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Note – Why Can't We Be “Friends”? A Call for a Less Stringent Policy for Judges Using Online Social Networking

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Why Can't We Be "Friends"?

A Call for a Less Stringent Policy for Judges Using Online Social Networking

BRIAN HULL*

Judges are increasingly using social networking websites like Facebook, Twitter, LinkedIn, MySpace, and Google+, and, naturally, the question arises: What are the ethical limits for judges doing so? A number of judicial ethics committees and others knowledgeable about judicial ethics have analyzed this question. Not all, however, were familiar with the nuances of online social networking. The California Judges Association falls into both of these categories. In November 2010, it released an advisory opinion, Opinion 66, describing its views on judges using social networking sites.

This Note details the views expressed by Opinion 66 and by opinions from Florida, Indiana, Kentucky, New York, Ohio, Oklahoma, and Wisconsin. Opinion 66 stated that a judge may not include an attorney in her online social network if the attorney is appearing before the judge—a view shared by Florida and Oklahoma but rejected by Indiana, Kentucky, New York, Ohio, and Wisconsin. This view typifies the failure of Opinion 66 to appreciate that the current ethical rules allow a judge to be online “friends” with an attorney appearing before her. This failure stemmed in part from a lack of recognition that an online connection is not indicative of a close connection. Other analytical flaws were the inexplicably higher standard for online contact and the lack of appreciation of how social networking sites work. Opinion 66—and all of the other opinions on this subject—also failed to appreciate the benefits of allowing judges to use online social networking, including transparency, outreach, and even enforcing the ethical rules.

This Note argues that the California Judges Association can, and should, release a new opinion further analyzing the use of social networking sites by judges.

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INTRODUCTION

Social networking websites are becoming extremely common and judicial ethics committees are finally taking notice. In November 2010, the California Judicial Ethics Committee of the California Judges Association (the “California Committee”) released an advisory opinion, Opinion 66, concerning “what ethical constraints arise when a judge participates in online social networking.”¹ Opinion 66 analyzed three issues: (1) whether a judge may be “a member of an online social networking community,” (2) whether a judge may include in her online social network lawyers who might possibly appear before her, and (3) whether “a judge [may] include lawyers who have a case pending

1. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 1 (2010).

before the judge" in her online social network.² It answered the first two questions with "a very qualified yes" and answered the third question with a "no."³ The California Committee, however, was not the first to act: It followed committees in several other states, which had released ethics opinions after judges inquired about the propriety of being members of various social networking sites.⁴ Organizations governing judicial ethics in other states should (and probably will) release opinions about online social networking soon.⁵ These opinions are important; judges need to know what they can and cannot do on social networking sites.⁶ Online social networking is extremely popular in the United States and the number of people using it continues to grow.⁷ This number includes over forty percent of current judges.⁸ The number of judges using social networking sites is also growing and will continue to do so.⁹

2. *Id.*

3. *Id.*

4. See Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2010-06 (2010) (clarifying and answering questions about an earlier opinion, Op. 2009-20); Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010); Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009); N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009); see also Adrienne Meiring, *Ethical Considerations of Using Social Networking Sites*, IND. CT. TIMES, Nov.–Dec. 2009, at 10, 10–11 (answering whether Indiana judges can use social networks and discussing the ethical considerations of using these sites); Richard J. Sankovitz, *Can't We Be Friends? Judges and Social Networking*, THIRD BRANCH, Winter 2010, at 10, 10–11 (2010) (discussing how judges in Wisconsin—including the author, a judge at the trial court level—are using Facebook, and giving an unofficial opinion about judges using online social networking). Adrienne Meiring, counsel to the Indiana Commission on Judicial Qualifications, explained that she wrote the column "to address some of these routine ethical questions [about online social networking]" that had been asked by a number of judges. Meiring, *supra*, at 10.

5. Ohio released an opinion shortly after California released Opinion 66. See Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7 (2010). Oklahoma released an opinion in mid-2011. Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).

6. The ABA is considering amending the rules for attorneys. See Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, A.B.A. J., Feb. 2011, at 48, 50 ("The working group [of the ABA Commission on Ethics] is studying ethics issues arising from lawyers' use of social media and other technologies... and may even recommend significant amendments to the ABA Model Rules of Professional Conduct.").

7. As of June 2010, approximately 66% of online American adults had visited a social networking site in the last thirty days. See EXPERIAN SIMMONS, 2010 SOCIAL NETWORKING REPORT 2–3 (2010). This number increased from 53% in 2008 and 27% in 2007. *Id.* at 3.

8. CONFERENCE OF COURT PUB. INFO. OFFICERS, *NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE* 65 (2010). It is necessary to note that the data gathered in the report suffers from possible design flaws. There was a low response rate (less than one in ten respondents completed even part of the survey and only about one in twenty completed the survey in its entirety) and the "electronic-only survey tool" (what may be called the request for information) was "distributed on [an] e-mail-distribution system." *Id.* at 64. It seems this biases the survey numbers to those who check their email regularly (the survey was open for only a week) and who would complete an online-only survey. Furthermore, "judicial officers" (judges, magistrate judges, or administrative judges) accounted for just 31.4% of the completed surveys. *Id.* With the expansion of social networking sites, however, there is still a good reason for states to release opinions regardless of the numbers of judges using them: The number of judges using these sites will continue to rise.

9. See Ginny LaRoe, *Local Judges Put Social Media on Trial*, RECORDER (S.F.), May 23, 2011, at

This is especially true because lawyers who were students at the time of the online social networking explosion are going to be the next generation of judges.¹⁰

Other than the handful of opinions released by ethics advisory boards, there has been little legal scholarship on the ethics of judges using social networking sites.¹¹ This Note does not try to answer every question relating to judges using online social networking. In the process of analyzing the California decision, however, this Note highlights many of the issues faced by judicial ethics committees.

This Note will explain why the California opinion is flawed both from a legal perspective and as a matter of policy. Part I provides a brief description of online social networking. Part II analyzes the advisory opinions released by California, Florida, Indiana, Kentucky, New York, Ohio, Oklahoma, South Carolina, and Wisconsin to illustrate different interpretations of the propriety of judges using online social networks. Part III examines the California Code of Judicial Ethics,¹² authoritative interpretations of the California Code, and the interpretations of judicial ethics codes in other states to show why Opinion 66 is flawed in the way it interpreted the law. Among other faults, it applied the applicable language far too strictly. Part III will also explain why Opinion 66 is wrong as a matter of policy. The opinion neglects to consider the potential of online social networking to increase transparency in the court process, educate the public, and improve the conduct of attorneys and fellow judges. It also created a potentially perverse situation in which a judge could be found to be exhibiting bias despite the lack of any actual bias. Part IV of this Note proposes solutions that the California

5. (discussing recent appointees' use of online social networking and the use of Twitter by judges who have been on the bench for some time). Ethics committees and others are taking note and discussing the ethics of judges using social media. See *Judicial Ethics and the Intersection of Social Media and the Courtroom*, NAT'L JUD. C., (Aug. 15, 2011), <http://www.judges.org/news/newso81511.html> (discussing briefly the lack of consensus regarding the use of social media by judges and a forthcoming presentation "devoted to ethical concerns of the use of social media by judges").

10. See LaRoe, *supra* note 9. In addition, this conclusion is based on data showing that, as of Fall 2009, 69% of Americans aged thirty-five to forty-nine and 88% of Americans aged eighteen to thirty-four have visited a social networking site within the past thirty days. See EXPERIAN SIMMONS, *supra* note 7, at 3. America's future judges are included in that data.

11. See James J. Alfani, *Future Trends in Judicial Ethics: The Influence of Cyberspace*, 51 S. TEX. L. REV. 851, 851 ("In the coming years, there will be a compelling need to address new circumstances with creativity, greater attention to rigorous analysis of judicial ethics provisions (particularly appearance of impropriety) by state high courts in deciding judicial misconduct cases, and an increased emphasis on judicial education."); Angela O'Brien, Comment, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away from Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 525 (2010) (discussing three state ethics opinions concerning judges' use of social networking sites and analyzing the applicability of the Model Code of Judicial Conduct to judges' use of social media).

12. This examination includes the analysis of the canons in DAVID M. ROTHMAN, CALIFORNIA JUDICIAL CONDUCT HANDBOOK (3d ed. 2007).

Committee should consider, including a call for the Committee to issue a new opinion that is more detailed and nuanced.

I. SOCIAL NETWORKING WEBSITES

There is a wide variety of social networking websites.¹³ The most widely used are Facebook,¹⁴ Twitter,¹⁵ LinkedIn,¹⁶ and MySpace¹⁷. There is also a site on the rise called "Google+."¹⁸ These sites all have distinct features, although, to a degree, their features are becoming remarkably similar. In addition, all of the sites allow users to restrict much of the personal information that can be seen by others.

Facebook is the most used site for social networking.¹⁹ A user creates a profile that contains personal information about her; this may include, among other things, interests, education, contact information,

13. CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 8, at 28–29, 37 (describing Facebook, MySpace, LinkedIn, Ning, Twitter, Tumblr, Plurk, and mentioning other sites such as MyYearbook, Bebo, and BlackPlanet). Technically, sites such as Twitter are "microblogging" sites, but these sites are often mentioned when discussing popular sites that create possible ethics issues for attorneys and judges. *See id.* at 37–39; *see also* O'Brien, *supra* note 11, at 512–14 (2010) (introducing Facebook, MySpace, and Twitter in a comment intended to explore ethical issues for attorneys and judges); Daniel J. Crothers, *Judicial Use of Social Media*, *NASJE* (Jan. 26, 2011), <http://news.nasje.org/?p=142> (discussing from the perspective of a North Dakota supreme court justice the concerns about ex parte communication occurring on social networking sites).

14. Facebook has more than 800 million active users. *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Dec. 23, 2011). About 143 million of these are in the United States. *Facebook.com*, QUANTCAST, <http://www.quantcast.com/facebook.com> (last visited Dec. 23, 2011).

15. Twitter had more than 200 million users as of April 2011. Shea Bennett, *How Many Users Does Twitter Have? 200 Million! No, Wait, 362 Million! Uh, Split The Difference?*, *MEDIA BISTRO*, http://www.mediabistro.com/alltwitter/how-many-twitter-users_b13110 (Aug. 26, 2011, 6:00 AM). About sixty-eight million of these are in the United States. *Twitter.com*, QUANTCAST, <http://www.quantcast.com/twitter.com> (last visited Dec. 23, 2011).

16. LinkedIn had more than 120 million users as of August 4, 2011; this number is increasing at a rate of two members per second (which is more than 600,000 per week). *LinkedIn Press Center, About Us*, LINKEDIN, <http://press.linkedin.com/about/> (last visited Dec. 23, 2011).

17. MySpace has about nineteen million users in the United States. *Myspace.com*, QUANTCAST, <http://www.quantcast.com/myspace.com> (last visited Dec. 23, 2011). This number continues decline as the other online social networks grow. *See id.* (charting the decrease in the number of visitors to MySpace each month).

18. *See* Claire Cain Miller, *Another Try by Google to Take on Facebook*, *N.Y. TIMES*, June 29, 2011, at B1, (discussing Google+ as a new social networking service). At least twenty million people have signed up for Google+. Scott Cameron, *Google Plus: Do You Need Another Social Network?*, *NPR* (Aug. 6, 2011, 6:57 AM), <http://www.npr.org/blogs/talk/2011/08/06/138828455/google-plus-do-you-need-another-social-network>. It is difficult to document how many unique visitors Google+ has because the site is tied to Google.com, which is the most trafficked site in the United States. *See Google.com*, QUANTCAST, <http://www.quantcast.com/google.com> (last visited Dec. 23, 2011). There has been an increase in the number of unique visitors to Google.com since Google+ was released but it is difficult to say whether that increase is due to Google+ or something else. *See id.* (charting the number of visitors, with an increase beginning in June).

