged in a motion for disqualification are insufficient, a judge may still recuse themselves if it is in the best interest of justice); *see also* Barber v. Mackenzie, 562 So. 2d 755, 757 (Fla. Dist. Ct. App. 1990) (stating that "[l]egal sufficiency is governed by a reasonable person standard.").

may have different forms of relationships with several members of the legal community, there must be more than a mere connection to a party that would require the judge to disqualify themselves.[52]

In an estate matter in Florida, a judge had to determine whether he was required to disqualify himself because of his friendship with a former judge whose firm was representing a party in the matter.[53] Prior to reaching his conclusion, the judge considered previous case history as well as different codes of conduct that addressed the issue of judicial disqualification.[54] As a result, the judge determined that, "absent some special circumstance, friendly relationships between judges and attorneys do not of themselves require disqualification."[55] The judge reasoned that if mere friendship with a lawyer was enough for judicial disqualification, then judges across the nation, in both rural and urbanized areas, would need to disqualify themselves in a substantial amount of cases.[56] Therefore, without any evidence that would tend to show that the judge's impartiality would be affected by the friendship in question, disqualification was not required.[57]

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52. *See In re Estate of Carlton*, 378 So. 2d at 1220 (concluding that friendship alone between a lawyer and a judge does not meet the legal standard that would result in disqualification); *see also* Randall T. Shepard, *Judicial Professionalism and the Relations Between Judges and Lawyers*, 14 NOTRE DAME J.L. ETHICS, & PUB. POL'Y 223, 224 (Feb. 2014), http://scholarship.law.nd.edu/ndjlepp/vol14/iss1/8 (noting that it is expected for lawyers and judges to communicate often, but that this does not necessarily require recusal).

53. *See In re Estate of Carlton*, 378 So. 2d at 1218 (considering "whether the asserted circumstances of personal friendship are sufficient to require disqualification."); *see also* Shepard, *supra* note 52, at 224–25 (discussing different instances in which judges have needed to recuse themselves because of relationships, but also listing exceptions that do not violate judicial ethics).

54. *See Ervin*, 85 So. 2d at 833 (reviewing a matter in which an attorney sought disqualification of three judges because of their personal relationships and connections to one of the parties in the cause at hand); *see also* Fla. Judicial Ethics Advisory Comm., Op. 76-12 (1976) (finding that a judge need not disqualify himself in all cases regarding the public defender's office simply because the judge's son was employed by the public defender).

55. *In re Estate of Carlton*, 378 So. 2d at 1219 (interpreting Florida's Code of Judicial Conduct as not requiring judges to recuse themselves in all cases in which they have a connection to one of the parties in the matter before them); *see also* FLA. CODE JUD. CONDUCT, Canon 3 (discussing the administrative responsibilities of judges in cases where their impartiality may be questioned and in what circumstances they must recuse themselves).

56. *See In re Estate of Carlton*, 378 So. 2d at 1220 (arguing that even in metropolitan areas, judges would need to recuse themselves in various cases if having a friendly relationship with an attorney was sufficient grounds for disqualification); *see also* Shepard, *supra* note 52, at 229 (explaining how judges and attorneys are typically involved in the same professional associations, and that judges are even encouraged to participate in these associations in order to contribute to the legal community).

57. *See In re Estate of Carlton*, 378 So. 2d at 1220 (concluding that the relationship between the judge and the attorney was far too remote and did not require the judge to disqualify himself from the case because he could still consider the issues of the case without prejudice or bias); *see*

Similarly, Florida's Supreme Court has emphasized that the alleged facts in a motion for disqualification must "place a reasonably prudent person in fear of not receiving a fair and impartial trial."[58] In this case, a litigant's contribution to a trial judge's political campaign was insufficient grounds for disqualification because the alleged facts did not tend to prove that the contribution was in any way out of the ordinary.[59] Although some may perceive a monetary contribution to a judge to influence a judge's decision in a case, there are sufficient safeguards to ensure that the judiciary remain impartial and that a litigant is not prejudiced.[60] Moreover, "there are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant . . ., e.g., friendship, member of the same church or religious congregation, neighbors, former classmates[,] or fraternity brothers."[61] However, without asserting any facts that would show that the relationship between the judge and the attorney is so close in nature that it would influence the judge's bias, the motion to disqualify should be denied.[62]

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also Shepard, *supra* note 52, at 224 (commenting that although certain relationships would require disqualification, not all communications warrant recusal since it is common that "lawyers and judges spend many of their days working closely together, and the judicial code recognizes that communication is part of what makes for an effective court system.").

58. Mackenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1334–35 (Fla. 1990) (holding that a judge's determination as to whether the facts alleged in a motion to disqualify are legally sufficient are based on the petitioner's reasonable belief of an unfair trial instead of the judge's own perception of what they believe to be true); *see also* Barber v. Mackenzie, 562 So. 2d 755, 757 (Fla. Dist. Ct. App. 1990) (stating that the facts alleged in a motion for disqualification cannot be frivolous and must create a legitimate fear in a reasonable person in order for the motion to be granted).

