Q&A

LAWYER LIABILITY AND ETHICS

Why Can't We Be Friends?

Joseph Brophy

By Joseph A. Brophy, Jennings Haug Cunningham

Despite its many detractors, Facebook has been indispensable to those of us that enjoy having our personal data sold to strangers, the depression and anxiety that often accompany social envy, and observing the shortened attention spans it causes in our youth. Unfortunately for judges, participation in this modern American pastime is circumscribed by the ethical obligations of their job.

The Court of Appeals of Wisconsin recently concluded that a trial judge's undisclosed Facebook connection with a litigant created a great risk of actual bias resulting in the appearance of partiality. The problem arose from a motion and hearing regarding the modification of child custody, which also involved issues of domestic violence. Three days after the parties submitted their final arguments in writing, but before the ruling, the judge accepted a Facebook "friend" request from the mother.

From the establishment of the Facebook connection until the judge issued his ruling, the mother "liked" eighteen of the judge's Facebook posts and commented on two of them. The judge did not "like" or comment on any of the mother's posts. For good measure, and presumably in case the judge did not get her very subtle message, the mother also "shared" a third-party photograph related to domestic violence. In his ruling, the judge ultimately concluded that the father had engaged in a pattern of domestic abuse of the mother. Whether the evidence supported the judge's conclusion was beyond the scope of the appellate court's analysis.

After noting the lack of any guidance on the issue in their state, the Wisconsin appellate court held that although judicial use of electronic social media is generally allowed, certain online activity can easily be misconstrued and create an appearance of impropriety, regardless of the strength of the personal connection. Specifically, the court found problematic the timing of the "friending" (during litigation), the judge's failure to disclose the connection, and the ex-parte nature of the communication.

The Supreme Court of Arizona has issued detailed guidance on the judicial use of Facebook, as well as other forms of social media, and it generally tracks the Wisconsin court's decision. AZ. Jud. Adv. Op. 14-01. The Arizona Code of Judicial Conduct does not impose a per se disqualification requirement in cases where a litigant or lawyer is a "friend" or has a similar status with a judge through social or electronic networks, but the Supreme Court strongly urges disclosure of the connection, even if the judge believes there is no basis for disqualification, so that the parties at least have the opportunity to determine whether they want to attempt to have the judge disqualified.

Given the superficiality of many (most?) Facebook "friendships," and the one-way nature of the communications, it is not unreasonable to question whether the Wisconsin appellate court was perhaps too hard on the trial judge. Appellate judges routinely sit in judgment of trial judges with whom they have meaningful personal relationships. Justice Byron White went skiing with Attorney General Robert Kennedy while the latter was a party in cases that were before the former, including cases that Mr. Kennedy personally argued. In refusing to recuse himself from a case in which his friend Vice-President Dick Cheney was a party, Justice Antonin Scalia famously wrote regarding the basis for the recusal (accompanying Mr. Cheney on a duck hunt to which they were transported on Mr. Cheney's government plane): "If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined."

The case law/rules on judicial friendships with litigants makes a distinction between public officials who are parties in their official capacity (as Kennedy and Cheney were), and litigants who are parties in their personal capacity. Nevertheless, the Wisconsin trial judge could be forgiven for thinking that Justice Scalia's comment could just as easily apply to him. How many lawyers representing the opposing party would feel more comfortable with the Kennedy/Cheney facts instead of the Wisconsin facts?

Either way, all of you Facebookers who are on the bench, or who plan to be one day, should consider alternative methods to obtain the approval of others for going to the gym or looking great in your latest selfie. The good news is that the canons of judicial ethics do not as of yet place any restriction on befriending dogs as a viable, and often less messy, alternative to befriending (on Facebook or otherwise) the litigants that appear before you. ■

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Black History Month

The Arizona Black Bar held a reception at Gust Rosenfeld in celebration of Black History Month.

From left: ABB President Kina Harding, Christian Bell, MCBA President Melinda M. Sloma, and MCBA Board Member Benjamin Taylor. Other MCBA board members in attendance included Hon. Geoffrey Fish, Chas Wirken, Flynn Carey, and Stan Silas.

APRIL CALENDAR

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