19. Facebook has the most users of the five sites mentioned and the most users in the United States. *See supra* notes 14–18.

and work history.²⁰ Each user, as part of the profile, also has a “wall:” “a place to post and share content with . . . friends” including photos, videos, links, application content, and a user’s own status.²¹ Users with profiles can “friend” or “add as a friend” other members of Facebook, provided that the other person accepts the “friend request.”²² Once “friends,” a user can “tag” the other in a photo they see; post a comment, link, or video on the other person’s wall; and much more.²³ Facebook, in a sense, is driven by having friends. Users can also follow “pages”: profiles for public figures, bands, universities, athletes, companies, and celebrities.²⁴ Following a page (also called becoming a “fan” of a page) is essentially a one-way friend request—the page administrator does not screen requests, although the administrator may remove people who “like” or follow it.²⁵

Each Facebook user also has a home page that includes the News Feed, a “constantly updating list” of information about the user’s “friends” (or pages followed), including posts, photos tags, friend requests, event RSVPs, group membership, and status updates (and possibly comments by users).²⁶ If this is not enough, nearly all of these

20. *Factsheet*, FACEBOOK, <http://www.facebook.com/press/info.php?factsheet> (last visited Dec. 23, 2011). Facebook, however, is not sitting idle; the site is continuously changing. Recently, it announced a new format for user profiles, called the “timeline.” See Barbara Ortutay & Michael Liedtke, *Facebook Redesigns Profiles, Adds “Timeline,”* ASSOCIATED PRESS (Sept. 22, 2011), <http://news.yahoo.com/facebook-redesigns-profiles-adds-timeline-175250945.html>. The development may lead to changes in other online social networks, but this Note’s analysis and basic descriptions of the sites are still relevant.

21. *Facebook Help Center, What Can I Do on the Wall? (Timeline)*, FACEBOOK, <http://www.facebook.com/help/?faq=224964477515963> (last visited Dec. 23, 2011).

22. *Facebook Help Center, How Do I Add a Friend?*, FACEBOOK, <http://www.facebook.com/help/?faq=146466588759199> (last visited Dec. 23, 2011).

23. *How Tagging Works*, FACEBOOK, <http://www.facebook.com/about/tagging> (last visited Dec. 23, 2011).

24. *Discover Facebook Pages*, FACEBOOK, <http://www.facebook.com/pages> (last visited Dec. 23, 2011).

25. *Press Release, Who’s Sharing on Facebook?*, FACEBOOK (Mar. 4, 2009), <http://www.facebook.com/press/releases.php?p=87889>; *Facebook Help Center, How Do I Remove Someone Who Is Connected to My Page?*, FACEBOOK, <http://www.facebook.com/help/?faq=222702104422027> (last visited Dec. 23, 2011). It is also possible to follow something without “liking” it. See Ortutay & Liedtke, *supra* note 20 (“We are making it so you can connect to anything you want. . . . [Y]ou don’t have to like a book, you can just read a book.” (quoting Facebook CEO Mark Zuckerberg)).

26. See *Facebook Help Center, What Is News Feed?*, FACEBOOK, <http://www.facebook.com/help/?faq=210346402339221> (last visited Dec. 23, 2011); *Facebook Help Center, What Types of Content Can Appear in News Feed?*, FACEBOOK, <http://www.facebook.com/help/?faq=211104095587055> (last visited Dec. 23, 2011). In addition, Facebook allows a variety of applications to be installed: from games to quizzes to filling out March Madness brackets. Recently, the site even launched a service to send reminders of court dates to litigants in Philadelphia. *Facebook Help Center, What Is an App on Facebook?*, FACEBOOK, <http://www.facebook.com/help/?faq=217453588274571> (last visited Dec. 23, 2011) (listing examples); Kara Mignanelli, *Friend Request! The District Court Wants to Be Friends on Facebook*, SOCIAL AXCESS (Aug. 5, 2011), <http://socialaxcess.com/2011/08/05/friend-request-the-district-court-wants-to-be-friends-on-facebook/> (discussing the plans of Philadelphia’s First Judicial District to send reminders of court dates to litigants via text message, Facebook, and Twitter); see, e.g.,

things can be “liked”: a simple click for a user to tell the rest of Facebook that she “likes” whatever that is.²⁷

There is also a somewhat recently developed feature of Facebook called the “friendship page.”²⁸ This page shows the common history of two “friends,” including posts on each other’s walls, events both users attended, pictures together, and things both people have “liked.”²⁹ This page can also be seen by any user who is “friends” with both people—provided that both people’s privacy settings allow the information to be shared with their other “friends.”³⁰

Twitter is a site where users post “tweets” of 140 characters or less.³¹ Similar to a Facebook’s wall-posting feature, Twitter users can also include photos, videos, links, or other content as part of a tweet.³² In addition, some use Twitter “simply . . . as a way to get the latest information on their interests.”³³ Importantly, each user may choose to follow particular accounts (possibly a friend, celebrity, business, or a news source) to see what those users have tweeted.³⁴ The tweets show up on the user’s “Home Timeline”—a collection of the tweets of the people the user follows, from most recent to least recent.³⁵ This may also include “retweets”: one user’s tweets rebroadcasted by another user.³⁶ Twitter

Quiz Creator, FACEBOOK, <http://www.facebook.com/thequizcreator> (last visited Dec. 23, 2011) (offering a quiz-making app); *CBSSports.com Brackets*, FACEBOOK, <http://www.facebook.com/apps/application.php?id=5713520924> (last visited Dec. 23, 2011) (offering a March Madness bracket app). There is even dedicated space for games on Facebook. *What Are the Application Dashboard and the Games Dashboard?*, FACEBOOK, <http://www.facebook.com/help/?faq=219209578106339> (last visited Dec. 23, 2011).

27. See *Facebook Help Center, What Is the Like Feature?*, FACEBOOK, <http://www.facebook.com/help/?faq=200273576682757> (last visited Dec. 23, 2011) (“‘Like’ is a way to give positive feedback or to connect with things you care about on Facebook. You can like content that your friends post to give them feedback or like a Page that you want to connect with on Facebook.”). Of course, despite this description, just because someone “likes” something does not necessarily mean they are giving it positive feedback.

28. *Id.*

29. *Id.*

30. *Facebook Help Center, Who Else Can See a Friendship Page Between Me and One of My Friends?*, FACEBOOK, <http://www.facebook.com/help/?faq=185127274870484> (last visited Dec. 23, 2011).

31. *Twitter Help Center, Twitter 101: How Should I Get Started Using Twitter?*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/215585> (last visited Dec. 23, 2011).

32. *Twitter Is the Best Way to Discover What’s New in Your World*, TWITTER, <http://twitter.com/about> (last visited Dec. 23, 2011).

33. *Id.* Indeed, many judges, including Supreme Court Justice Stephen Breyer, use Twitter as a news source. *LaRoe*, *supra* note 9.

34. *Twitter 101: How Should I Get Started Using Twitter?*, *supra* note 31.

35. *Twitter Help Center, What Is a Timeline?*, TWITTER, <http://support.twitter.com/articles/164083> (last visited Dec. 23, 2011).

36. *Id.* To make this clear, say Person A is following Celebrity B. Celebrity B decides to retweet an article posted by Company C. While Person A does not follow Company C, the article that Company C tweeted may be seen in the “Home Timeline” of Person A. This, of course, does not have to be a link to an article or a video but may be just a regular tweet.

users also can see who a particular user is following and who follows that user (though this can be restricted).³⁷ Twitter is a bit different from the other social networking sites mentioned in that following is not mutual: “Someone who thinks you’re interesting can follow you, and you don’t have to approve, or follow back.”³⁸ Overall, Twitter focuses less on the social networking aspect³⁹ and more on being a forum for people to post what they think or have read—a characteristic mentioned by many of the ethics opinions.

LinkedIn is the largest online *professional* network.⁴⁰ It is a site where professionals (and students) can network by inviting one another to “connect.”⁴¹ A user makes a profile that contains her professional experience, goals, education, and other information.⁴² Similar to Facebook, a user can post a “status,” though these are intended to be “professional updates.”⁴³ There are also “groups” on the site, places where users can comment on or follow threaded discussions.⁴⁴ The LinkedIn site even has a “guide” for attorneys, which includes a recommendation that users post “timely legal commentary” in an area of the site called “LinkedIn Answers.”⁴⁵ LinkedIn also has a feature to allow a user to see who has viewed her profile.⁴⁶ Again, though, the emphasis on this site is that the connection is a professional relationship.

37. *Twitter Help Center, What Is Following?*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/108-finding-following-people/articles/14019> (last visited Dec. 23, 2011).

38. *Id.*

39. This may be changing, especially among attorneys. See Jay Shepherd, *Small Firms, Big Lawyers: Twitter and Business Cards at the ABA TechShow*, ABOVE THE LAW (Apr. 15, 2011, 11:35 AM), <http://abovethelaw.com/2011/04/small-firms-big-lawyers-twitter-and-business-cards-at-the-aba-techshow/> (discussing how lawyers network by trading Twitter usernames).

40. See *LinkedIn Learning Center, What Is LinkedIn?*, LINKEDIN, <http://learn.linkedin.com/what-is-linkedin/> (last visited Dec. 23, 2011); *LinkedIn Press Center, About Us*, LINKEDIN, <http://press.linkedin.com/about/> (last visited Dec. 23, 2011). This is one distinction between the online social networks: LinkedIn markets itself as a *professional* network more than as a *social* network, but this distinction is based simply on the site’s intended use, not its actual use. As discussed in this Part, LinkedIn’s features are remarkably similar to those of the other sites.

41. *LinkedIn Help Center, Building Your Professional Network*, LINKEDIN, https://help.linkedin.com/app/answers/detail/a_id/348/ (last visited Dec. 23, 2011) (describing how to make connections).

42. *LinkedIn Learning Center, Profiles*, LINKEDIN, <http://learn.linkedin.com/profiles/> (last visited Dec. 23, 2011).

43. *Id.*

44. *LinkedIn Learning Center, Groups*, LINKEDIN, <http://learn.linkedin.com/groups/> (last visited Dec. 23, 2011).

45. *LinkedIn Learning Center, Attorneys*, LINKEDIN, <http://learn.linkedin.com/attorneys/> (last visited Dec. 23, 2011). LinkedIn Answers is an area where questions about a large number of areas (such as business travel, conferences and event planning, health, hiring and human resources, law and legal services) can be posed and then answered by users of the site. *LinkedIn Answers*, LINKEDIN, <http://www.linkedin.com/answers> (last visited Dec. 23, 2011). One of these sections is “Law and Legal,” which has subdivisions of corporate law (which has further divisions), criminal law, employment and labor law, property law, and tax law. *LinkedIn Answers, Law & Legal Questions*, LINKEDIN, <http://www.linkedin.com/answers/browse/law-legal/LAW> (last visited Dec. 23, 2011).

46. “Who’s Viewed Your Profile” Overview and Privacy, LINKEDIN, <https://help.linkedin.com/>

MySpace is another social networking site that, although in decline, is still in use.⁴⁷ Some, however, may hesitate to call it a social networking site anymore.⁴⁸ Nevertheless, it is important to discuss when examining judicial ethics because "MySpace is still rather popular among individuals who end up in the criminal justice system."⁴⁹ In addition, commentators and most of the advisory committees still mention MySpace when discussing social networking sites.⁵⁰ Furthermore, a judge pro tem lost his position because of his MySpace profile after it was discovered that the profile suggested a bias against prosecutors.⁵¹

MySpace is similar to Facebook in that users create profiles, play games, post updates, and follow the progress of their "friends" doing these things.⁵² The only real differences between MySpace and Facebook

app/answers/detail/a_id/42 (last visited Dec. 23, 2011).

47. See Dawn C. Chmielewski & David Sarno, *Once-Trendy MySpace Hits an Awkward Stage*, L.A. TIMES, June 17, 2009 (Business), at 1 (noting that the number of MySpace users is declining and projected to fall further); Brandon Dimmel, *MySpace CEO Abandons Ship as Site's Popularity Diminishes*, INFOPACKETS (Feb. 12, 2010, 10:29 PM EST), http://www.infopackets.com/news/internet/2010/20100212_myspace_ceo_abandons_ship_as_sites_popularity_diminishes.htm (stating that the popularity of MySpace is declining); see also John D. Sutter, *Praise for MySpace's New Look—But That Logo?*, CNN (Oct. 27, 2010, 14:48 GMT), <http://edition.cnn.com/2010/TECH/web/10/27/myspace.revamp/> ("Everyone knows MySpace has fallen on hard times in recent years . . . [It is] repositioning itself not as a social network . . . but as a 'social entertainment destination for Gen Y.'"). The site is called "MySpace," "Myspace," or "My_____" depending on where you look. See *id.* (using all three of the terms while discussing the newest, which is "My_____"). For simplicity, I will refer to it as "MySpace" throughout this Note.

48. See Sutter, *supra* note 47 ("[MySpace] seems to be emphasizing [promoting bands and celebrities on video- and audio-heavy pages] and largely abandoning the social network aspects of the site."). The company itself has said it does not want to compete with Facebook, but instead would prefer to be a complementary service focusing on music and, to a lesser extent, movies, television, and video games. Alexei Oreskovic, *MySpace Launching New Version of Website*, REUTERS (Oct. 27, 2010), <http://www.reuters.com/assets/print?aid=USTRE69Q11M20101027>.