59. *See Mackenzie*, 565 So. 2d at 1334–35 (overturning the decision of the lower courts and holding that a contribution alone was insufficient grounds for disqualification as a reasonably prudent person would not find that the contribution alone would cause a fear of an impartial trial); *see also* Shepard, *supra* note 52, at 242 (finding that "the fact that a defendant made a campaign contribution to a judge does not mandate the recusal of the judge from any proceeding involving the defendant.").

60. *See* FLA. STAT. § 38.02 (2018) (outlining the procedure in which judges must recuse themselves if the facts of the allegations are true and require disqualification); *see also* Fla. R. Jud. Admin. 2.330 (detailing the process attorneys must follow if they have a reasonable belief of facing an impartial judge and how they must follow the proper procedure in order to disqualify the judge).

61. *Super Kids Bargain Store*, 565 So. 2d at 1338 (listing the various instances in which judges may have a relationship with a lawyer but that the relationship does not require these judges to disqualify themselves); *see* Shepard, *supra* note 52, at 243–44 (noting that the relationships kept between judges and attorneys requires a "unique balancing act" that if done correctly, cannot only allow for confidence in the legal profession, but allow for the legal system to thrive as a whole).

62. *See Super Kids Bargain Store*, 565 So. 2d at 1338 (finding that a campaign contribution is insufficient grounds for recusal because "it does not tend to indicate any closer relation between the contributor and the recipient than would ordinarily exist between members of the

B. WHEN IS A JUDGE TOO SOCIAL?

When Florida was first faced with the issue as to whether social media connections were sufficient to require judicial disqualification, there was little precedent that dealt with the matter.[63] However, other states had already addressed the issue and had already determined whether or not they believed social media relationships should lead to judicial disqualification.[64] Most states have found that these internet connections between judges and attorneys are legally insufficient grounds for disqualification and have maintained that there must be more than a mere Facebook friendship to disqualify a judge.[65]

i. New York

In its own Judicial Ethics Advisory Opinion, New York has found that as long as judges comply with the Judicial Codes of Conduct, they may join social media and use these networks in whichever way they deem appropriate.[66] The opinion states that there are many reasons why judges may want to join social media, and as long as these judges avoid the appearance of impropriety, they may continue to use these social

same local bar."); *see also* Daytona Beach Racing & Rec. Facilities Dist. v. Volusia Cty, 372 So. 2d 417, 419 (Fla. 1978) (denying a motion for disqualification of judges who participated in a convention that voted against the litigant because there was no record or evidence that tended to show the judge's bias or prejudice).

63. *See* Domville v. State, 103 So. 3d 184, 185 (Fla. Dist. Ct. App. 2012) (using the Florida Judicial Ethics Advisory Opinion as a basis for their decision since no Florida court had ever dealt with a similar matter); *see also* Chace v. Loisel, 170 So. 3d 802, 804 (Fla. Dist. Ct. App. 2014) (noting that "*Domville* was the only Florida case that discussed the impact of a judge's social network activity and, as such, was binding upon the trial judge in [the] case.").

64. *See* N.Y. Advisory Comm. On Judicial Ethics, Op. 08-176, *supra* note 8 (finding no issue with judges engaging in social media as long as they are mindful of their interactions); *see also* Ethics Comm. of the Ky. Judiciary, Formal Ethics Op. JE-119, at 1 (2010) [hereinafter Ky. Op. JE-119] (concluding that judges may "participate in an internet-based social networking site, such as Facebook, LinkedIn, Myspace, or Twitter, and be 'Friends' with various persons who appear before the judge in court") (emphasis omitted).

65. *See* Benjamin P. Cooper, *Judges and Social Media: Disclosure as Disinfectant*, 17 SMU SCI. & TECH. L. REV. 521, 528 (2014) (labeling New York, Kentucky, and Ohio as some of the permissive states that allow for judicial engagement in social media); *see also* Browning, *supra* note 4, at 510–27 (comparing the various state views on judicial engagement on social media and whether they should recuse themselves in cases based on their online relationships).

66. *See* N.Y. Advisory Comm. On Judicial Ethics, Op. 08-176, *supra* note 8 (noting that the question is not whether judges can interact on social media, but rather whether the way a judge interacts with social media is unethical); *see also* Cooper, *supra* note 65, at 531 (stating that New York allows the judge to determine whether or not to disclose their online friendships to the parties before them).

networking sites.[67]

The New York Ethics Committee also addressed the issue of judicial disqualification based on a judge's social media connections with parties that may go before them.[68] They found that "the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal."[69] Furthermore, the Committee emphasized that there are varying degrees of relationships between judges and attorneys and that in order to determine whether a judge's impartiality may be questioned, there must be a fact-dependent analysis that would show that these social media connections are more than just acquaintances.[70] Therefore, as long as a judge adheres to his or her ethical obligations as a judiciary, they may continue to participate on social media.[71]

ii. Kentucky

Similarly, Kentucky has also found that although social media sites "may designate certain participants as 'friends,' . . . such a listing, by itself, does not reasonably convey to others an impression that such persons are in

67. *See* N.Y. Advisory Comm. On Judicial Ethics, Op. 08-176, *supra* note 8 (acknowledging that social networking sites have many uses, both for personal reasons and for professional purposes); *see also* Sehl, *supra* note 1 (stating that people who engage in Facebook, use the website to not only connect with other people, but to find jobs, create meaningful group pages, and use the website as a way to fundraise for certain events).

