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Recent Developments in Risk Management

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Social Media “Friending” Between Judges and Lawyers

Law Offices of Herssein and Herssein PA et al. v. United Services Automobile Association, 229 So.3d 408 (Fla. Dist. Ct. App. 2017).

Risk Management Issue: What are the dangers when an attorney is a social media “friend” of a judge?

The Case: A Florida law firm sued its former client, USAA, for breach of contract and fraud. The law firm accused one of USAA’s executives of witness tampering and indicated the executive was a potential witness and potential defendant. USAA hired a former circuit court judge to represent it in the suit. The law firm filed a motion to disqualify the trial judge because the former circuit court judge was Facebook “friends” with the trial court judge. The motion alleged that the law firm had a well-grounded fear in not receiving a fair and impartial trial. The trial court denied and the law firm appealed.

The appeals court considered whether a reasonably prudent person would fear having a fair and impartial trial because the judge is a Facebook friend with a lawyer representing USAA and, potentially, the USAA executive in the suit. While allegations of mere friendship are generally insufficient to disqualify a judge in Florida, certain circumstances of friendship can warrant disqualification.

Florida has previously addressed the propriety of a judge’s social media “friend” status with a lawyer or potential witness before. A 2009 opinion of the Florida Judicial Ethics Advisory Committee specifically advised that judges were prohibited from adding lawyers who appear before them as Facebook friends, because the selection and communication process gives the impression that they are in a position to influence the judge. [Fla. JEAC Op. 2009-20 \(Nov. 17, 2009\)](#). In 2010, the Committee issued opinions that allowed judicial candidates to add lawyers as Facebook friends who may appear before them in the future. Despite a minority view that the 2009 opinion should be reversed, the Committee reaffirmed it. [Fla. JEAC Op. 2010-05 \(March 19, 2010\)](#); [Fla. JEAC Op. 2010-06 \(March 26, 2010\)](#).

In 2012, Florida’s Fourth District Court of Appeal held that recusal was required where a judge was Facebook “friends” with the prosecutor. [Domville v. State, 103 So. 3d 184 \(Fla. 4th DCA 2012\)](#). However, in 2014, Florida’s Fifth District Court of Appeal disagreed with the Fourth District’s opinion requiring a judge to recuse himself from a divorce proceeding after sending the wife a friend request while the matter was pending. [Chace v. Loisel, 170 So. 3d 802, 803-04 \(Fla. 5th DCA 2014\)](#). The Fifth District noted that Facebook friendship alone does not signify the existence of a close relationship—particularly in smaller communities where everyone knows everyone in the legal community; by the Fourth District’s logic, disqualification would be required in cases involving an acquaintance of a judge. *Id.* Additionally, the Fifth District noted that such a premise would be unworkable and unnecessary. *Id.*



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Ultimately, Florida's Third District Court of Appeal agreed with the Fifth District, and disagreed with the Fourth District, in determining that a Facebook friendship does not automatically require disqualification because (1) some people have thousands of Facebook "friends"; (2) Facebook members cannot recall every person they have accepted as friends or who have accepted them as friends; and (3) many Facebook "friends" are selected based on Facebook's "data-mining technology" rather than personal interactions. The opinion notes that most Facebook "friends" are not actual friends and assuming that all Facebook "friends" have a close relationship that warrants disqualification does not reflect the nature of social networking. *Note: The Florida Supreme Court recently heard oral arguments on this issue, but has not yet issued a decision. (Law Offices of Herssein and Herssein, P.A., etc., et al. v. United Services Automobile Association, SC17-1848).*

Numerous other state courts have contemplated whether social media friendships with the judge create the appearance of impropriety or bias. The division in the Florida District Courts of Appeal demonstrates a similar division among other state courts that have heard cases on this issue. A handful of states—including California, Colorado, Connecticut, Massachusetts, and Oklahoma—concluded that a judge being friends on Facebook with an attorney appearing in a case before the judge is sufficient grounds for recusal. [California Judicial Ethics Committee, Opinion 2010-66 \(November 23, 2010\)](#); [Colorado Bar Association Ethics Committee, Opinion 2015-127 \(September 2015\)](#); [Connecticut Committee on Judicial Ethics, Informal Opinion Summaries, 2013-06 \(March 22, 2013\)](#); [Massachusetts Committee on Judicial Ethics, Opinion 2011-6 \(December 28, 2011\)](#); [Oklahoma Judicial Ethics Opinion 2011-3 \(July 6, 2011\)](#). Some of these courts have noted that a judge may be friends with attorneys on Facebook and other social networking sites, as long as these friendships do not include attorneys who have cases pending before the judge. They have determined that a ban on attorney-judge social media friendships is necessary to prevent an impression that "friended" attorneys are in a special position through which they could improperly influence the judge.

Other courts and bar associations across the country have come to the opposite conclusion, finding that a Facebook friendship between a judge and attorney, without more, is insufficient to require the judge to recuse him or herself from a case in which that attorney is present. Arizona, Kentucky, Maryland, Missouri, New Mexico, New York, Ohio, South Carolina, and Utah have all published ethics opinions that disapprove of the practice of judicial recusal solely based on the fact that an attorney and the judge presiding over the case are friends on Facebook. [Arizona Judicial Advisory Opinion 14-01 \(May 5, 2014\)](#); [Ethics Committee of the Kentucky Judiciary, Judicial Ethics Opinion JE-119 \(January 20, 2010\)](#); [Maryland Judicial Ethics Committee, Opinion 2012-07 \(June 12, 2012\)](#); [Missouri Commission on Retirement, Removal and Discipline Opinion 186 \(April 24, 2015\)](#); [New Mexico Advisory Committee on the Code of Judicial Conduct, Advisory Opinion Concerning Social Media \(February 15, 2016\)](#); [New York Advisory Committee on Judicial Ethics, Opinion 13-39 \(May 28, 2013\)](#); [Ohio Board of Commissioners on Grievances and Disputes, Opinion 2010-7 \(December 3, 2010\)](#); [South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion 17-2009 \(October, 2009\)](#); [Utah Judicial Ethics Advisory Committee, Informal Opinion 12-01 \(August 31, 2012\)](#). These courts reason that not all social media friendships require disqualification, but instead, that being friends with one another on social media is just one factor to consider when deciding if judicial recusal is necessary for the proper adjudication of the case.

Risk Management Solution: Because of the wide variety of positions on whether lawyers should consult their state's case law and ethics opinions. The safest decision for an attorney is to avoid social media friendship with any judge before whom he or she may appear. As the decisions that object to these social media "friendships" opine, such relationships have at least the potential to create the appearance of possible impropriety. Moreover, avoiding social media "friendships" can avoid—for the client and the firm—the expense of unnecessary fees in fighting a motion based upon these grounds.

Hinshaw & Culbertson LLP

151 North Franklin Street
Suite 2500, Chicago, IL 60601
312-704-3000
www.hinshawlaw.com
www.lawyerlinglaw.com

Editors:

Anthony E. Davis and **Noah D. Fiedler**

Contributor: **Alyssa A. Johnson**

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