49. Derrick Harris, *How Social Media Is Pushing the Limits of Legal Ethics*, GIGAOM (Feb. 26, 2011, 12:00 PM), <http://gigaom.com/2011/02/26/how-social-media-is-pushing-the-limits-of-legal-ethics/> (quoting Jennifer Lynch, a staff attorney with the Electronic Frontier Foundation).

50. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 1 (2010); Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010); Sankovitz, *supra* note 4, at 10; Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7, at 5 (2010).

51. K.C. Howard, *MySpace Judgment: Guilty*, LAS VEGAS REV. J. (Aug. 13, 2007, 10:00 PM), <http://www.lvrj.com/news/9121536.html> (last updated Sept. 26, 2008, 4:38 PM) (discussing how, in 2007, a substitute judge in North Las Vegas was dismissed for appearing to have a bias against prosecutors by listing one of his interests as: "Breaking my foot off in a prosecutor's ass . . . and improving my ability to break my foot off in a prosecutor's ass.>").

52. See *What's New with the Myspace Homepage*, MYSPACE, <http://www.myspace.com/guide/homepage> (last visited Dec. 23, 2011); *Find Friends*, MYSPACE, <http://www.myspace.com/help> (enter "Friends" into the search box, then follow the link with the same name) (last visited Dec. 23, 2011). It also has an option to import a user's Facebook interests and sync updates with Twitter, Facebook, and YouTube. See *Import Your Interests, Mashup with Facebook*, MYSPACE, <http://www.myspace.com/guide/mashup> (last visited Dec. 23, 2011) (detailing the importing of interests from Facebook); *Sync with Facebook Twitter and Youtube*, MYSPACE, <http://www.myspace.com/guide/sync> (last visited Dec. 23, 2011) (explaining how to sync interests). Note that "YouTube" is a video sharing site, not a social network. See *About YouTube*, YOUTUBE, <http://www.youtube.com/t/>

are that MySpace has a different layout, a different user base, and a different emphasis.

Google+ is the newest of the social networks and is on the rise.⁵³ It can be summarized as a combination between Twitter and Facebook.⁵⁴ A user can follow others as on Twitter,⁵⁵ post updates, photos, links, and other features similar to Facebook.⁵⁶ Also, users can “+1” a post or article located on various other sites (for example, an article on sfgate.com, the website for the San Francisco Chronicle)⁵⁷—similar to “liking” on Facebook.

II. THE ISSUES ADDRESSED BY ADVISORY OPINIONS

No judge has been punished for using an online social network in violation of the canons of the California Judicial Code of Ethics—at least not yet. This can be shown by reviewing the annual reports of discipline, which are released by the California Commission on Judicial Performance. The Commission’s disciplinary actions include public removal, public censure, public admonishment, private admonishment, and advisory letters.⁵⁸ No published disciplinary measure explicitly mentions an online social network or implicitly refers to social networking activities.⁵⁹

about_youtube (last visited Dec. 23, 2011).

53. See *supra* note 18. But see Paul Tassi, *A Eulogy for Google Plus*, FORBES (Aug. 15, 2011, 10:54 AM), <http://www.forbes.com/sites/insertcoin/2011/08/15/a-eulogy-for-google-plus/2/> (predicting that Google+ will not last long because it is too similar to Facebook); Paul Tassi, *The Rise of the Google Plus Faithful*, FORBES (Aug. 15, 2011, 3:45 PM) <http://www.forbes.com/sites/insertcoin/2011/08/15/the-rise-of-the-google-plus-faithful/2/> (predicting that perhaps Google+ will last but will not become more popular than or “destroy” Facebook).

54. Matt Hartman, *The Google+ Double Filter Model*, NONSEQUITORIAL (Aug. 13, 2011), <http://matthartman.tumblr.com/post/8865698480/the-google-double-filter-model>.

55. *About Circles*, GOOGLE+, <http://www.google.com/support/+/bin/static.py?hl=en&page=guide.cs&guide=1257347&rd=1> (last visited Dec. 23, 2011).

56. See *supra* note 21 and accompanying text; see also *How To*, GOOGLE+, <http://www.google.com/support/+/?hl=en> (last visited Dec. 23, 2011).

57. *About the +1 Button*, GOOGLE+, <http://www.google.com/support/plus/bin/static.py?page=guide.cs&guide=1207011&answer=1047397> (last visited Dec. 23, 2011).

58. ROTHMAN, *supra* note 12, § 12.85 (3d ed. 2007).

59. The California Commission on Judicial Performance has issued some private admonishments and advisory letters responding to conduct that perhaps could have taken place on an online social network or that could occur over social networking sites in the future (forwarding an email could be similar to posting on a wall or posting as a status). See, e.g., CAL. COMM’N ON JUDICIAL PERFORMANCE, 2009 ANNUAL REPORT 18 (2009) (“During trial, a judge contacted one of the counsel’s supervisors ex parte to criticize the attorney’s performance.”); CAL. COMM’N ON JUDICIAL PERFORMANCE, 2008 ANNUAL REPORT 26 (2008) (“A judge used the court computer to forward to judicial officers a satirical e-mail that promoted negative stereotypes about people from a certain country, apparently realizing that it would be offensive to at least one judge whose ancestors were from that country.”); CAL. COMM’N ON JUDICIAL PERFORMANCE, 2007 ANNUAL REPORT 32 (2007) (“A judge participated in an ex parte communication by email with a district attorney about a pending case.”); CAL. COMM’N ON JUDICIAL PERFORMANCE, 2006 ANNUAL REPORT 32 (2006) (discussing ex parte communications without discussing the precise manner in which they occurred, leaving open the possibility that they occurred online); CAL. COMM’N ON JUDICIAL PERFORMANCE, 2004 ANNUAL REPORT 22 (2004) (“A judge engaged

The California Committee considered three main issues in Opinion 66: (1) the propriety of a judge being a member of an online social network, (2) the propriety of a judge including in her online social network lawyers who might appear before her, and (3) the propriety of a judge including a lawyer in her online social network while the lawyer has a case pending before the judge.⁶⁰ Other states, including Florida, Indiana, Kentucky, New York, Ohio, Oklahoma, South Carolina, and Wisconsin, also have considered these questions, though some have phrased them differently or have combined the analysis of the questions.⁶¹ As this Note focuses on the California decision, it will consider the questions as addressed by the California Committee.

Before analyzing the decision, it is important to understand the framework of judicial ethics in California and function of the California Committee. All members of the California judiciary must comply with the California Code of Judicial Ethics.⁶² The Committee has "studied questions presented to it by judges, and has occasionally given formal opinions."⁶³ The California Supreme Court and the California Commission on Judicial Performance "give weight to these opinions, especially the Formal Opinions."⁶⁴ The Committee developed this reputation by frequently providing informal advice to judges and by releasing annual "Judicial Ethics Updates" for judges.⁶⁵ Currently, there is no case in which the California Supreme Court or the Commission on Judicial Performance has disregarded the Committee.⁶⁶

in extensive use of a court computer during court hours over a period of at least two years for a purpose specifically prohibited by court policy.").

60. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 1 (2010).

61. See generally Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011); Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010); Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7 (2010); Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009); N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009); Meiring, *supra* note 4 (the Indiana "unofficial opinion"); Sankovitz, *supra* note 4 (the Wisconsin "unofficial opinion").

62. CAL. CODE OF JUDICIAL ETHICS pmbl. (2009); see also ROTHMAN, *supra* note 12, § 1.30, at 13 (noting that compliance with the Code is mandatory). Rothman notes that there was dispute as to whether the Code was mandatory before 1996, despite its application by the California Supreme Court in judicial conduct cases, but it is now clear that it applies to all members of the judiciary. ROTHMAN, *supra* note 12, § 1.30, at 13 n.27; see also *id.* § 12.82 (discussing the importance of the California Code of Judicial Ethics).

63. ROTHMAN, *supra* note 12, § 12.83, at 662.

64. *Id.*

65. *Id.*

66. By this I mean exactly that: There are no cases that disagree with the reasoning of the Committee. There have been changes in the rules, which supersede opinions released by the Committee. That clearly is some kind of disagreement, but it is difficult to say it was with the Committee itself because the Committee was just interpreting the existing rule. As one looks through the reasons expressed for changing the rules, however, there is never a reference to explicitly superseding an opinion by the Committee.

A. MAY JUDGES USE ONLINE SOCIAL NETWORKING?

I. California

The first question the California Committee addressed in Opinion 66 was whether a judge could “be a member of an online social networking community.”⁶⁷ It answered “a very qualified yes.”⁶⁸ After looking at Canon 4A of the California Code of Judicial Ethics⁶⁹ and its commentary, it advised that judges could “use technology to accomplish what is otherwise permissible under the Code.”⁷⁰ Next, the opinion discussed the ethical limits of five “unique issues”⁷¹ posed by the use of technology necessary for online social networking.⁷² First, it noted how comments on social networking sites are not private but are like any other public comment a judge may make.⁷³ The Committee added that this means Canon 3B(9)⁷⁴ controls what a judge may “say” (post, tweet, and so forth) online.⁷⁵ The other four “unique issues” related to other aspects of the Code of Judicial Ethics and were all essentially reminders to judges about the public nature of social networking sites.⁷⁶ Opinion 66 cautioned judges against violating Canon 4A by casting doubt on their ability to act impartially and reminded judges not to exhibit bias or demean the judicial office.⁷⁷ The opinion further discouraged both impermissible online political activity, in violation of Canon 5, and lending the prestige of the judicial office to advance the personal interests of the judges or others.⁷⁸

To address this first issue, the Committee highlighted the differences between interaction on social networking sites and interaction face to face. Opinion 66 stated that for a judge to avoid

67. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 1 (2010).

68. *Id.*

69. Canon 4A states: “A judge shall conduct all of the judge’s extrajudicial activities so that they do not (1) cast reasonable doubt on the judge’s capacity to act impartially; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.” CAL. CODE OF JUDICIAL ETHICS Canon 4A (2009).

70. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 3–4 (2010).

71. The Committee noted that this was not an exhaustive list. *Id.* at 4.

72. *Id.* at 4–6.

73. *Id.* at 4–5.

74. Canon 3B(9) prohibits “public comment about a pending or impending proceeding in any court” and “nonpublic comment that might substantially interfere with a fair trial or hearing.” It allows the judge to discuss legal education programs and cases in appellate courts, as long as the comments or discussion will not interfere with a fair hearing of the current case. CAL. CODE OF JUDICIAL ETHICS Canon 3B(9) (2009).

75. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 4–5 (2010).

76. *Id.* at 4–6.

77. *Id.* at 5 (citing CAL. CODE OF JUDICIAL ETHICS Canon 2A) (using Canon 2A as a baseline for what is acceptable and warning judges that they must always act in a manner “that promotes public confidence in the integrity and impartiality of the judiciary”).

78. *Id.* at 5–6.

casting doubt on her ability to act impartially, the judge has an affirmative obligation to frequently check and remove, repudiate, or hide comments made by others that may be distasteful or offensive.⁷⁹ While discussing the duty to uphold the reputation of the judicial office, the Committee colorfully declared:

Online activities that would be permissible and appropriate for a member of the general public may be improper for a judge. While it may be acceptable for a college student to post photographs of himself or herself engaged in a drunken revelry,⁸⁰ it is not appropriate for a judge to do so.

The Committee found that using features of a social networking site, like creating a link to an organization or commenting on a proposed legislative matter, may constitute impermissible political activity.⁸¹ The discussion about lending prestige did not mention anything specific to technology, though the opinion noted that if a post is associated with the judge, then the post would fall under Canon 2B—meaning the judge would have to avoid “post[ing] any material that could be construed as advancing the interests of the judge or others.”⁸²

2. *Other States*

Every other state that released an opinion relating to online social networking has approved of social networking use by judges.⁸³ Most committees appeared to do so without much reservation. The New York Advisory Committee on Judicial Ethics said it “cannot discern anything inherently inappropriate about a judge joining and making use of a social network.”⁸⁴ It even recognized there are several reasons a judge might want to join such an online community.⁸⁵ The New York Advisory Committee thought the true question was “not whether a judge can use a social network but, rather, *how he/she does so*.”⁸⁶ The New York opinion added that posts on a profile page (either the judge’s or another user’s) may violate its Rules Governing Judicial Conduct, and referenced an opinion specifically advising a court not to link to the website for an

79. *Id.* at 5.