68. *See* N.Y. Advisory Comm. On Judicial Ethics, Op. 13-39 (2013) [hereinafter N.Y. Op. 13-39] (responding to an inquiring judge as to whether the judge needed to recuse himself in a criminal matter because the judge was Facebook friends with the parents of the parties affected by the defendant's conduct); *see also* Browning, *supra* note 4, at 513–14 (summarizing the opinions of the New York Ethics Committee and commenting on their reasonable and more modernized approach at handling social media issues).

69. N.Y. Advisory Comm. On Judicial Ethics, Op. 13-39, *supra* note 68 (finding that a judge's impartiality should not be reasonably questioned based solely on a social media connection); *see also* Cooper, *supra* note 65, at 534 (noting that while a judge's interaction with social media may be significant in certain cases, it is not disqualifying in and of itself).

70. *See* N.Y. Advisory Comm. On Judicial Ethics, Op. 13-39, *supra* note 68 (noting that the Committee can provide guidelines for judges to follow when it comes to disqualifying themselves, but that it is ultimately the judge's decision to determine whether the relationship in question requires disqualification); *see also* Browning, *supra* note 4, at 509 (noting that New York understood that a Facebook friendship does not hold the same meaning as a personal friendship and that in order to determine whether judges must disqualify themselves, they must look at the relationship itself).

71. *See* N.Y. Advisory Comm. On Judicial Ethics, Op. 13-39, *supra* note 68 (concluding that there is no inherent issue with a judge's use of social media or with the connections they make on these sites); *see also* N.Y. Advisory Comm. On Judicial Ethics, Op. 08-176, *supra* note 8 (stating that the Committee could not "discern anything inherently inappropriate about a judge joining and making use of a social network.").

a special position to influence the judge."[72] This decision was based on the belief that judges should not isolate themselves from the community and that, because they may have various types of relationships, not all require immediate recusal.[73] The Committee found that these relationships should be "viewed on a continuum," with one side of the spectrum being complete strangers that would not require recusal and the other extreme being a close, personal relationship, which would require recusal.[74]

However, the Committee did caution judges from engaging in any activity that may be unsuitable for a judiciary with a high standard of conduct.[75] The Committee warned judges from engaging in commentary that may be inappropriate and advised against these judges from participating in any ex parte communications that would give an appearance of impropriety.[76] In conclusion, the Kentucky Committee found that, while judges should be extremely cautious when interacting on social media, their participation was permissible.[77]

iii. Maryland

In their own decision, Maryland's Judicial Ethics Committee also

72. Ky. Op. JE-119, *supra* note 64, at 2 (stating that social media sites use the terms "friends," "fans," and "followers" to describe the connections between the members of their sites); *see also* Browning, *supra* note 4, at 514 (mentioning how New York and Kentucky have similar views regarding this issue).

73. *See* Ky. Op. JE-119, *supra* note 64, at 2 (noting that personal relationships can range from close relationships to mere acquaintances); *see also* Browning, *supra* note 4, at 514–15 (discussing the reasoning behind the Kentucky Committee's decision).

74. *See* Ky. Op. JE-119, *supra* note 64, at 2 (discussing what a judge should do when faced with a situation where they are presiding over a person with whom they have a close relationship with); *see also* Shear, *supra* note 28 (discussing the varying degrees of friendship and how they apply to social media).

75. *See* David Post, *Ky. Judge Suspended for Going After Prosecutor on Facebook*, WASH. POST (Aug. 29, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/29/ky-judge-suspended-for-going-after-prosecutor-on-facebook/?noredirect=on&utm_term=.0b33ff58c2ce (mentioning a controversial situation where a judge used his social media to imply that an attorney was racist); *see also* Ky. JE-119, *supra* note 64, at 4 (noting that judges may not engage in social media in the same manner as the general public since what is appropriate for others may be inappropriate for judges).

76. *See* Debra C. Weiss, *Judge Reprimanded for Posting Comment About Murder Case on Facebook*, ABA J. (June 13, 2018, 3:25 PM), http://www.abajournal.com/news/article/judge_reprimanded_for_posting_comment_about_murder_case_on_facebook (discussing a situation where a judge was disciplined for commenting on a case that she presided over); *see also* Ky. Op. JE-119, *supra* note 64, at 4 (emphasizing the importance of maintaining public confidence in the judiciary); *see also*.

