***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

**To:** CAFL Appellate Panel Support Unit

**From:** [Law student (VT})

**Date:** March 15, 2018

**Re:** Judges on Social Media Platforms- Ethics and Recusal

**Question Presented**

What are Mother’s best arguments to recuse the judge, where the judge is Facebook friends with the DCF attorney and they have posted photos and links on each other’s pages? Generally, what Massachusetts rules or ethics opinions govern judges connecting with attorneys on social media platforms?

**Brief Answers**

A judge may use social media so long as her online behavior is consistent with upholding the impartiality and integrity of the judiciary. In Mother’s case, the judge being Facebook friends with the DCF attorney may be grounds for recusal if objectively the judge’s impartiality could be reasonably questioned by a fully-informed, disinterested third party.

**Discussion**

1. **Social Media Ethics for Judges**

In general, the same overarching principles and concerns apply to judges’ use of all forms of social media that are currently available. However, there are distinct issues that arise for each social media platform due to the nature of their use and specific features.

1. **Facebook**

Massachusetts Code of Judicial Conduct Rule 1.2 states that a judge “shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” The Massachusetts Committee for Judicial Ethics (CJE) has interpreted the Code to prohibit judges from being Facebook “friends”[[1]](#footnote-1) with lawyers who are reasonably likely to appear before them. CJE Opinion No. 2016-01 (Feb. 16, 2016). A lawyer who is a Facebook friend with a judge may appear to others to be in a special position to influence the judge. Id. Even the most casual of Facebook friends may, for example, acquire personal information about the judge (e.g., celebration of a family event, a vacation destination) that could be used to convey the impression that the Facebook friend has special knowledge about and access to the judge. Id. The CJE has stated that a judge should not make or accept friend requests from lawyers who are likely to appear before them. Id. A judge must review their Facebook friends and “unfriend” any lawyer likely to appear before them. Id. If a judge knows that the lawyer appearing before them is a former Facebook friend, the judge should disclose the existence and nature of that past Facebook friendship even if the judge believes there is no basis for disqualification. Id.

1. **LinkedIn**

The CJE has articulated the same basic principles for judges being connected via LinkedIn with attorneys who may appear before them as described above for Facebook. A judge may not “connect”[[2]](#footnote-2) on LinkedIn with any attorney who is reasonably likely to appear before them. CJE Opinion No. 2016-08 (Sep. 6, 2016). Judges must deny requests and disconnect from attorneys likely to appear before them. Id. LinkedIn provides a platform for professional recommendations and endorsement of professional skills. The information available on a LinkedIn page is of a professional nature. Since it is less personal than the information posted on a Facebook profile, there is less of an opportunity to gain special knowledge and access to a judge that would create the appearance of bias. However, disconnection and disclosure are still necessary to protect the independence, integrity, and impartiality of the judiciary. Id. The judge should both disconnect from the lawyer on LinkedIn and disclose on the record the existence and nature of the LinkedIn connection. S.J.C. Rule 3:09: Code of Jud. Conduct 2.11, Comment [5]. If a judge knows that a lawyer appearing before the judge is a former LinkedIn connection, the judge should consider the nature of that past connection to determine whether disclosure is warranted. See S.J.C. Rule 3:09: Code of Jud. Conduct 2.11, Comment [5B].

1. **Twitter**

The CJE has articulated the same basic principles as stated above for Facebook and LinkedIn for Twitter. A judge on Twitter must uphold and promote the independence, integrity, and impartiality of the judiciary. CJE Opinion No. 2016-09 (Nov. 22, 2016). The CJE did not specifically address whether a judge may follow an attorney likely to appear before them on Twitter but offered guidance on what accounts judges may follow. Because a Twitter account is publicly accessible (unless certain privacy features are turned on), the list of accounts one follows is readily available to followers as well as anyone who visits the judge’s account at Twitter.com. Id. Additionally, pop-up notices occasionally call attention to those one follows, even if one does not retweet from those accounts. Id. Tweets from a page a judge follows may still pop-up on their personal page without them taking any action to make it appear on their page. Consequently, a judge must be cautious when selecting accounts to follow, such as the accounts of political candidates or parties. Id. Although the CJE did not expressly prohibit a judge from following an attorney likely to appear before her in court, disconnection and disclosure are probably the better practice to ensure the appearance of an independent and unbiased judiciary, as addressed for Facebook and LinkedIn, above.

1. **Recusal**
2. **In general**

A judge shall disqualify herself in any proceeding in which the judge cannot be impartial or the judge's impartiality might reasonably be questioned. This includes, but is not limited to, “if the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.” S.J.C. Rule 3:09: Code of Jud. Conduct 2.11. A judge is disqualified from any matter if she cannot satisfy both a subjective and objective standard. Code of Jud. Conduct 2.11., Comment 1. The subjective standard requires disqualification if the judge concludes that she cannot be impartial. Id. The objective standard requires disqualification whenever the judge's impartiality might reasonably be questioned by a fully-informed, disinterested observer, regardless of whether any of the specific provisions of 2.11 apply. Id. A judge must also bear in mind that social relationships may contribute to a reasonable belief that the judge cannot be impartial. Id. A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify or recuse is filed. Id. at Comment 2. A judge should disclose on the record information that she believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes that there is no basis for disqualification. Id. at Comment 5.