80. *Id.*

81. *Id.* at 5–6. The opinion presumably uses the same definition of “political organizations” as does the Code of Judicial Ethics, meaning “political party, political action committee, or other group, principal purpose of which is to further the election or appointment of candidates to nonjudicial office.” See CAL. CODE OF JUDICIAL ETHICS Terminology. In addition, by “proposed legislative measure” the opinion surely means legislative measures not related to “improvement of the law, the legal system, or the administration of justice.” See *id.* Canon 5.

82. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 6 (2010).

83. See *supra* note 61.

84. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).

85. *Id.*

86. *Id.* (emphasis added).

advocacy group for Megan's Law.⁸⁷ The Florida Judicial Ethics Advisory Committee agreed that the state's ethics code does not forbid using social networking sites,⁸⁸ but noted that using online social networking could lead to violations, depending on the content of the judge's post.⁸⁹ Ohio also declined to take issue with a judge using social networking sites, although the state's Board on Grievances and Disputes noted, "[A] judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct."⁹⁰ Oklahoma echoed these statements, noting a judge may use online social networks but the judge "must not use the [online social] network in a manner that would otherwise violate the Code of Judicial Conduct."⁹¹ The opinion emphasized that the conduct must not create the perception the judge engaged in conduct that reflects adversely on her impartiality.⁹² Unofficial opinions⁹³ issued in Indiana and Wisconsin echoed the New York and Ohio opinions: Participation in online social networking is permissible as long as judges do not violate another part of the code.⁹⁴ The South Carolina Advisory Committee even seemed to encourage judges to be members of social networking sites because doing so "allows the community to see how the judge communicates and gives the community a better understanding of the judge."⁹⁵

The opinion issued by the Ethics Committee of the Kentucky Judiciary expressed the most reservations as to whether judges may use online social networking and answered the question with a "Qualified Yes."⁹⁶ It dealt with the question fairly quickly, though, explaining that

87. *Id.*

88. Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009) ("The [Florida] Code of Judicial Conduct does not address or restrict a judge's . . . method of communication but rather addresses its substance."). However, the Florida Advisory Committee did say that the substance of a judge's online postings can violate the code of conduct.

89. *Id.* ("Of course, the substance of what is posted may constitute a violation.")

90. Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7, at 1 (2010).

91. Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).

92. *Id.*

93. The term "unofficial opinion" is my own. The unofficial opinions cited in this Note are an article written by a Wisconsin judge and an article written by a lawyer on the Indiana state ethics committee. Although these articles do not carry the same weight as official ethics opinions, they likely reflect the way the state in question would decide the issue, as their authors are those one would expect to know the answer to, or at least to have a very educated opinion about, the questions raised by Opinion 66.

94. See Meiring, *supra* note 4, at 10 ("[J]udges generally can join internet social networks . . . so long as the activities do not otherwise violate the [Indiana Code of Judicial Conduct]."); Sankovitz, *supra* note 4, at 11 ("Facebook and other online social networks are like social networks that are not online . . . [A] blanket ban on joining such groups has never been suggested.")

95. S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009). This opinion responded to a question from a magistrate judge, but there is little reason to think this distinction makes a difference, as the opinion still cites the state's judicial code of conduct.

96. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 1 (2010). Note the actual question answered by the Kentucky Ethics Committee was a compound question: "May a Kentucky judge or

while the Kentucky Judicial Code of Conduct “was promulgated . . . long before social networking sites” developed, judges have to maintain high standards of conduct.⁹⁷ The Kentucky Committee admitted it “struggled with this issue” and almost answered a “Qualified No.”⁹⁸ The tipping point was that Kentucky judges are elected and should not be isolated from their community.⁹⁹ The Kentucky Ethics Committee, like the California Committee but using less colorful language, specifically advised that “pictures and commentary posted on sites which might be of questionable taste, but otherwise acceptable for members of the general public, may be inappropriate for judges.”¹⁰⁰ The Kentucky committee also advised that the judges be mindful of ex parte communications or public comment.¹⁰¹

B. MAY JUDGES “FRIEND” LAWYERS WHO MIGHT APPEAR BEFORE THEM?

1. California

The second issue discussed by Opinion 66 was whether a judge may include in her online social network a lawyer who might appear before her.¹⁰² The opinion explained that while a judge should be careful to avoid even the appearance of bias or undue influence, the judge also should not be separated from the community in which she lives.¹⁰³ It added that judges may participate in associations to improve the law, even ones that limit membership; online social networking should be the same.¹⁰⁴ In answering this question, the California Committee specified that the principal issues were the ones relating to appearances, the obligations to disclose the online relationship (and possible recusal), and the danger of ex parte communications.¹⁰⁵

To deal with the issues relating to appearances, the California Committee delineated four factors to determine whether the judge “interacting with an attorney on a social networking site would create the impression the attorney is in a special position to influence the judge and

justice, consistent with the code of judicial conduct, 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, such as attorneys, social workers, and/or law enforcement officials?” *Id.*

97. *Id.* at 1–2, 4–5.

98. *Id.* at 5.

99. *Id.*

100. *Id.* at 4 (citing *In re* Complaint of Judicial Misconduct, 575 F.3d 279 (3d. Cir. 2009)). That case, however, seems to express a somewhat extreme view. The material in question was sexually explicit, something that would violate the terms of service of the social networking sites. *In re* Complaint of Judicial Misconduct, 575 F.3d 279, 283–84 (3d. Cir. 2009).

101. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 4–5 (2010).

102. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 6 (2010).

103. *Id.* at 6–7.

104. *Id.*

105. *Id.* at 7, 10.

cast doubt on the judge's ability to be impartial."¹⁰⁶ The first factor is the nature of the social networking site and the nature of the page.¹⁰⁷ Thus, if a judge used a page for primarily personal reasons, then an attorney being "friends" with the judge might create the impression of bias, while if a judge used the page to interact with groups like bar associations or alumni groups, there would be no appearance of bias.¹⁰⁸ The second factor is the number of "friends" the judge has; a smaller number supposedly creates the appearance of more influence.¹⁰⁹ The third, admittedly similar, factor is who the judge includes in her online social network, again with more exclusivity meaning a higher chance of the appearance of bias or influence.¹¹⁰ The fourth factor is how frequently the attorney appears before the judge— the only factor requiring analysis of facts other than those that can be gleaned from someone's social networking profile.¹¹¹ As one may suspect, according to the Committee, the more often the attorney appears before the judge, the greater the appearance of bias or influence.¹¹² Opinion 66 expanded on this last factor by noting that an attorney perhaps should not be included at all in a judge's online social network if the relationship between the two would already require disclosure.¹¹³

The Committee went on to give an example of an unacceptable social networking interaction and an example of an acceptable social networking interaction, adding, "The closer a given situation comes to one of these examples, the more likely it is that 'friending' an attorney is either permissible or prohibited."¹¹⁴ In the hypothetical of an impermissible interaction, the judge appeared to have a "personal" page involving extrajudicial activities, and a former law school classmate ("who is not a close friend") who practiced in the judge's jurisdiction tried to add the judge as a friend.¹¹⁵ The permissible hypothetical consisted of a judge who was a board member of a local bar association and of the local Inns of Court and who merely wanted to update participants about the activities of the two organizations or discuss issues

106. *Id.* at 8.

107. *Id.*

108. *Id.* This probably means that a site like LinkedIn, because of its professional nature, would have a better chance of being acceptable than would a site like Facebook, but the California Committee is not clear.

109. *Id.*

110. *Id.* The examples given are a judge being "friends" with a large number of prosecutors but not defense attorneys, or a large number of plaintiff's lawyers and no insurance defense counsel. The important factor here is the appearance of bias or influence.

111. *Id.*

112. *Id.*

113. *Id.* at 8–9.

114. *Id.* at 9.

115. *Id.*

related to the legal community and profession.¹¹⁶ This judge also included any lawyer who would like to be a part of his or her online social network.¹¹⁷

The California Committee next decided that disclosure is required if an attorney is included in the online social network of a judge.¹¹⁸ It based its decision on “the peculiar nature of online social networking sites” because there may be evidence of the connection but not of the extent of the connection.¹¹⁹ If the site is of a personal nature, but the judge allowed the connection because it was unlikely the attorney was going to appear before her, then the “judge should disqualify him or herself” if the attorney does appear.¹²⁰

The final issue addressed in Opinion 66 was whether a judge may include an attorney in her online social network.¹²¹ The opinion noted that “the judge’s page will include posts the attorneys make on their pages.”¹²² This may include acceptable public communications made by the attorney that the judge should not see.¹²³ The California Committee was concerned that if attorney A is included in the judge’s online social network, then the judge may see on Attorney A’s profile something written by attorney B (an attorney appearing before the judge but not included in the judge’s online social network), such as a Facebook comment or tweet. Essentially, the committee was worried about inadvertent *ex parte* communications online.

2. Other States

Most of the other states that released opinions believed it was acceptable for a judge to include attorneys in her online social network, although they did not discuss the matter in as much detail as did California Opinion 66. The New York opinion commented that this connection was “[i]n some ways . . . no different from adding the person’s contact information into the judge’s Rolodex or address book or speaking to them in a public setting.”¹²⁴ The Kentucky Ethics Committee—the same committee that almost answered “no” as to whether judges could participate in online social networks—said it best: “While the nomenclature of a social networking site may designate certain participants as ‘friends,’ . . . such a listing, by itself, does not reasonably convey to others an impression that such persons are in a

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 10.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (noting that attorneys may discuss their cases more freely than may judges).

¹²⁴ N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).

special position to influence the judge.”¹²⁵ The “intensity” of the relationship is what matters, not the term itself.¹²⁶ In fact, “[t]he Committee conceives such terms as ‘friend,’ ‘fan’ and ‘follower’ to be terms of art.”¹²⁷ This means, according to the Kentucky Ethics Committee, judges must be mindful of whether their online connection, combined with other factors, rises to the level forbidden by the code.¹²⁸ The Ohio opinion agreed, referring to the language in the Kentucky opinion.¹²⁹ It noted that “not all social relationships, online or otherwise, require a judge’s disqualification.”¹³⁰ The South Carolina Advisory Committee’s opinion did not address the issue at all.¹³¹

The unofficial opinions in Indiana and Wisconsin also did not take issue with a judge including attorneys in her online social network. The Indiana article stated that judges may “friend” attorneys.¹³² The Wisconsin article did not directly address this issue, but in criticizing the Florida opinion (and agreeing with the Florida dissenters), it seemed to hint that the author, a judge himself, thinks judges should be permitted to include attorneys in online social networks.¹³³

Despite later criticisms and characterizations of it,¹³⁴ the Florida opinion never stated that judges should be forbidden from including attorneys in their online social network.¹³⁵ Instead, the opinion explicitly limited judges to including attorneys not in the judge’s area or ones who are already listed on the judge’s recusal list.¹³⁶ This means that attorneys who cannot appear before the judge or are very unlikely to appear

125. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 2 (2010).

126. *Id.*

127. *Id.*

128. *Id.* at 3 (citing KY. CODE OF JUDICIAL CONDUCT Canon 3E(1)).

129. Sup. Ct. of Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2010-7, at 5 (2010).

130. *Id.* at 9.

131. The South Carolina opinion answered only the question of whether a magistrate judge may be a member of Facebook, doing so in the context of a judge who specifically asked about the possible impropriety of being Facebook friends “with several law enforcement officers and employees of the Magistrate’s office.” S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009).

132. Meiring, *supra* note 4, at 10.

133. Sankovitz, *supra* note 4, at 10.

134. See, e.g., John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 10, 2009, at A25 (“Judges and lawyers in Florida can no longer be Facebook friends.”); Barb Dybwad, *Florida to Judges: Don’t Facebook Friend Lawyers*, MASHABLE (Dec. 10, 2009), <http://mashable.com/2009/12/10/florida-bans-lawyer-friends/> (analyzing the opinion and noting that the opinion is not a complete bar to lawyers and judges being Facebook friends); Violet Petran, *Judges and Lawyers Are Not Facebook Friends*, LEGALMATCH (Jan. 11, 2010), <http://lawblog.legalmatch.com/2010/01/11/judges-and-lawyers-are-not-facebook-friends/> (“Recently, a Florida Judicial Ethics Advisory Committee opines on ethical issues relating to judges’ use of social networking sites like Facebook. The verdict . . . judges may not be ‘friends’ (cyber speaking that is) with lawyers.”).

135. Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

136. *Id.* Interestingly, the opinion speaks of these issues in reference to Facebook but then goes on to state that the same conclusions apply to all other social networking sites that allow others, whether or not they are a part of the network, to see who the judge has included in her online social network. *Id.*

(because they are based in another state, for example) before the judge can be included. The Florida opinion, however, later explained that including attorneys who are likely to appear would violate the Florida Code of Judicial Conduct.¹³⁷ A minority of the ethics commission disagreed, reasoning that the connection between judges and attorneys may be described differently online.¹³⁸

The Oklahoma opinion agreed with Florida's majority opinion, noting connections were permissible but only in limited circumstances.¹³⁹ Specifically, the Oklahoma Judicial Ethics Advisory Panel declared that a judge may have a social networking account, but limited the permissible connections to persons who do not regularly appear or who are unlikely to appear before the judge.¹⁴⁰ This limitation includes not only attorneys but also social workers, law enforcement officers, and "others who regularly appear in court in an adversarial role," which presumably extends to expert witnesses.¹⁴¹ It also admonished that "social networking sites are fraught with peril for Judges."¹⁴²

C. MAY JUDGES BE "FRIENDS" WITH LAWYERS WHO ARE APPEARING BEFORE THEM?

The states' judicial ethics opinions differed most on the issue of whether a judge may be "friends" with an attorney appearing before her. The advisory committees of the states recommended either that a judge should not include attorneys appearing before her in her online social network, or that the judge should be allowed to, subject to limitations. South Carolina did not address this question.¹⁴³

I. California

The California Committee answered this question with a decisive "no."¹⁴⁴ It said that if an attorney appears before a judge, the judge should immediately cease contact on the social networking site to avoid any possible appearance of bias.¹⁴⁵ This is to be done regardless of which social networking site the judge and attorney are using.¹⁴⁶ The Committee did not factor the nature of the social networking site into its analysis

137. *Id.*

138. *Id.* ("[S]ocial networking sites have become so ubiquitous that the term 'friend' on these pages does not convey the same meaning that it did in the pre-internet age . . .").

139. Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).

140. *Id.*

141. *Id.*

142. *Id.*

143. S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (2009). Again, the opinion concerned the inclusion of law enforcement officers in the online social network of a judge.

144. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 11 (2010).

145. *Id.* at 10-11 ("[T]he attorney should be unfriended.")

146. *Id.* at 11.

because it reasoned that continuing contact of any kind creates the impression “that the attorney is in a special position to influence the judge simply by virtue of the ready access afforded by the social networking site.”¹⁴⁷

2. *Other States*

All of the other states’ advisory opinions, besides Florida’s, found that a judge may be “friends” with an attorney while the attorney is appearing before the judge, subject to some limitations. The New York opinion warned judges that an online connection, alone or combined with other factors, can rise to a level that requires disclosure or recusal.¹⁴⁸ Kentucky, as mentioned, also warned judges to be mindful of the strength of the connection.¹⁴⁹ The Ohio opinion had similar sentiments, noting that the nature of the relationship (more than just being a “friend”) is the important factor, though “not all social relationships, online, or otherwise, require a judge’s disqualification.”¹⁵⁰

The unofficial opinions from Indiana and Wisconsin were split on the question of whether a judge should be allowed to be “friends” online with attorneys appearing before the judge. The counsel for the Indiana commission had the most nuanced approach, recommending a judge eliminate connections with attorneys on MySpace and Facebook but seeing no issue with LinkedIn.¹⁵¹ Like the California opinion, there was a concern about appearance issues, although Indiana only *recommended* (but did not require) that the connection cease.¹⁵² The Wisconsin judge seemed to believe that there would be no issue unless there was a close friendship that required recusal, as an online connection is just a different way to network.¹⁵³

Like the California Committee, the Florida Judicial Ethics Advisory Committee and the Oklahoma Judicial Ethics Advisory Panel advised that a judge not include attorneys who are appearing before her in her online social network.¹⁵⁴ In Opinion 09-20, the Florida committee stated that it believed such a connection is improper because it creates an

¹⁴⁷ *Id.*

¹⁴⁸ N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).

¹⁴⁹ Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 3 (2010).

¹⁵⁰ Sup. Ct. of Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2010-7, at 9 (2010).

¹⁵¹ Meiring, *supra* note 4, at 10–11 (discussing how the chance of receiving ex parte communications is lower on LinkedIn and how being in the same LinkedIn network is more like being in the same bar or alumni association than like being social friends). However, the author of the Indiana opinion may change her approach now that users of LinkedIn have “the ability to post daily musings.” *Id.* at 11.

¹⁵² *Id.* at 10 (“To avoid issues, the judge may want to remove the attorney . . . as a ‘friend’ from his Facebook or MySpace list until the case is over.”).

¹⁵³ Sankovitz, *supra* note 4, at 11.

¹⁵⁴ Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011); Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

appearance of bias.¹⁵⁵ It emphasized that it is the *appearance* of influence that is important—the mere act of identifying a lawyer as a social networking friend is the violation of the code—not whether there is any chance of influence.¹⁵⁶ A minority of the Florida committee disagreed, noting the mere act does not create the appearance of bias.¹⁵⁷

In a second opinion, the Florida committee reaffirmed Opinion 09-20, again with a minority disagreeing.¹⁵⁸ The minority opined that because social networking sites are growing so quickly, members of the public would not immediately think there is an appearance of influence when an attorney is a member of a judge's online social network because they know it may mean the two are merely acquainted.¹⁵⁹ The minority added that even if the term "friend" were accepted as referring to actual friendship, additional facts are required before recusal because being actual friends does not even require disclosure in many instances.¹⁶⁰ The majority, however, reiterated its belief that online connections are impermissible because the "unique medium in which internet social networking sites permit the networking and sharing of personal information and experiences among a select and exclusive community" creates the appearance that the attorney is in a position of influence.¹⁶¹ However, the Florida committee unanimously declared that if there is an appearance of bias, a judge cannot cure it by adding a disclaimer saying he or she will accept as a friend any user with a recognized name or with common "friends."¹⁶² This was never suggested by any of the other opinions, likely because they are less restrictive.

The Oklahoma opinion was brief but very similar to Florida's Opinion 09-20.¹⁶³ It explicitly agreed with Florida's opinion that a judge would violate ethical rules by including lawyers who appear before her in her online social network.¹⁶⁴ The Oklahoma panel emphasized that the appearance of influence was the critical feature that makes such a connection improper, and offered the following reasoning: "We believe

155. Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009).

156. *Id.*

157. *Id.*

158. Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2010-06 (2010) ("A majority of this Committee continues to believe that Fla. JEAC Op. 09-20 was correctly decided and that judges should not accept requests from lawyers *who appear before them* to be recognized as their 'friends' or contacts on social networking sites." (emphasis added)). The minority opinion here, however, was much more thorough and in-depth than was the previous opinion. Additionally, this opinion included a number of case citations, unlike the previous opinion. *Id.*

159. *Id.*

160. *Id.* (citing cases and prior opinions including one in which a twenty-eight year relationship did not necessarily require recusal, and one in which a weekly tennis match did not even require disclosure).

161. *Id.*

162. *Id.*

163. Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).

164. *Id.*

that public trust in the impartiality and fairness of the judicial system is so important that is imperative to err on the side of caution where the situation is ‘fraught with peril.’”¹⁶⁵ Perhaps this is why it suggested the strictest guidelines of all of the opinions, extending the prohibition beyond attorneys to any person who regularly appears in the judge’s court—not even necessarily before the judge.¹⁶⁶ The Oklahoma panel also (oddly) quoted the Kentucky opinion in saying that a judge must freely accept restrictions on conduct that may be burdensome to an ordinary citizen.¹⁶⁷

D. GENERAL CONCERNS OF THE ADVISORY OPINIONS

These state advisory opinions also contained several other concerns relating to the use of social networking sites.¹⁶⁸ The California opinion concluded by saying it had not enacted a per se ban on interactions with attorneys who might appear before judges.¹⁶⁹ It added some general advice about checking privacy settings and ended with a statement expressing that “notwithstanding the explosion of participation in online social networking sites, judges should carefully weigh whether the benefit of their participation is worth all the attendant risks.”¹⁷⁰

Other opinions noted that “[t]here is something about the ease of communication [on social networking sites] that may just make it too easy for a judge to slip.”¹⁷¹ All of the opinions had similar concerns. New York was clear to remind judges that giving legal advice or discussing a case would be impermissible.¹⁷² The Kentucky ethics committee echoed these concerns, and it was particularly concerned with *ex parte* communications, noting that a North Carolina judge had been publically reprimanded for communicating with an attorney.¹⁷³ It warned judges to

^{165.} *Id.*

^{166.} *Id.* The opinion, however, explicitly noted that the judge may be connected to court staff. *Id.*

^{167.} *Id.* (quoting Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 4 (2010)). It is odd because the Kentucky opinion—which was quoting the commentary to Canon 2A of the Kentucky Code of Judicial Conduct—allowed a judge to use online social networking. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 1, 4 (2010). The context of this quote in the Kentucky opinion, however, was noting the limits of the use of online social networking (especially not posting inappropriate pictures or commentary), not forbidding the use of the sites. *Id.* at 4.

^{168.} These concerns, while not precisely pertinent to this Note, provide essential information for a judge who is considering whether she wants to use, or continue to use, any social networking site.

^{169.} Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 11 (2010).

^{170.} *Id.* at 11–12.

^{171.} Allison Petty, *Social Networking Web Sites Raise Ethical Issues for Judges, Lawyers*, ALLBUSINESS (Feb. 3, 2010), <http://www.allbusiness.com/legal/trial-procedure-judges/13862837.html> (quoting Cynthia Gray, director of the American Judicature Society Center for Judicial Ethics, who was speaking only about Facebook).

^{172.} N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).

^{173.} Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 4–5 (2010) (citing Public Reprimand of B. Carlton Terry Jr., N.C. Judicial Standards Comm’n Inquiry No. 08-234 (2009)).

be “extremely cautious” on social networking sites.¹⁷⁴ The Oklahoma opinion similarly suggested caution.¹⁷⁵ The Ohio opinion provided guidelines for using social networking sites, including (in addition to similar ones mentioned by other states): (1) judges must maintain dignity in photographs, (2) judges “must not foster . . . interactions . . . if [they] will erode confidence in the independence of judicial decision making,” (3) judges must not use social networking sites to do outside research, and (4) judges should “be aware of the contents of [their] social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.”¹⁷⁶ The unofficial opinion in Indiana had similar concerns.¹⁷⁷ The Wisconsin article did not address these specific issues.

III. CALIFORNIA OPINION 66 IS FLAWED

As a matter of law and as a matter of policy, Opinion 66 partially missed the mark. Despite using the appropriate canons, the understanding of social networking sites displayed by the California Committee led to flawed results from a legal perspective. The Committee also failed to consider a number of policy issues, especially that California judges are elected. To the credit of the Committee, it recognized that Opinion 66 “promises to be the first of many to address this issue” of ethical constraints that arise when a judge participates in online social networking in California.¹⁷⁸ Another opinion is necessary to correct the errors in Opinion 66. Hopefully, the California Committee will take appropriate action.

A. OPINION 66 IS FLAWED FROM A LEGAL PERSPECTIVE

The canons of the California Code of Judicial Ethics establish standards for actions of judges on and off the bench.¹⁷⁹ Other relevant statutory sources of law in California are sections 170.1 and 170.6 of the California Code of Civil Procedure, which contain the grounds for voluntary and involuntary disqualification, respectively.¹⁸⁰ In addition, retired judge David Rothman’s *California Judicial Conduct Handbook*—a book that “attempt[s] to integrate all available materials on judicial ethics in California”—provides guidance for judges.¹⁸¹ It is important to

174. *Id.* at 5.

175. Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).

176. Sup. Ct. of Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2010-7, at 7–9 (2010).

177. Meiring, *supra* note 4, at 10–11 (discussing how ex parte information may be inadvertently received and how legal advice may be solicited).

178. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 1 (2010).

179. CAL. CODE OF JUDICIAL ETHICS pmbl. (2009).

180. CAL. CIV. PROC. CODE §§ 170.1, 170.6 (2010).

181. ROTHMAN, *supra* note 12, § 1.00.

note that in California, advisory opinions about judicial ethics can become “authoritative.”¹⁸² Opinion 66, however, should not.