77. *See* Ky. Op. JE-119, *supra* note 64, at 5 (concluding that judges can participate in social networking sites); *see also* Browning, *supra* note 4, at 515 (finding that a "friend" on social media does not automatically suggest that a judge is easily impressionable).

addressed the issue as to whether judges may participate on social networking sites and whether their online relationships would require immediate recusal.[78] The Committee answered these questions by first reviewing the decisions made by other states that had already addressed this issue.[79] Then, the Committee looked at Maryland's own Judicial Code of Conduct in regards to the expected and unexpected behavior of the judiciary.[80] Ultimately, they concluded that since there was "no rule prohibiting judges from having what traditionally has been thought of as 'friends,' be they attorneys or laypersons," the same logic should apply to a judge's friends on social media.[81]

Moreover, the Committee emphasized that the ethical issues that arise out of a judge's interaction with social media is not the participation itself, but rather, the manner in which judges conduct themselves on these sites.[82] They reasoned that, while judges need to be cautious with the content they post on these sites and the impressions their interactions may create, judges may continue to socialize with their colleagues.[83] As a result, the Committee found that since personal relationships with attorneys do not in themselves require a judge's disqualification, they "see no reason to view or treat 'Facebook friends' differently."[84]

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78. *See* Md. Judicial Ethics Comm., Published Op. 2012-07, at 1 (2012) [hereinafter Md. Op. 2012-07] (discussing the implications of a judge's use of social media); *see also* Browning, *supra* note 4, at 515–16 (reviewing Maryland's decision regarding judges' interaction on social networking sites).

79. *See* Md. Op. 2012-07, *supra* note 78, at 2–3 (summarizing the ethics committee decisions from California, Florida, Oklahoma, and Massachusetts); *see also* Browning, *supra* note 4, at 513–27 (comparing the states with a more traditional approach to the issue versus the states with more modernized views).

80. *See* Md. Op. 2012-07, *supra* note 78, at 3–4 (detailing the different codes of conduct regarding judicial behavior); *see also* MD. CODE JUD. CONDUCT R. 1.2(b) (2010) (outlining the conduct that would compromise the integrity of the judiciary).

81. *See* Md. Op. 2012-07, *supra* note 78, at 4 (finding no rule in the Judicial Code of Conduct that explicitly prohibits internet friendships); *see also* MD. CODE OF JUD. CONDUCT R. 3.1 (2010) (listing the extrajudicial activities that judges are prohibited to participate in).

82. *See* David Kravets, *Texas Admonishes Judge for Posting Facebook Updates About Her Trials*, ARS TECHNICA (Apr. 27, 2015, 1:35 PM), https://arstechnica.com/tech-policy/2015/04/texas-admonishes-judge-for-posting-facebook-updates-about-her-trials/ (discussing a situation in which a judge was reprimanded for improperly using social media); *see also* Md. Op. 2012-07, *supra* note 78, at 6 (disagreeing with their state counterparts that find participation in these social networking sites alone as unethical).

83. *See* Shari C. Lewis, *When Judges 'Friend' Lawyers: Must Recusal Necessarily Follow?*, RIVKIN RADLER (June 18, 2013), https://www.rivkinradler.com/publications/when-judges-friend-lawyers-must-recusal-necessarily-follow/ (commenting on Maryland's rationale in concluding that judges may have social media connections with attorneys); *see also* Md. Op. 2012-07, *supra* note 78, at 4–5 (understanding that judges are not expected to go into isolation once they take the bench).

84. *See* Md. Op. 2012-07, *supra* note 78, at 5 (finding that internet relations should be

C. WHAT DOES FLORIDA SAY?

Although the Florida Judicial Ethics Committee first addressed the issue in 2009, it was not until 2012 that Florida's Fourth District Court of Appeal first discussed whether judges may be friends with attorneys on social media.[85] Following that decision, there were two more cases from different districts that addressed the same issue.[86] However, due to a progression of the understanding of the functions these social networking sites, the different District Courts of Appeal began to release conflicting decisions.[87] As a result of these differing opinions, the Florida Supreme Court decided to review the issue and came to a conclusion that not only reflects the importance of maintaining confidence in the judiciary, but also reflects the evolution of the law.[88]

i. *Domville v. State*

In Florida's first case regarding judicial disqualification based on a judge's social media presence, the Fourth District Court of Appeal reviewed the denial of a defendant's motion to disqualify a judge based on the judge's Facebook friendship with the prosecutor assigned to the case.[89] The criminal defendant alleged that this relationship between the judge and the prosecutor prejudiced him because the judge would be incapable of

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treated as personal relationships); *see also* Lewis, *supra* note 83 (noting that Maryland is among the many states that agree that a Facebook friendship does not necessarily signify that the person can influence the judge).

85. *See* Domville v. State, 103 So. 3d 184, 185 (Fla. Dist. Ct. App. 2012) (using the Judicial Ethics Committee opinion to set the precedent); *see also* Fla. Op. 2009-20, *supra* note 31 (concluding that judges may not befriend attorneys on social media).

86. *See* Law Offices of Herssein v. United Servs. Auto. Ass'n, 229 So. 3d 408, 412 (Fla. Dist. Ct. App. 2017) (discussing whether a trial court judge was required to disqualify herself based on a Facebook friendship); *see also* Chace v. Loisel, 170 So. 3d 802, 804 (Fla. Dist. Ct. App. 2014) (reviewing whether recusal was warranted when a judge attempted to communicate with a party from a case she was presiding over).