The decision to withdraw rests first within the judge’s sound discretion, and an abuse of discretion must be shown to reverse that decision. In re Care & Protection of Summons, 437 Mass. 224, 239 (2002). The judge must apply a two-part test when deciding whether disqualification is proper. Parenteau v. Jacobson, 32 Mass. App. Ct. 97, 103 (1992). First, the judge must be inwardly satisfied that she is free from bias or prejudice toward the parties. Id. Second, the judge must assess whether her impartiality might reasonably be questioned if she presides over the proceeding. Id. A great deal of weight is given to the objective prong. In Parenteau, the Appeals Court held that the judge should have recused himself, where the judge was inwardly satisfied that he could be fair, but the record made it clear that his impartiality was highly questionable. Id. The defendant had previously testified before the judge as a witness and the judge found him not to be credible. Id. at 100. The judge was quoted on the record saying, “I could understand why he would not want me to hear the case…even though I think I can be fair to him in the future-I should probably disqualify myself from hearing his cases.” Id. at 100-101. The Court held that the judge abused his discretion in denying the motion for recusal where he clearly acknowledged the appearance of impartiality. Id. at 103.

Massachusetts courts have not addressed the issue of judges being Facebook friends with attorneys appearing before them. In Domville v. State, the Florida Fourth District Court of Appeals held that recusal was required when a judge was a Facebook friend with the prosecutor because it conveyed the impression that the prosecution was in a special position to influence the judge. 103 So.3d 184, 185 (2012), (4th Fla.Dist. Ct. App. 2012). However, Florida Third District Court of Appeals held that the mere fact that a judge is a Facebook friend with a lawyer for a potential party or witness, without more, does not mean that the judge cannot be impartial. Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n, 229 So. 3d 408, 412 (3rd Fla. Dist. Ct. App. 2017). The Court reasoned that being friends on Facebook is not indicative of a close relationship or friendship “in a traditional sense.” *Id.* at 412. People are generally aware that “degree of intimacy among Facebook “friends” varies greatly,” so there is no reasonable fear that the judge could not be impartial. *Id.* at 412.

In our case, the judge had a duty to disclose on the record that she is Facebook friends with the DCF attorney and to unfriend the DCF attorney as required in CJE Opinion No. 2016-01, discussed above. In a motion to recuse, Mother’s counsel should argue that the judge fails the objective part of the recusal test because the judge’s impartiality could reasonably be questioned due to the judge and DCF attorney being Facebook friends. Parenteau, 32 Mass. App. Ct. at 103. Mother’s counsel should argue that the nature of the judge’s Facebook friendship with the DCF attorney went beyond the individuals allowing each other access to their personal profiles because they have each posted photos and links on each other’s timelines (homepages). This suggests that the DCF attorney has a level of access to the judge not available to all counsel and may be in a position to influence the judge. It is objectively reasonable to question the judge’s impartiality, and the judge fails the objective prong.

1. **Timeliness**

A party seeking disqualification of a judge must do so at the earliest moment after learning facts demonstrating the basis for such disqualification. Demoulas v. Demoulas Super Markets, Inc., 428 Mass. 543, 549 (1998). Recusal motions filed after trial are presumptively untimely absent a showing of good cause for tardiness. Id. at 547. The burden is on the party seeking recusal to make a strong showing that nothing could have been done at an earlier time. Id. at 548.

In Care & Prot. of Summons, the parents delayed their recusal request until the proceedings were well underway. At the time of the motion, the judge had issued his initial order requiring the parents to present the child for identification and had found the parents in contempt for their failure to comply with his order. 437 Mass. at 239. The SJC held that the judge did not abuse his discretion in denying the motion to recuse. The parents’ concern about the judge's involvement in their earlier care and protection proceedings should have been raised at the outset, and their belated request suggested a tactical decision in the face of an adverse ruling. Id. at 239.

In our case, Mother’s counsel should file the motion to recuse as soon as possible. It is unclear from the limited facts provided how long Mother’s council has known about the judge being Facebook friends with the DCF attorney. If it has been a long time, Mother’s council should explain in the motion why it could not have been filed earlier.

**Conclusion**

Judges must ensure that their use of social media platforms promotes public confidence in the independence, integrity, and impartiality of the judiciary. A judge should not be Facebook friends with an attorney who is reasonably likely to appear before her. A judge must unfriend any attorney likely to appear before her and disclose on the record the nature of the Facebook friendship.

The decision to withdraw rests within the sound discretion of the judge. The judge must do a subjective evaluation to decide if she is inwardly satisfied that she can be fair and unbiased. The judge must then consider whether, objectively, her impartiality could be reasonably questioned by a disinterested third party. A motion to disqualify a judge must be made at the earliest moment that the facts demonstrating a basis for disqualification come to light. If there is significant delay, the moving party must show good cause why the motion could not have been brought earlier. Therefore, to recuse a judge for her social media connections with attorneys, the moving party must make a timely motion alleging the reasonable appearance of impartiality on the judge’s part. An objective determination that the judge’s impartiality could reasonably be questioned calls for recusal.

Here, Mother’s counsel should file a motion to recuse as soon as possible, alleging the judge’s lack of impartiality based on her Facebook friendship with the DCF attorney. Mother’s counsel should argue that the judge’s impartiality could reasonably be questioned. The judge and DCF attorney are connected on Facebook and have access to each other’s private pages, suggesting a level of access and influence not available to all attorneys and parties in the case. They have posted photos and links to each other’s timelines which shows friendship in a more traditional sense beyond merely being connected on the site. If timeliness is brought into question, Mother’s counsel must explain why it was not possible to bring the motion sooner.

1. A Facebook “friend” is someone that the host (the judge) has given permission to view the judge’s Facebook page. By becoming “friends,” users have full access to all the information and photos on the judge’s profile. Non-friends can view the profile, but will not be able to see all the material the judge posts. [↑](#footnote-ref-1)
2. To “connect” with someone on LinkedIn, the judge must extend or accept an invitation to join her LinkedIn Network. When users are connected they have access to all the information on the other user’s profile, receive updates about the other user, and have the ability to directly message them. [↑](#footnote-ref-2)