The California Committee was concerned about the risk of an apparent connection between an attorney and a judge on an online social network indicating bias or influence.¹⁸³ The Committee believed this issue was largest during trial (or appeal), thus its declaration that a judge should not include an attorney in her online social network during that period.¹⁸⁴ This conclusion is based on a partially flawed view of online social networking. Opinion 66 correctly noted that, under specific circumstances, merely because an attorney is “friends” with a judge does not mean the attorney is in a special position to influence the judge.¹⁸⁵ It also set out four important factors as part of the test to determine whether there is a possible appearance of impropriety.¹⁸⁶ Despite this test, the Committee concluded that if a judge and an attorney are connected on a social networking site, then the judge is always disqualified because of an appearance of impropriety unless the judge “unfriends” the attorney and discloses the online connection.¹⁸⁷ Opinion 66 reached this conclusion without referring to the test it advanced. The opinion did say that even if a judge makes a disclosure regarding the connection, the judge still must cease online contact so as to avoid the appearance of bias or influence.¹⁸⁸

The California Committee should have recognized that an online connection between an attorney and a judge while a case is pending does not warrant recusal under the California Code of Civil Procedure, especially if it does not rise to the level of special influence. The test under the Code to determine whether a trial judge must be recused is whether “[a] person *aware of the facts* might reasonably entertain a doubt that the judge would be able to be impartial.”¹⁸⁹ Additionally, Judge Rothman noted:

182. See *Ethics Committee Advisory Opinions*, CAL. JUDGES ASS’N, http://www.caljudges.org/ethics_opinions.vp.html (last visited Dec. 23, 2011) (declaring that some opinions are authoritative, others are no longer applicable, and that others have no comment or distinguishing characteristics). Recall that the opinions, while not technically binding, are relied on by the California Commission on Judicial Performance and the California Supreme Court.

183. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 7–10 (2010).

184. *Id.* at 10–11.

185. *Id.* at 7.

186. *Id.* at 8.

187. *Id.* at 10–11.

188. *Id.* at 11.

189. CAL. CIV. PROC. CODE § 170.1 (a)(6)(A)(iii) (2010) (emphasis added). If an attorney believes there is actual prejudice, she can file a peremptory challenge under section 170.6, which requires an affidavit under penalty of perjury stating that the judge is prejudiced. *Id.* § 170.6(2). Based only on online social networking contact, such a motion would likely fail.

The test for disclosure and disqualification in social friendships is similar to that which one might employ with respect to a dating relationship: is the relationship that of a mere "acquaintance," in which case even disclosure is questionable, or is the person within the inner circle of the judge's intimate friends, such that disqualification is required? Between these extremes are the variables, where the relationship gradation moves closer to clear disclosure and then to clear disqualification. The circumstances might also be such that, whereas the *judge might not even consider disclosure of an acquaintanceship with an attorney appearing in court to represent a client*, the judge might recuse where the attorney is personally a party in the case.¹⁹⁰

Online social networks are an indication of social friendships, social acquaintances, and professional connections. The relationship between a judge and an attorney can be examined by looking at their connection and interaction with one another on the particular website. As noted, being online "friends" with a judge does not necessarily mean one has special access to a judge. Furthermore, attorneys should trust that a judge would disclose any improper communication between her and opposing counsel during trial (something which may alter the situation).¹⁹¹ As the actual relationships that a judge has with "friends" in her online social network may vary, a social networking connection by itself should not raise an improper appearance issue. The opinions in Kentucky, New York, and Ohio recognized this fact.¹⁹²

As mentioned, the California Committee seemed to misinterpret the test for recusal provided by the California Code of Civil Procedure, or its application, because of a flawed view of social networking sites. The Committee's interpretation is far too strict, as "a person aware of the facts" would understand the relationship that online "friends" have with one another—namely that a person who understands the facts would not think the connection by itself means the judge cannot be impartial. This lack of understanding is typified by the first example it gave after it described the four-factor test to determine whether "friending" is permissible.¹⁹³ In the hypothetical, a former classmate, not a close friend, requested to be included in the judge's online social network.¹⁹⁴ The judge in this situation had a "personal" page and only a small number of

190. ROTHMAN, *supra* note 12, § 7.51, at 356–57 (emphasis added) (footnote omitted) (citing Cal. Judges Ass'n, Formal Ethics Op. 45, at 4 (1997)).

191. The judge likely would be required to disclose this communication, depending on the circumstances, the nature of the communication, and other factors. If, for example, it was a "professional" connection, there would be no reason for an attorney to believe there were some kind of special access the judge would not disclose. Any communication would be like any other *ex parte* communication. If the communication were related to a professional meeting, such as a bar association or alumni meeting, it would not even need to be disclosed.

192. *See supra* notes 124–33, 148–53 and accompanying text.

193. *See* Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 9 (2010).

194. *Id.*

“friends,” including a few colleagues.¹⁹⁵ The California Committee believed this would not be an acceptable interaction.¹⁹⁶ Unfortunately, the Committee did not give enough information for its own test (for instance, the judge’s practice for determining who to include was not part of the test at all—if the judge had a brand new profile, the lawyer’s request might be the first from someone who was not a close friend or colleague). Regardless, the California Committee did not seem to understand the purpose of social networking sites: to connect or reconnect with people you know. In addition, the law regarding recusal and disclosure circumstances must be taken into account; a person aware of all the facts would still examine the actual relationship and conclude that there is no reason a distant classmate would receive preferential treatment.¹⁹⁷

Ex parte communications also worried the California Committee.¹⁹⁸ In general, under Canon 3B(7) of the California Code of Judicial Ethics, a judge must disclose all ex parte communications received from an attorney in a case over which the judge is presiding.¹⁹⁹ An improper ex parte communication can result in disqualification of the judge: Any such communication violates Canon 3B(7) even if it is not prejudicial.²⁰⁰ If the communication was inadvertent, then the judge must disclose it, but the judge does not have to recuse herself unless she cannot be impartial.²⁰¹ The possibility of ex parte communication may be greater on an online social network²⁰² because of the public nature of many comments on the sites.²⁰³ This does not mean, however, that a judge should avoid using

195. *Id.*

196. *Id.*

197. CAL. CIV. PROC. CODE § 170.1 (a)(6)(A)(iii) (2010). Of course, this assumes the judge has no history of giving preferential treatment to prior classmates, something that is very easy to assume because of the high level of professionalism required of judges.

198. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 10 (2010).

199. CAL. CODE OF JUDICIAL ETHICS Canon 3B(7) (2009); ROTHMAN, *supra* note 12, § 5.23, at 220. Note that this assumes the ex parte communication is improper: “A judge may initiate or consider any ex parte communication when expressly authorized by law to do so.” CAL. CODE OF JUDICIAL ETHICS Canon 3B(7)(e) (2009). For example, under California Penal Code section 987.9, a judge (who is not the trial judge) must communicate ex parte with experts, investigators, and others while considering a ruling on a motion for ancillary services to assist an indigent defendant in a death penalty case. *See* CAL. PEN. CODE § 987.9 (2010); *see also* 6 B.E. WITKIN, CALIFORNIA PROCEDURE §§ 58–62 (5th ed. 2008) (noting portions of the law regarding permissible ex parte communications in civil cases).

200. ROTHMAN, *supra* note 12, § 5.00, at 195.

201. *See Judicial Ethics Update*, CAL. JUDGES ASS’N (Apr. 2000), http://www.caljudges.org/ethics_updates_update1999.vp.html.

202. These communications can, of course, come from a judge, too. *See* Petty, *supra* note 171 (“There is something, apparently, about technology that encourages people to do things that they might not otherwise do” (quoting Cynthia Gray, director of the American Judicature Society Center for Judicial Ethics)).

203. By public nature, I mean that unless the judge or attorney explicitly limits what the other can see (an action possible only on Facebook so far) then once the two are connected, everything one posts can be seen by the other.

online social networking because of the possibility of *ex parte* communications: There is a duty to disclose *ex parte* communications, not a duty to avoid situations in which they may occur. The canons regarding *ex parte* communications never mention that a judge must avoid such potential situations.²⁰⁴ In fact, the opposite is true: Judges should interact with the community.²⁰⁵

Opinion 66 also discusses the apparent bias that may result from postings on a judge's profile page by other users.²⁰⁶ The Committee stated that judges should be responsible for removing certain postings.²⁰⁷ However, it is not legally sound to mandate or suggest that "a judge has an *obligation* to be vigilant" and check frequently to see if anyone posted a comment that may be offensive.²⁰⁸ First, despite what the California Committee believed, comments on the judge's page do not create an impression that the judge has adopted them.²⁰⁹ There must be a "public manifestation . . . of the judge's knowing approval of invidious discrimination" for "adoption" of a comment to violate the California Code of Judicial Ethics.²¹⁰ Without more than the mere appearance of a post on a wall, it cannot be said the judge knowingly approved of the post. To conclude otherwise would be similar to saying that a person adopts all of his or her *received* emails (which may even include spam), assuming the emails were made public.²¹¹ It may be better if the judge disclaims comments, especially particularly offensive comments or posts, but this cannot be a requirement. Second, Canon 3A of the California Code of Judicial Ethics requires that "judicial duties prescribed by law shall take precedence over all other activities."²¹² Requiring a judge to be "vigilant" implies that a judge needs to check frequently to possibly

204. See ROTHMAN, *supra* note 12, § 5.00, at 195.

205. *Id.* § 10.00.

206. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 5 (2010).

207. *Id.*

208. *Id.* (emphasis added).

209. This is true for the most part, though there may be times where it is apparent that the judge approves (for example, the judge comments on the post, likes the post, reposts or retweets the same thing, and so forth). The South Dakota Supreme Court noted this issue in *Onnen v. Sioux Falls Independent School District No. 49-5*, although the Facebook post at issue in that case was a "Happy Birthday" post written on the judge's wall in Czech by a testifying witness. 801 N.W.2d 752, 757 (S.D. 2011).

210. CAL. CODE OF JUDICIAL ETHICS Canon 2C cmt. (2009). This is, however, still being discussed and is not yet "fully answered." See Rachel M. Zahorsky, *Panelists: Judges Should Watch Whom They "Friend" on Social Media and What Friends Post About Them*, A.B.A. J. (Aug. 6, 2011, 5:04 PM) http://www.abajournal.com/news/article/judges_should_watch_who_they_friend_on_social_media_and_what_friends_family/ ("One question that was not fully answered by the panel . . . was the extent of the judiciary's responsibility to monitor the activities of friends and family members who might include a judge's likeness or appear to represent a jurist's opinion or affiliation.").

211. A distinction, of course, can be made between the two because of the public nature of social networking sites, even though access can be limited to a degree.

212. CAL. CODE OF JUDICIAL ETHICS Canon 3A (2009) (footnote omitted).

remove offending posts. However, judges should not be expected to constantly spend time monitoring all of their online social networking profiles, which would detract from their duties. This requirement would leave them unable to have such profiles at all.

Opinion 66 treated social networking technology in a special manner, in a way that has no basis in the relevant law. There is not a single canon or statute relating to judicial ethics, nor a relevant case, that mentions online social networking²¹³ or that says that a judge using social networking sites makes the situation different or creates a different test for recusal.²¹⁴ Be that as it may, it is true that new technology does change some things when it comes to a judge's daily activities and judicial ethics.²¹⁵ Many of these changes, as will be explained, are for the better.

B. OPINION 66 IS FLAWED FROM A POLICY PERSPECTIVE

As a matter of policy, Opinion 66 does not make sense, especially with respect to its requirement a judge cease contact on online social networks while a case is before her. This requirement may lessen the chance of an attorney or party discovering an improper relationship. In addition, because California judges are elected, they may be hesitant to

213. Occasionally, a disciplinary action involves online social networks but does not comment on any specific aspects; it merely mentions how social networking led to the improper behavior. *See, e.g.*, Public Reprimand of B. Carlton Terry Jr., N.C. Judicial Standards Comm'n Inquiry No. 08-234 (2009) (reprimanding a judge for an ex parte communication on Facebook).

214. Indeed, the South Dakota Supreme Court expressly noted that a Facebook post by a testifying witness wishing a judge "Happy Birthday" is not an ex parte communication because it does not concern the proceeding—thus, it is acceptable. *Ommen*, 801 N.W.2d at 757–58. The court went on to hold that even if the post was an ex parte communication, it was uninvited, not related to the case, and did not affect the decision because the judge was not even aware it had occurred. *Id.* at 758. More important, the "post did not relate to any facts regarding the case and certainly not to any facts [the plaintiff] would need to rebut." *Id.* While this case involved a witness and not an attorney, the outcome likely would not have been different had an attorney made the post.