87. *See* Browning, *supra* note 4, at 513–27 (detailing different state opinions on a judge's use of social media and how these states have adapted their laws based on the advancement of social media); *see also* McKoski, *supra* note 33 (comparing the opinions of the different appeals courts of Florida).

88. *See* Saunders, *supra* note 49 (providing an overview of the different questions posed by the Florida Supreme Court during oral arguments); *see also* Freeman, *supra* note 5 (discussing how "[t]he Florida Supreme Court will review whether judges should be removed from cases when they are Facebook friends with the lawyers in their courtrooms, due to possible appearances of impartiality.").

89. *See Domville*, 103 So. 3d at 185 (addressing an issue that had never been brought forward in Florida); *see also* Browning, *supra* note 4, at 528 (explaining that the case surrounded a defendant who was charged with battery).

remaining fair and impartial.[90] The defendant further explained that "he was a Facebook user and that his 'friends' consisted of 'only his closest friends and associates, persons whom he could not perceive with anything but favor, loyalty, and partiality.'"[91]

As a result, the trial court erred in denying the motion for disqualification as the facts alleged were legally sufficient.[92] This decision was solely based on the Florida Judicial Ethics Committee opinion that found that by listing attorneys as friends on Facebook, it would convey a message that the attorney could influence the judge.[93] Furthermore, "a judge's activity on a social networking site may undermine confidence in the judge's neutrality," and judges should "avoid situations that will compromise the appearance of impartiality."[94] Therefore, a judge's Facebook friendship alone would qualify as legally sufficient grounds to disqualify a judge.[95]

ii. *Chace v. Loisel*

Following *Domville*, Florida's Fifth District Court of Appeal was presented with a similar situation regarding a dissolution of marriage case, where a judge's interactions on Facebook called for the judge's recusal.[96] In that case, the Petitioner requested that the presiding judge be disqualified based on the judge's attempt to "friend request" the Petitioner prior to the

90. *See Domville*, 103 So. 3d at 185 (calling the judge biased based on this relationship); *see also* FLA. CODE JUD. CONDUCT, Canon 3B(5) (requiring judges to perform their duties without prejudice or bias).

91. *See Domville*, 103 So. 3d at 185 (believing that the judge's Facebook friends would also only consist of close associates). *But see* ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 462, *supra* note 3, at 2 (highlighting the importance of the context surrounding the specific circumstances and that while one person may only have close friends on Facebook, the same could not be said for all Facebook users).

92. *See Domville*, 103 So. 3d at 185–86 (finding there to be sufficient grounds for disqualification); *see also* Fla. R. Jud. Admin. 2.330 (providing a general overview of the required grounds for disqualification).

93. *See Domville*, 103 So. 3d at 185–86 (using the opinion of the Judicial Ethics Advisory Committee as a basis for the court's conclusion); *see also* Fla. Op. 2009-20, *supra* note 31 (barring judges from friending attorneys on social media).

94. *Domville*, 103 So. 3d at 186 (concluding that the judge's connection on Facebook violated judicial ethics); *see also* Fla. Op. 2009-20, *supra* note 31 (asserting that if judges are friends with attorneys on social media, they would violate the Judicial Code of Conduct).

95. *See Domville*, 103 So. 3d at 186 (reversing the lower court's decision and granting the defendant's motion); *see also* Fla. R. Jud. Admin. 2.330 (providing requirements that were satisfied by the petitioner in *Domville*, which were needed for the judge's recusal).

96. *See* Chace v. Loisel, 170 So. 3d 802, 804 (Fla. Dist. Ct. App. 2014) (addressing the issue two years after *Domville*); *see also Domville*, 103 So. 3d at 186 (providing a baseline decision for the Fifth District to use).

entry of final judgment.[97] The party claimed that as a result of denying this request, the trial judge retaliated and entered a final judgment that was unfairly prejudicial towards her.[98]

Upon review, the trial court erred in denying the Petitioner's motion because "a judge's ex parte communication with a party presents a legally sufficient claim for disqualification, particularly in the case where the party's failure to respond to a Facebook 'friend' request creates a reasonable fear of offending the solicitor."[99] In coming to this conclusion, the Fifth District considered *Domville* as it was the only case in Florida that discussed the implications of a judge's use of social media.[100] However, unlike *Domville*, they believed a Facebook friendship alone does not necessarily mean the judge has a close relationship with a particular party.[101]

They argued that, "other than the public nature of the internet, there is no difference between a Facebook 'friend' and any other friendship a judge might have."[102] Therefore, if judges were required to disqualify themselves in every situation in which they were simply acquaintances with parties, they would need to disqualify themselves in a multitude of cases, making this requirement "unworkable and unnecessary."[103] Yet, although they were hesitant in using the same logic as the one used in *Domville*, they

97. *See Chace*, 170 So. 3d at 803 (learning that, upon further investigation, this was not the only case in which the judge attempted to communicate with parties via social media); *see also* FLA. CODE JUD. CONDUCT, Canon 3B(7) (violating the provision that prohibits ex parte communications).

