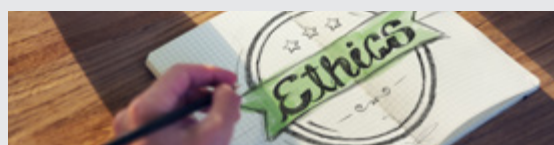
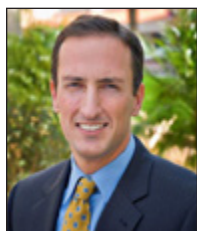


Q&A



LAWYER LIABILITY AND ETHICS

Judge's Attendance at Protests or Rallies is Problematic



Joseph Brophy

It is a well settled fact that judges are prohibited by the rules of ethics from having any fun. Past issues of this column have chronicled the ethical troubles that judges experience when they express political opinions

or accept Facebook friend requests. Now you can add wearing costumes to the list.

At the center of this latest "scandal" is, of course, Facebook. The judge in question is a New York judge who, in July 2020, attended a "Back the Blue" event in Ontario County, New York, at which a procession of motorists drove their vehicles to show support for law enforcement. The judge displayed a "Thank You" sign on his vehicle, then posted two photographs of him wearing an Ontario County sheriff's uniform on Facebook.

Admittedly, dressing up like a police officer seems like an odd way to thank police for doing their jobs, but then again imitation is supposed to be the highest form of flattery. No one ever dresses up like a lawyer to say thank you to the entire profession. Perhaps that is because we are disliked by the general public. It should be noted that the judge had a daughter who was a recent graduate of a police academy, so his support for law enforcement was more personal than that of the average police-loving taxpayer.

To the judge's great credit, one photo received 277 "likes" and the other received 940 "likes." That is nice since the currency of Facebook is the approval of people who are basically strangers. However, in issuing its reprimand, New York's Commission on Judicial Conduct noted that a number of Facebook comments appearing under the photos also referred to the fact that he was a judge. This displeased the Commission, as did the fact that the photos in question were made viewable to the public at large rather than just the judge's Facebook "friends."

The Commission concluded that individuals viewing the judge's Facebook posts, and seeing him in a law enforcement uniform, would reasonably question his ability to conduct himself in a fair and impartial manner while presiding over cases involving law enforcement. Similarly, the Maryland Judicial Ethics Committee issued an opinion last year stating that judges should not attend protests, marches or rallies associated with the Black Lives Matter movement for the same reason.

In 2018, the Arizona Supreme Court Judicial Ethics Advisory Committee considered the propriety of judges participating in marches, rallies and protests. (Opin-

ion 2018-06). Although the request was a general one, it gave as examples "Women's Marches" and a recent March for Science. The Arizona Committee concluded that the decision whether to participate in a march, rally or protest was "a fact-intensive inquiry that ultimately must be decided on a case-by-case basis," subject to "some overarching ethical principles" that judges should consider in their decision. The Committee also noted that judges "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed" by their codes of conduct. That is a long-winded way of saying "there are theoretically some protests a judge may ethically attend, but it is probably a bad idea most of the time."

For a cautionary tale of how treacherous these waters can be for a judge, see the case of Fifth Circuit Judge Don Willett. Judge Willett, once a prolific and popular tweeter, left Twitter, in part, because of the heat he took for jokingly posting the day after the *Obergefell* decision that he would support a constitutional right to marry bacon, which he meant as a comment on the awesomeness of bacon rather than a statement about the implications of gay marriage, legal or otherwise. That tweet almost kept him off the federal bench.

If judges are going to use social media, they are well advised to, at a minimum, limit public access to their posts and consider not identifying themselves as judges. Reporting decisions of a court is generally allowed but commenting on pending cases or political issues is not. And if you are on the bench in New York, you cannot dress up like a police officer. But if you do, do not take a picture and post it on Facebook. ■

Joseph Brophy is a partner with Jennings Haug Cunningham in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@JHC.law.

JULY CALENDAR

Check out maricopabar.org/events and watch your inbox for the latest updates on dates, times, and locations for events and meetings.

MEMBER SPOTLIGHT JOSEPH S. KELLY JR. JS Kelly Law LLC

HOW LONG HAVE YOU BEEN A MEMBER OF THE MCBA?

Since 2013.

HAVE YOU EVER BEEN INVOLVED WITH ANY SECTIONS OR DIVISIONS?

I was a member of the CLE and Civil Litigation committees.

HOW LONG HAVE YOU BEEN PRACTICING LAW?

1974 in Iowa and 1977 in Arizona

WHAT WAS YOUR FIRST AREA OF PRACTICE?

Tort Law. I was an assistant attorney general defending the State of Iowa in tort claims.

WHAT DO YOU SEE AS THE FOCUS FOR THE MCBA THIS YEAR?

Educating the public as to their rights and responsibilities as citizens. Educating the Bar as to their responsibilities to ethically, economically and efficiently litigate civil disputes.



WHAT ISSUES DO YOU SEE FACING ATTORNEYS IN ARIZONA?

Protecting the judiciary from biased attacks by extremist groups.

IF YOU HADN'T BEEN A LAWYER, WHAT ELSE WOULD YOU BE?

A journalist.

IF YOU COULD BE ANY FICTIONAL CHARACTER—ON TV, IN BOOKS, IN MOVIES—WHO WOULD IT BE AND WHY?

James Bond, because good always prevailed over evil.

WHAT'S THE STRANGEST JOB YOU'VE EVER HELD?

I was a bartender when I was a minor. ■

Joe and his wife just celebrated their 50th wedding anniversary, and they have five granddaughters whom they like to spoil.

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