215. Everyone knows how much easier it is to find information now with a connection to the Internet. Judges must resist the temptation to research on the Internet, as they have a duty to consider only what is before them before. *See Judicial Ethics Update*, CAL. JUDGES ASS'N (Mar. 2005), http://www.caljudges.org/ethics_october_2004_ethics_update.vp.html ("A judge should not use the internet to research the validity of facts presented in court proceedings."). *But see* A.B. v. State, 885 N.E.2d 1223, 1224 (Ind. 2008) ("The Commentary to Canon 3B of the Indiana Code of Judicial Conduct advises: 'A judge must not independently investigate facts in a case and must consider only the evidence presented.' Notwithstanding this directive, in order to facilitate understanding of the facts and application of relevant legal principles, *this opinion includes information regarding the operation and use of MySpace from identified sources outside the trial record of this case.*" (emphasis added)). Also, Supreme Court Chief Justice John Roberts—who is not bound by any code of conduct—did online research before deciding *Arizona Free Enterprise Fund v. Bennett*, 131 S. Ct. 2806 (2011), and *McCormish v. Bennett*, 130 S. Ct. 1498 (2010) (mem.). *See* Ira Pilchen, *Social Media Has Benefits and Pitfalls for Courts, Panelists Say*, ABANOW (Aug. 7, 2011), <http://www.abanow.org/2011/08/social-media-has-benefits-and-pitfalls-for-courts-panelists-say/> (discussing Chief Justice Roberts' comments during oral arguments and noting a that district court judge questioned Chief Justice Roberts' actions).

remove attorneys from an online social network and risk losing their political support.

The most concerning policy implication of Opinion 66 is that judges cannot engage in what is becoming normal behavior: using online social networks.²¹⁶ It is true, as the California Code of Judicial Ethics provides, that to avoid irresponsible or improper conduct, “[a] judge must . . . accept restrictions on the judge’s conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.”²¹⁷ Yet a judge can likely use social networking sites while still avoiding both irresponsible and improper conduct. This is true even when an attorney in the judge’s online social network appears in her court.²¹⁸ If judges are restricted from using the sites, there may be an unfortunate situation similar to what occurred in Florida: judges removing a number of their “friends” or even shutting down their social networking accounts completely.²¹⁹

Opinion 66 also recommended that judges disclose online social networking contact with attorneys, especially if one of the attorneys appears in the judge’s court.²²⁰ Although the idea makes sense, the Committee’s belief that the nature of the online connection requires automatic disclosure is misguided.²²¹ It seems this conclusion is due to some idea of special access or contact with the judge. Yet often judges’ official email addresses, phone numbers, and mailing addresses are extremely easy to discover,²²² so contacting a judge is not difficult. An attorney may already have the judge’s email address. The analysis must turn on the nature of the relationship, not on the possibility of contact.

216. LaRoe, *supra* note 9 (“[Judge Grewal of the Northern District of California] is among a class of younger judges adamant about keeping their social networks going despite the tightrope they must walk.”).

217. CAL. CODE OF JUDICIAL ETHICS Canon 2A cmt. (2009). But “[t]he Commentary does not constitute additional rules and should not be so construed.” *Id.* at pmb1.

218. This seems like a bold assertion, but it has to be true. As mentioned, around 40% of judges are using social networking sites and the number of cases in which a judge has been disciplined is extremely small. The only public reprimand so far is of Judge B. Carlton Terry, Jr., in North Carolina. See Public Reprimand of B. Carlton Terry Jr., N.C. Judicial Standards Comm’n Inquiry No. 08-234 (2009). In addition, there was a judge in Georgia who resigned after questions arose about his contact with a defendant, including “Facebook e-mails” that detailed the relationship between the two. Debra Cassens Weiss, *Ga. Judge Resigns After Questions Raised About Facebook Contacts*, A.B.A. J. (Jan. 7, 2010, 10:44 AM) http://www.abajournal.com/news/article/ga_judge_resigns_after_questions_raised_about_facebook_contacts/.

219. Sarah Lundy, *Judges Find Facebook Can Be a Lonely Place*, ORLANDO SENTINEL (Jan. 1, 2010), http://articles.orlandosentinel.com/2010-01-01/news/0912310148_1_facebook-friends-judges-question-social-networking-site (discussing the reactions of judges in Florida to its advisory opinion).

220. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 10–11 (2010).

221. *Id.* at 11.

222. Judges’ email addresses are frequently some combination of the judge’s first name, or first initial, and their last name plus the court’s domain name. For example: “JMarshall@SupremeCourt.org” or “JohnMarshall@SupremeCourt.org.” These domain names are not hard to discover because usually there will be at least one email address listed on the court’s website that uses the domain name.

The law does not require a judge to disclose all social contact,²²³ and from a policy perspective, disclosure should be up to the judge. Furthermore, courts are busy and congested. As such, it makes more sense to trust judges to act properly and disclose connections that may be an issue.²²⁴ Without such trust, an unworkable system would result, one with frequent recusals, causing cases to shift from one judge to another. Most judges know that if the situation calls for disclosure or recusal, they have the discretion to analyze the situation and act as they deem appropriate.²²⁵ This does not mean that a judge will never have to disclose an online contact—sometimes the judge may feel it is appropriate to do so. An automatic disclosure of all contacts, however, is far too burdensome.

It may be an even better policy to encourage a judge to include an attorney in her online social network, as this might help attorneys and judges adhere to their respective codes of conduct. A judge has a duty to “take appropriate corrective action” if the judge has “personal knowledge” that an attorney has violated any provisions of the Rules of Professional Conduct.²²⁶ In Texas, which has a similar rule, a judge did just that: Judge Susan Criss denied a continuance to an attorney who had posted several updates about drinking and partying during the week, but when appearing before Judge Criss, asked for a continuance because of the death of her father.²²⁷ An attorney may, of course, be wary of connecting with a judge.²²⁸ It is not, and should not, be a requirement that an attorney include a judge in the attorney’s online social network. In addition, a judge should not have to police the attorneys who appear before them, but if an attorney and judge become “friends,” then such

223. See *supra* Part III.A.

224. But see Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 670 (2005) (“[T]he judge’s belief that she is not biased is not conclusive, and indeed, is irrelevant.”).

225. Judges even have a checklist to help them. See ROTHMAN, *supra* note 12, at app. F (giving trial judges a six-step checklist for determining whether recusal or disclosure is appropriate and what to do if either is appropriate).

226. CAL. CODE OF JUDICIAL ETHICS Canon 3D(2) (2009). California law also “imposes additional reporting requirements regarding lawyers.” See *id.* at Canon 3D cmt.

227. Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, A.B.A. J. (July 31, 2009, 2:16 PM), http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/.

228. Alex Ginsberg, *SI Judge Is Red “Face”d*, N.Y. POST (Oct. 15, 2009, 10:44 AM), http://www.nypost.com/p/news/local/staten_island/item_1TCZaxBoS2p5oOyES11jPN (“[Receiving a friend request from a judge] puts the lawyer in a very uncomfortable position. If you say no, and then you have to appear before him and ask for bail. And if you say yes, that’s also awkward.”); Petty, *supra* note 171 (“I don’t know if I necessarily would want the judges to be aware of what’s going on in my personal life” (quoting Christopher J. McGeehan, a partner in a technology law firm)); cf. Paul B. Kennedy, *Can’t We All Just Be Friends?*, DEF. RESTS (Feb. 10, 2011), <http://kennedy-law.blogspot.com/2011/02/cant-we-all-just-be-friends.html> (“Judge Susan Criss in Galveston [Texas] and I are ‘friends’ on Facebook. I practice in her court. I have no special privileges when I set foot in her courtroom. Judge Criss posts pictures of the sun setting over the island and of her dogs chewing up her slippers. It’s funny.”).

policing is possible. An online connection may cause an attorney at least to pause before posting a potentially violative statement on a social networking site. Social networking may improve judicial ethics, as well, because a judge has a similar duty to initiate corrective action if she has "reliable information" that another judge has violated the California Code of Judicial Ethics.²²⁹

Another important policy consideration relates to judicial elections in particular: An elected judge should be able to include attorneys in her online social network.²³⁰ This should be allowed regardless of the chance of an attorney appearing before the judge. In California, judges are elected (in an initial election or approval of appointment, a reelection, or a "confirmation" election).²³¹ A California judge may receive a donation for an election from an attorney and still hear a case involving that attorney,²³² which arguably would make a judge appear more biased than would having an online connection with the attorney. Judges in some states use or create their social networking profile during elections²³³ because it is an effective way to connect with attorneys.²³⁴ While it is true that on Facebook a judge may be able to make a public profile or "fan" page,²³⁵ this is not true for other social networking sites, nor is it practical for some judges to do. For example, a judge may already have a number of Facebook friends who are attorneys and creating a fan page does not ensure the attorneys will all become "fans" of the judge.

As for attorneys appearing before the judge, if the judge had to remove each one from her list of online "friends" before trial, not only is there no guarantee that the attorney would rejoin the judge's online social network, there is even the danger of the appearance of bias. This may occur when the judge or attorney "friends" the other after the trial. The appearance of bias may also go the other way (that is, the judge may

229. CAL. CODE OF JUDICIAL ETHICS Canon 3D(1) (2009).

230. Because Opinion 66 did not address the question, this Note is not directly discussing any ethical issues relating to social networking sites and judicial elections.

231. 2 B.E. WITKIN LEGAL INST., *supra* note 199, §§ 2–3.

232. CAL. CODE OF JUDICIAL ETHICS Canon 5A cmt. (2009) ("In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(6), a judge's campaign may receive attorney contributions.")

233. *See* Petty, *supra* note 171 (discussing the use of Facebook by Judge William H. Hooks for his election campaign); *Editorial: Facebook Requires Judges' Caution*, NEWS HERALD (Dec. 13, 2010), <http://www.news-herald.com/articles/2010/12/13/opinion/nh3400373.txt?viewmode=fullstory> (discussing Judge Eugene A. Lucci's use of Facebook during his election and mentioning that several judges created new profiles during the election cycle).

234. *See, e.g.*, Christie L. Smith, *Newsflash . . . Social Media*, TEXAS CTR. FOR THE JUDICIARY, <http://www.yourhonor.com/SocialMediaPartOne.html> (last visited Dec. 23, 2011) (noting the use of Facebook and LinkedIn by a judge elected to the bench).

235. *See supra* notes 24–25 and accompanying text.

appear to be biased *against* the attorney because she “unfriended” the attorney). Opinion 66 recommended disclosure when a judge has included an attorney in her online social network because of a belief that the attorney was not going to appear before the judge, but somehow did.²³⁶

Another extremely important policy issue relating to Opinion 66 is transparency. Even if a judge decides not to use social networking sites, contact with the judge’s close friends will still take place. By allowing, or encouraging, judges to use social networking sites, these relationships become more transparent. Although this Note advocates that judges should be trusted, there are times where the judge may simply forget to disclose that she went to high school, college, or law school with an attorney appearing before her or may believe wholeheartedly that disclosure is unnecessary because she will not act in a biased fashion. When the contact occurs online, especially if opposing counsel “friends” the judge, then the entire process will be more transparent. The Facebook “friendship page” would particularly help with transparency because it is an amalgamation of the contact between a judge and an attorney.

Furthermore, online social networking allows the judge to reach a broader audience so the judge can help educate the public about the law.²³⁷ Judges, subject to some restraints, should not be separated from the community in which they live: “Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.”²³⁸ Online social networking, with its widespread use, is almost certain to be a part of a judge’s community. Isolation from that avenue of communication is not wise and may hinder the judge’s duty to, among other things, act as a leader in the community, promote understanding of and confidence in the administration of justice, and help the public understand the courts.²³⁹

C. THE CALIFORNIA JUDICIAL ETHICS COMMITTEE DID NOT GET EVERYTHING WRONG

Despite its flaws, Opinion 66 had a number of valid points. It is relatively uncontroversial for judges to use social networking sites, something the opinion noted.²⁴⁰ In addition, the opinion listed a number

236. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 10 (2010).

237. ROTHMAN, *supra* note 12, § 10.00, at 522 (“[A] judge has a duty to help educate the public.”).

238. CAL. CODE OF JUDICIAL ETHICS Canon 4A cmt. (2009).

239. CAL. R. COURT 10.5 (2007) (describing the role of the judiciary in the community); *see also* CAL. CODE OF JUDICIAL ETHICS Canon 4B cmt. (“As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice . . .”).

240. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 3–4 (2010). Indeed, all of the advisory opinions that have been released allow a judge to use social networking sites, albeit with different limitations. *See supra* Part II.B.

of important ethical considerations for judges to consider while using online social networking.²⁴¹ The opinion also reminded judges to be aware of privacy settings on social networking sites—both for ethics-related and non ethics-related reasons.²⁴² It closed with a reminder unrelated to ethics but important for all judges, maybe even all people, using social networking sites: Be mindful of security because “[i]t is frightening how much someone can learn about another person from a few Internet searches.”²⁴³

IV. WHAT THE CALIFORNIA JUDICIAL ETHICS COMMITTEE SHOULD PROPOSE

Since Opinion 66 is not yet authoritative according to the California Committee, it can release a new opinion correcting itself. The California Committee should propose a more nuanced approach to dealing with issues that arise out of online social networking. It must recognize that many people who will become judges are already using social networking sites and it must consider in more depth what judges can do online.

Imagine the following situation: An assistant district attorney, one who has been working for fifteen years in criminal law, is appointed to be a judge. While in law school, the attorney added or accepted some fellow law students as Facebook friends. Since becoming a district attorney, however, most of her Facebook friends who are lawyers are ones with whom she works. Furthermore, she frequently spends time with these fellow district attorneys, so her Facebook wall contains a few posts from them. Maybe this attorney, at one time or another, rejected the requests of criminal defense counsel to be “friends”—for perfectly innocent reasons such as “I do not really know you,” “I do not see you frequently,” or “I forgot to accept the friend request.” According to Opinion 66, this hypothetical situation would require the new judge to disqualify herself on any criminal cases involving the attorneys with whom she is online friends. She would even have to recuse herself if the prosecutor in a case she hears is a new assistant district attorney hired

241. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 4–6.

242. *Id.* at 11.

243. *Id.*; see also John M. Annese, *Staten Island Criminal Court Judge to Be Transferred to Manhattan After Facebook Postings, Sources Say*, STATEN ISLAND ADVANCE, Oct. 15, 2009, http://www.silive.com/news/index.ssf/2009/10/criminal_court_judge_to_be_tra.html (detailing how Judge Matthew Sciarrino was transferred because of his Facebook page, which allowed the public to view aspects of his private life and “blow-by-blow details of his location and schedule”). In addition, a judge may not be anonymous when she puts something online. See Leila Atassi, *Cuyahoga County Judge Shirley Strickland Saffold Files \$50 Million Lawsuit Against The Plain Dealer and Others*, CLEVELAND.COM (Apr. 8, 2010, 12:00 AM), http://blog.cleveland.com/metro/2010/04/cuyahoga_county_judge_shirley.html (discussing the suit of Judge Shirley Strickland against *The Plain Dealer*, an Ohio newspaper, for publishing registration information and revealing that a certain username made comments—which included comments about cases before the judge—and that the particular username was registered to an email address linked to the judge).

just out of law school, one whom she had seen only once at the DA's office but whose "friend" request she had accepted before leaving.

This is a flawed approach, especially if the hypothetical is changed to address an area of law in which specialized knowledge is particularly useful. In fact, for this particular hypothetical, the California Code of Civil Procedure would not require recusal.²⁴⁴ In a specialized area of law, the relevant limitation is a two-year wait before hearing cases involving attorneys in the judge's former firm or private practice.²⁴⁵ For a situation like this, especially one involving a firm, the California Commission on Judicial Performance advises disclosure and caution.²⁴⁶

This is not to say that a criminal defense attorney would have no concerns in the hypothetical situation described above, but the point is that the new judge's online social network is not what created the issue. Instead, the actual facts surrounding the relationship may give rise to a need for disclosure or recusal. The social network at issue should make some difference as well—a connection on LinkedIn is probably less concerning than an intimate connection on Facebook or the judge following the attorney on Twitter. And in the future it may be that online relationships are assumed, especially as increasing numbers of people use online social networks. Again, the test for self-recusal is whether a judge "believes there is a substantial doubt as to his or her capacity to be impartial" or whether "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."²⁴⁷

In addition, the California opinion should have expanded on what it believes is proper or improper for a judge. It seems axiomatic that a judge should not act like a college student,²⁴⁸ but one would hope the judge would refrain from doing so regardless. Alcohol is certainly a sensitive issue for judges,²⁴⁹ which perhaps is why the example about a judge refraining from posting pictures of or herself "engaging in drunken

244. CAL. CIV. PROC. CODE § 170.1(a) (2010) ("A judge shall be disqualified if . . . he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.").

245. *Id.* § 170.1(a)(2)(B).

246. For example, the Commission issued an advisory letter in the case of a judge who presided over a case in which one of the attorneys was his former law partner. The Commission concluded that because "the judge had left the partnership somewhat more than two years earlier, the judge was not automatically disqualified," but that "the relationship should have been disclosed on the record." STATE OF CAL. COMM'N ON JUDICIAL PERFORMANCE, 1993 ANNUAL REPORT 19 (1993).

247. CAL. CIV. PROC. CODE § 170.1(a)(6)(A)(ii)–(iii).

248. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 5 (2010).

249. Indeed, the California Code of Judicial Ethics makes special mention of the reporting requirement for misdemeanors involving alcohol, controlled substances, and prescriptions. *See* CAL. CODE OF JUDICIAL ETHICS CANON 3D(3) (2009); *see also In re Judge Donald R. Alvarez*, Cal. Comm'n on Judicial Performance, at 3 (2005) ("To protect the public, when a judge is charged with an alcohol-related charge, it is the commission's policy to investigate not only the charged incident but also whether there is a substance abuse problem that is affecting the judge's performance of judicial duties.").

revelry" appeared obvious to the writers of Opinion 66.²⁵⁰ The example is, however, a bit extreme.²⁵¹ A judge, however, should follow the general rule of avoiding demeaning the judicial office. The test Rothman gives is an excellent one: "Write yourself the worst headline about this thought or action that you can think of for the next day's newspaper If this gives you pause, then you probably have an issue relating to ethics."²⁵² Judges should especially consider this test when attempting to use humor.²⁵³

A nuanced approach to judicial ethics would be better as well. The California Committee attempted to do this by setting forth a number of factors to consider.²⁵⁴ This proposal was an intriguing start, though the fourth factor, how regularly the attorney appears before the judge, should be removed from the test for the appearance of impropriety because continual appearances before a judge do not necessarily lead to any appearance of bias unless the judge explicitly mentions a dislike of the attorney (or vice versa). The nature of the social networking site and profile are relevant (that is, whether they are professional or personal), as is the judge's practice of determining who to include. To a degree, this also means that the number of Facebook friends a judge has is relevant, though this is probably enveloped by the other factors. For example, if a judge's profile is recently created but includes anyone who wants to be "friends" with the judge, it would probably be acceptable, as would be the professional profile of a judge who has a policy of accepting as "friends" only attorneys within her jurisdiction. The most important factor seems to be who the judge includes in her network.

Judges should consider following the approach of Judge Criss. She has a personal Facebook profile that appears to be of a personal nature,²⁵⁵ but avoids politics and talking about any cases.²⁵⁶ She also accepts all lawyers who "friend" her and follows all of the relevant

250. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 5 (2010).

251. In addition, the California Committee does not define "drunken revelry" anywhere. A picture of a judge drinking may be ambiguous—it can be impossible to tell if the judge is "engaged in revelry" or not.

252. ROTHMAN, *supra* note 12, § 1.66, at 32; *see also* LaRoe, *supra* note 9 (discussing the policy of Magistrate Judge Nandor Vadas).

253. Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 187 (1989) (noting the danger of judges attempting humor on the bench). Judicial attempts at humor off the bench also are not always received well. In general, judges should use this test before they act. *See, e.g., In re Ellender*, 889 So. 2d 225, 227–28 (La. 2004) (disciplining a white judge for wearing a blackface mask at a Halloween party as part of his prisoner costume, while his wife was dressed as a police officer). *But see In re Complaint of Judicial Misconduct*, 632 F.3d 1289 (9th Cir. 2011) ("The mere fact that a statement takes the form of a joke does not render it misconduct; humor is the pepper spray in the arsenal of persuasive literary ordnance: It is often surprising, disarming and, when delivered with precision, highly effective.").

254. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 8 (2010).

255. Kennedy, *supra* note 228 (noting that Judge Criss posts pictures of things like her dog chewing her slippers).

256. McDonough, *supra* note 227 (detailing Judge Criss's policy).

ethical canons of her state.²⁵⁷ While she has not expanded to other sites, a judge using other sites could follow similar guidelines. Indeed, it appears that recent appointees do an excellent job of policing themselves, similar to Judge Criss, especially avoiding political posts.²⁵⁸

The guidelines given by Kentucky, New York, and Ohio are similar to Judge Criss's approach. All three opinions expressed concerns regarding the nature of online social networking (for example, heightened issues of an appearance of impropriety, potentially greater danger of comments on cases, and the need to maintain a high standard of conduct) but did not decide that there was any difference between online social networking and other contact with attorneys. This is a good approach: The judge should be aware of issues but still know the respective judicial code applies. There should not be any special rules for online connections.

While a judge could use an approach like Judge Criss's social networking sites like Facebook, there is a need for a nuanced analysis of the individual social networking sites because of the different nature of each. For example, on Twitter, connections are not mutual, making who the judge chooses to follow a more involved ethical choice.²⁵⁹ If the judge has a policy, however, of following any attorney who chooses to follow her, or perhaps a policy of following only organizations that are not political in nature, it is likely acceptable. A judge should be able to follow biased organizations relating to "improvement of the law, the legal system, or the administration of justice"²⁶⁰ if the judge also follows the other side. For example, if a judge follows a local district attorney's office and a local public defender's office (assuming both are using Twitter), this would be acceptable. This is an area the California Committee should analyze in more detail to test the limits of what else may be acceptable.

The analysis for LinkedIn is short: consider the judge's practice of including certain people. There are also possible ethical issues with what a judge posts, but this issue is not unique to this site. Here, the ethical issue is more about the effect of having a judge included in an attorney's network. The interesting question—unexplored by this Note—is whether this would be enough to qualify as endorsing the attorney or recommending the attorney, as judges have special rules for recommendations because of the prestige of the judicial office.²⁶¹

257. *Id.*

258. *See* LaRoe, *supra* note 9 (discussing the way recent appointees change the substance of their posts after joining the bench).

259. This raises possible issues of endorsement and may, therefore, violate Canon 2B of the California Code of Judicial Ethics.

260. This language is used frequently throughout the California Code of Judicial Ethics. *See, e.g.*, CAL. CODE OF JUDICIAL ETHICS Canon 4C(2) (2009).

261. *See id.* Canon 2B.

The analysis for MySpace likely would be similar to the analysis for Facebook. The sites are fairly similar, though perhaps the different user base raises other issues.²⁶²

The analysis for Google+ would depend on what action the judge is taking. Posts would be subject to the same scrutiny mentioned in discussing the other social networks. What is different, however, is the way people connect on Google+. As mentioned, Google+ allows a user to separate contacts into "circles" which means that a judge would be able to separate attorneys into separate circles or post things that only a certain group of people could see, as is possible on Twitter.²⁶³ This could lessen the chance of an ex parte communication (for example, the judge could avoid looking at a certain circle or have a special circle for attorneys appearing before them).²⁶⁴

CONCLUSION

Given the ubiquity of these sites today, it is safe to say that there are many judges in California using online social networking of some kind and that this number will continue to grow. The use of social networking sites by judges to make connections should not be restricted. The California Committee suggested that it is acceptable for judges to use social networking and to be online friends with attorneys generally, but not to be "friends" with an attorney appearing before the judge. This conclusion is flawed from both a legal and policy perspective. Instead, as many other states agree, judges should be able to use these sites at all times—as long as the judges adhere to their respective code of conduct—even when an attorney included in their online social network appears before them.

The California Committee should release a new opinion to correct and supplement Opinion 66. This new opinion should include a more nuanced approach to online social networking that considers the differences in the various types of social networking sites. It should also include a new test for possible recusal in the specific area of social networking and a new set of guidelines for judges using online social networking. A new test for recusal should consider each social networking site individually, the different possible actions on each site, and would have to include some kind of analysis of the actual relationship between the judge and the attorney.

262. See Harris, *supra* note 49 ("MySpace is still rather popular among individuals who end up in the criminal justice system."). Furthermore, there is at least one judge who searches social networking profiles of adjudicated offenders, something that would logically lead to searches of MySpace—although the legality of this practice has not been analyzed. Richard Acello, *Web 2. Uh-oh*, A.B.A. J. (Dec. 1, 2009, 9:29 PM), http://www.abajournal.com/magazine/article/web_2.uh-oh/.

263. See Hartman, *supra* note 54 (describing the "double filter" model and noting it is very similar to Twitter).

264. Of course, this site is still developing, so it will be interesting to see what other features develop.