98. *See Chace*, 170 So. 3d at 803 (stating that the judgment "allegedly attribut[ed] most of the marital debt to Petitioner and provid[ed] Respondent with a disproportionately excessive alimony award."); *see also* Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983) (contending that the petitioner must have a well-grounded fear of bias).

99. *See Chace*, 170 So. 3d at 803 (finding that the judge's actions "would prompt a reasonably prudent person to fear that she could not get a fair and impartial trial before that judge."); *see also* Fla. R. Jud. Admin. 2.330 (outlining the process in which trial judges must disqualify themselves from a particular case).

100. *See Chace*, 170 So. 3d at 803–04 (considering the opinion of the Fifth District and Florida's Judicial Code of Conduct); *see also Domville*, 103 So. 3d at 185 (setting the precedent in Florida regarding judicial disqualification based on social media connections).

101. *See Chace*, 170 So. 3d at 803 (stating that they had "serious reservations about the court's rationale in *Domville*"). *But see Domville*, 103 So. 3d at 185 (finding a Facebook friendship enough to disqualify a judge from a case).

102. *See Chace*, 170 So. 3d at 803 (describing "[t]he word 'friend' on Facebook [as] a term of art"); *see also* Shear, *supra* note 28 (calling for a better understanding of what a Facebook friendship entails).

103. *See Chace*, 170 So. 3d at 804 (commenting that requiring disqualification in every case where a judge has some form of connection to a party is unrealistic); *see also* York, *supra* note 9 (providing a breakdown of the growing population of people who use all the different forms of social media for multiple reasons).

ultimately concluded that the presiding judge was required to recuse herself as her actions would warrant disqualification.[104]

iii. *Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association*

In a more recent decision, the Third District Court of Appeal addressed a matter in which a party sought a judge's disqualification based on her Facebook friendship with an attorney who represented a potential party in the pending litigation.[105] However, unlike the previous district court decisions, they found that a Facebook friendship alone does not tend to prove that there is a close relationship between the parties and, as a result, affirmed the lower court's decision to deny the motion.[106]

From the outset, the opinion noted that mere allegations of a friendship between an attorney and a judge have been deemed insufficient grounds to disqualify the judge.[107] They recognized several different reasons as to why a Facebook friendship should not be treated any differently than a personal friendship and looked beyond previous court decisions to come to their own conclusion.[108] They found that a Facebook friendship alone was insufficient evidence to support an allegation of bias towards a party as judges may have hundreds of Facebook friends and not all of these friendships signify a close relationship.[109] These friendships

104. *See Chace*, 170 So. 3d at 804 (concluding that the Petitioner had a legally sufficient claim for her motion of disqualification); *see also* Fla. R. Jud. Admin. 2.330(d) (detailing that a motion is legally sufficient if the party believes "he or she will not receive a fair trial or hearing because of specifically described prejudice or bias").

105. *See* Law Offices of Herssein v. United Servs. Auto. Ass'n, 229 So. 3d 408, 409 (Fla. Dist. Ct. App. 2017) (indicating that the attorney in question was an ex-circuit court judge); *see also* McKoski, *supra* note 33 (explaining how the trial court denied the motion for disqualification and how the Third District affirmed the ruling).

106. *See Law Offices of Herssein*, 229 So. 3d at 411–12 (listing three main reasons for their rationale); *see also* Freeman, *supra* note 5 (explaining that over the years, there has been differing opinions in South Florida regarding the issue).

107. *See* Mackenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1338 (Fla. 1990) (listing several factors that may lead a person to believe that a judge may be biased, but that these reasons are legally insufficient); *see also Law Offices of Herssein*, 229 So. 3d at 409 (citing case history that addresses how the court should act when considering disqualification of traditional friendships).

108. *See Law Offices of Herssein*, 229 So. 3d at 409–11 (considering other state decisions and previous cases that addressed similar issues); *see also Chace*, 170 So. 3d at 804 (stating that not all internet relationships are close).

109. *See Law Offices of Herssein*, 229 So. 3d at 411 (citing to a Kentucky Supreme Court decision); *see also* Sluss v. Commonwealth, 381 S.W.3d 215, 222 (Ky. 2012) (holding that without more, the fact that a juror was Facebook friends with the victim's family member was insufficient grounds to require a new trial).

may range from as simple as an old classmate to a close friend, but that "[a]n assumption that all Facebook 'friends' rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking."[110]

Moreover, "Facebook members often cannot recall every person they have accepted as 'friends' or who have accepted them as 'friends,'" which would, therefore, suggest that these friends would not necessarily influence a judge in any way.[111] Lastly, due to the advancements of Facebook's technology, some of these friends are accepted after Facebook has compiled a list of "People You May Know" who may have been in similar groups and networks that the judge may have been a part of.[112] As a result, "[t]he designation of a person as a 'friend' on Facebook does not differentiate between a close friend and a distant acquaintance."[113] Therefore, due to the varying circumstances surrounding a Facebook friendship and the lack of specific facts that would lead a reasonably prudent person to believe that this trial court judge and the attorney had a close relationship, the petition was denied.[114]

iv. Florida Supreme Court

Once it became clear that the issue of judicial disqualification based on social media connections was one that the different districts could not agree upon, the Florida Supreme Court decided to review the matter. The court concluded that, "no reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a

110. *See Law Offices of Herssein*, 229 So. 3d at 412 (finding that Facebook friends can include acquaintances, old classmates, or even celebrities); *see also* Jackson, *supra* note 22 (explaining why she uses social media and the different types of relationships she has on these sites).

