Avoiding Liability

Electronic Social Media and Judical Recusal — Revisited

By Jeffrey P. Lewis

Two months ago in this space, there was a discussion about a recent case — *Law Offices of Herssein & Herssein, P.A. v. United Services Automobile Association,* ___ So.3d ___, 2018 WL 5994243 (Fla. Nov. 15, 2018). There, the Supreme Court of Florida held that there is no bright-line rule that a judge must recuse himself if he is a "friend" on an electronic social media website with one of the lawyers in a case. In that case, the majority, consistent with the majority view nationwide, held that the mere existence of such a relationship does not require recusal but depends on the facts in each individual case. The majority delivered that holding, however, in the face of a blistering dissent, which questioned the wisdom of any judge getting involved in social media at all. The majority affirmed the ruling of a trial judge to not recuse himself. This issue has been revisited in a case where the appellate court reversed the trial judge's decision to not recuse himself because of a social media "friendship" between the trial judge and one of the parties.

In Re The Paternity of B.J.M.: Miller v. Carroll, 2019 WL 761649, concerned a paternity and child support dispute. Unbeknownst to the father, the trial judge had accepted a Facebook "friend" request from the mother following a contested evidentiary hearing but before he issued a written decision ruling in her favor. The guardian ad litem of the child "was made aware of the Facebook post authored by [the mother] regarding the court order." This prompted the GAL to conduct a search and "inadvertently discovered that [the mother] and [the judge] were Facebook 'friends." The GAL informed the father's counsel, who, in turn, informed the father.

This prompted the father to file a motion for reconsideration, demanding judicial disqualification and a new hearing in front of a different judge. He argued that "[the judge's] Facebook connection with [the mother] during the pendency of the proceedings gave rise to the appearance of partiality."

The trial judge refused to recuse himself, reasoning that he was not subjectively biased because he had already decided the case in his mind when he accepted the request even though he had not yet reduced his ruling to writing. Moreover, "he concluded that '[e]ven given the timing of' his and [the mother's] Facebook connection, the circumstances did not 'rise to the level of objective bias." The father appealed to the Court of Appeals of Wisconsin, which reversed in an unanimous decision.

Just as in Pennsylvania, the court recognized the presumption "that a judge has acted fairly, impartially, and without bias." But under Wisconsin law, that presumption can be overcome by application of two different tests — one objective and the other subjective. The court noted that the "[o]bjective can exist in two situations: (1) where there is the appearance of bias or partiality; or (2) where objective facts demonstrate that a judge treated a party unfairly." The father successfully argued that the "appearance of partiality" here establishes "objective bias." The court found that "[t]he appearance of partiality constitutes objective bias when a reasonable person could conclude 'that the average judge could not be trusted to hold the balance of nice, clear and true under all the circumstances.'" Stated differently, "When the facts of a case reveal a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation has been established."

The court refused to consider whether it should recognize a "bright-line ban" that the mere existence of a social media "friendship" between a judge and a party is sufficient in itself to disqualify the judge because it was unnecessary in this case. In the court's view, the "appearance of partiality" based upon the facts here is so clear that the judge's conduct created an appearance of partiality.

The court was particularly concerned that the judge and the mother had not disclosed the existence of this "friendship" "to any of the other parties or attorneys involved in the case." Based upon this failure to disclose, "a reasonable person could believe that [the mother] sent the "friend" request in an attempt to influence [the judge's] decision" and "could believe that [the mother] did exert, either directly or indirectly, some influence."

The court quoted ABA Formal Op. 462 that "[a] judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must … avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety."

The court found that the timing of the formation of the "friendship"— before the judge had reduced his decision to writing — "would cause a reasonable person to question the judge's partiality," notwithstanding that the judge had thousands of Facebook "friends." In the court's view, this timing "conveys the impression that [the mother] was in a special position to influence [the judge's] ultimate decision — a position not available to individuals that he had not 'friended,' such as [the father]."

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The court was also concerned about the fact that this "friend" request during ongoing litigation constitutes an impermissible ex parte communication. The court also found that the judge's conduct implicates several rules of ethical conduct that "stress the importance of an independent and impartial judiciary."

The holding in this case is not really inconsistent with the holding in *Herssein,* notwithstanding that the court here found that the judge should have recused himself for being a "friend" and the court there found that the judge declined to recuse himself for being a "friend." After all, unlike in *Paternity of B.J.M.*, there was no communication occurring during the ongoing litigation via social media in *Herssein* between the judge and his "friend" involved in the litigation. Therefore, the case in favor of recusal was much stronger in *Paternity* than in *Herssein.*

Obviously, social media has added new considerations to the question of recusal.

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