111. *See Law Offices of Herssein*, 229 So. 3d at 411 (discussing cases where parties were unable to identify all of their Facebook friends); *see also* Furey v. Temple Univ., 884 F. Supp. 2d 223, 241 (E.D. Pa. 2012) (addressing a situation where a student was unaware that the student he had accused of assaulting was one of his Facebook friends).

112. *See Law Offices of Herssein*, 229 So. 3d at 411–12 (explaining how Facebook's data-mining system works and how Facebook friends may be selected); *see also* Rob Pegoraro, *Why Facebook's "People You May Know" Makes Some Weird Suggestions*, USA TODAY (July 30, 2017, 12:48 AM), https://www.usatoday.com/story/tech/columnist/2017/07/30/why-facebooks-people-you-may-know-makes-some-weird-suggestions/521264001/ (discussing the criteria Facebook uses to suggest friends).

113. *See Law Offices of Herssein*, 229 So. 3d at 410, 412 (arguing that a Facebook friendship and a traditional friendship should be viewed the same); *see also* Shear, *supra* note 28 (explaining how the connotations of internet friendships can vary).

114. *See Law Offices of Herssein*, 229 So. 3d at 412 (acknowledging that their decision was in conflict with their sister court); *see also* Freeman, *supra* note 5 (speaking on the circuit split caused by the Third District's decision).

judge and attorney appearing before the judge are Facebook 'friends' with a relationship of indeterminate nature."[115] This conclusion was based on previous case law that addressed the issues that arose out of disqualification from traditional friendships, as well as the decisions from other state courts.[116] The ruling also commented on the Florida Judicial Ethics Advisory opinion that barred judges from friending attorneys on Facebook and stated that the Committee's concern was "overarching" and misunderstood "the intrinsic nature of Facebook 'friendship.'"[117]

Similar to how traditional friendships can be close while others are not, "the establishment of a Facebook 'friendship' does not objectively signal the existence of the affection and esteem involved in a traditional 'friendship.'"[118] As a result, these social media connections should be viewed on a spectrum, ranging from intimate relationships to virtual strangers.[119] Moreover, unless there are specific facts that would tend to prove that the friendship in question is close in nature, "the mere existence of a Facebook 'friendship,' in and of itself, does not inherently reveal the degree or intensity of the relationship between the Facebook 'friends.'"[120] Therefore, although there may be circumstances in which a Facebook friendship would require recusal, there is no reason that these connections

115. *See* Law Offices of Herssein v. United Servs. Auto. Ass'n, No. SC17-1848, 2018 Fla. LEXIS 2209, at *16 (Fla. Nov. 15, 2018) (ruling that the circumstances regarding the matter did not require recusal); *see also* Hanna Kozlowska, *A Court Ruled that Judges Can Be Facebook Friends with Lawyers Because Those are not Real Friendships*, QUARTZ (Nov. 18, 2018), https://qz.com/1467342/a-court-ruled-that-judges-can-be-facebook-friends-with-lawyers-because-those-are-not-real-friendships/ (stating that Florida's decision is a fact "that most social media users already know").

116. *See Law Offices of Herssein*, 2018 Fla. LEXIS 2209, at *9–11 (discussing how Florida law has long recognized that a mere allegation of a friendship is not enough to require recusal); *see also* Jim Saunders, *Judges and Lawyers Can Be Friends—As Long As It's Just on Facebook, Court Says*, MIAMI HERALD (Nov. 15, 2018, 3:21 PM), https://www.miamiherald.com/news/state/florida/article221718525.html (reviewing Florida's final decision).

117. *See Law Offices of Herssein*, 2018 Fla. LEXIS 2209, at *19 (finding the Judicial Ethics Committee's concern to be unwarranted); *see also* Fla. Op. 2009-20 (providing a minority view that mirrors the approach taken by the Florida Supreme Court).

118. *See Law Offices of Herssein*, 2018 Fla. LEXIS 2209, at *13–14 (stating that it is understood that Facebook friendships can have a broader definition than traditional friendships); *see also* Saunders, *supra* note 116 (discussing how the majority of Florida's Supreme Court understood these friendships to encompass).

119. *See Law Offices of Herssein*, 2018 Fla. LEXIS 2209, at *14 (describing the varying degrees of intimacy of Facebook friends); *see also* Kozlowska, *supra* note 115 (stating that not all Facebook friends are real).

120. *See Law Offices of Herssein*, 2018 Fla. LEXIS 2209, at *15–16 (understanding that in order to determine the degree of intimacy, the context surrounding the relationship must be considered); *see also* Kozlowska, *supra* note 115 (agreeing with Florida's decision and with their understanding of what a Facebook friend is).

should be subjected to a bright-line rule of disqualification.[121]

IV. SOLUTION

In light of the recent decision from the Florida Supreme Court, the Florida Judicial Ethics Advisory Committee should release a revised opinion that reflects a more modernized approach of what Facebook friendships entail.[122] This advisory opinion should abandon the outdated ideas of what constitutes an intimate friendship on the internet and should adopt the minority opinion's view that not all social media connections signify a close relationship.[123] In drafting this opinion, the Committee should consider, not only what the Florida Supreme Court has decided, but what other states have held in regards to the degree of intimacy a Facebook friendship encompasses.[124]

Moreover, if the Committee continues to believe that a Facebook friendship between an attorney and judge violates Florida's ethical provisions, regardless of Florida's Supreme Court's decision, then they should define the type of internet connection that would warrant recusal that reflects a more modern understanding of what it means to be Facebook friends in today's society.[125] Therefore, instead of enforcing a per se rule, the Committee can set parameters that litigants may follow when requesting recusal and that judges may consider when reviewing a motion for disqualification.[126] By releasing an updated advisory opinion that

121. *See Law Offices of Herssein,* 2018 Fla. LEXIS 2209, at *19 (holding that not every relationship requires disqualification); *see also* Saunders, *supra* note 116 (analyzing Chief Justice Canady's majority opinion).

122. *See Law Offices of Herssein,* 2018 Fla. LEXIS 2209, at *21 (concluding that there is no per se rule when considering whether a judge should disqualify themselves based on a Facebook friendship); *see also* Shear, *supra* note 28 (describing Facebook friendships as a title of someone with whom you may or may not have met).

123. *See* Fla. Op. 2009-20, *supra* note 31 (stating that the minority believes that the term "friend" does not hold the same meaning as it did "in the pre-internet age . . . ."); *see also* Browning, *supra* note 4, at 533 (arguing that even traditional relationships and communications can violate ethical canons).

124. *See Law Offices of Herssein,* 2018 Fla. LEXIS 2209, at *19–20 (disagreeing with the rationale used in the 2009-20 advisory opinion); *see also* Browning, *supra* note 4, at 510–27 (providing a thorough explanation of how different states have handled judicial disqualification based on social media connections).

125. *See* Shear, *supra* note 28 (proposing a definition that explains what a Facebook friend is that could be applied to the legal community); *see also* Kozlowska, *supra* note 115 (stating that Florida's recent decision mirrors modern society's understanding of Facebook friendships).

126. *See* Jennifer Ellis, *Should Judges Recuse Themselves Because of a Facebook Friendship?*, JENNIFER ELLIS (Nov. 16, 2011), https://jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/ (proposing a test that helps determine whether a judge should be disqualified based on an online relationship); *see also* Browning, *supra* note 4, at 533 (claiming that being "either overly restrictive or too cautious . . . does no one a

reflects these modernized views, the Judicial Ethics Committee may continue to evolve in the direction as the law and remain prevalent with the legal community.[127]

V. CONCLUSION

Similar to the various state opinions that have found Facebook friendships alone to be insufficient grounds for disqualification, the Florida Judicial Ethics Committee should eliminate previous advisory opinions that bar these friendships and implement an opinion that is more understanding of how these connections are viewed today.[128] By accepting the rationale provided by the Florida Supreme Court, the Judicial Ethics Committee can continue to interpret and enforce Florida's Judicial Canons without contradicting modernized case law.[129] Therefore, these views will remain current with the growing population of judges interacting on social media and the new wave of professionals that are already active, and intend to remain active, on all social networking sites.[130]

service . . . .").

127. *See* Browning, *supra* note 4, at 533 (arguing for "[a] more digitally enlightened and realistic approach" when addressing concerns regarding social media); *see also* Rabe, *supra* note 29 (discussing how different states, specifically Tennessee, have approached this modern issue of judicial disqualification based on social media).

128. *See* Smith, *supra* note 27, at 16–17 (listing the different elements that have been understood to give an appearance of impropriety and how these factors should be applied to Facebook friendships); *see also* Browning, *supra* note 4, at 533 (describing the issue of judges and their participation on social media as "complicated.").

129. *See Law Offices of Herssein,* 2018 Fla. LEXIS 2209, at *21 (holding that a Facebook friendship would not convey the impression that these people "are in a special position to influence the judge . . . ."); *see also* FLA. CODE JUD. CONDUCT, Canon 3E (lacking a provision that specifically requires judicial disqualification based on an internet connection).

130. *See* Sehl, *supra* note 1 (summarizing a poll on Facebook usage and finding "that 82 percent of 18 to 29-year-olds . . . have Facebook accounts."); *see also* York, *supra* note 9 (providing statistics that show how the percentage of people using social media continues to grow each year).