# The Lawyers' Lawyer Newsletter

Lawyers for the Profession® | HINSHAW

*Recent Developments in Risk Management*

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## Engagement Agreements – Description of Scope of Representation – No Liability for Failing to Act Outside the Scope of the Agreement

***Attallah v. Milbank, Tweed, Hadley*, 2019 NY Sup. Ct. Slip Op 00583 (January 31, 2019)**

**Risk Management Issue:** What steps can lawyers and law firms take to avoid being held liable for failing to provide services to clients that were not described in the engagement letter?

**The Opinion:** In 2011, the Firm agreed to represent Adhy Attallah pro bono regarding his expulsion from the New York College of Osteopathic Medicine. The parties' engagement agreement stated:

> Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from the New York College of Osteopathic Medicine (the 'College'). This engagement does not, however, encompass any form of litigation or, to the extent ethically prohibited in this circumstance, the threat of litigation, to resolve this matter. This engagement will end upon your re-admittance to the College or upon a determination by the attorneys working on this matter that no non-litigation mechanisms are available to assist you.

The Firm undertook non-litigation efforts to reinstate Attallah, but the College refused to reconsider its dismissal, and the Firm terminated the representation without commencing litigation. Attallah then brought a legal malpractice action alleging that the Firm failed to (1) negotiate with the school, (2) commence litigation against the school, and (3) to advise him on the efficacy of a defamation action. The Firm moved to dismiss and the New York Supreme Court granted the motion. Attallah appealed.

On appeal, the court upheld the dismissal based on the engagement letter because:

> The letter of engagement conclusively demonstrated that there was no promise to negotiate. There was only a promise to investigate and consider whether there were any options possibly available to urge the school to reconsider the plaintiff's expulsion. Anything else, including the defendant's failure to commence litigation against the school and the defendant's alleged rendering of legal advice regarding the efficacy of the plaintiff's commencing a defamation action against others, was outside the scope of the letter of engagement.

The court held that "an attorney may not be held liable for failing to act outside the scope of a retainer." Because Plaintiff's allegations all fell outside the scope of the parties' letter of engagement, the court dismissed the suit.

**Risk Management Solution:** The *Attallah* matter underscores the crucial importance of including a clear and specific description of the scope of representation in an engagement letter. Rather than settling for generalized terms about representing Attallah regarding his dismissal from the College, the Firm employed a very specific description of the work it would and —just as importantly—would not perform. The investment of a few extra minutes at the outset of representation to consider and specifically describe the scope of representation can make the difference between winning and losing in a suit brought by a former client.

## Class Action – Defense Counsel Pre-Certification *Ex Parte* Communications with Putative Class Members

***Weller v. Dollar General Corp.*, No. 17-2292, Memorandum and Order (E.D. Pa. March 4, 2019)**

**Risk Management Issue:** Do the Rules of Professional Conduct preclude defense counsel from engaging in *ex parte* communications with putative class members prior to class certification in class actions brought under the Fair Labor Standards Act, the Pennsylvania Minimum Wage Act, and the Pennsylvania Wage Payment and Collection Law?

**The Opinion:** In May 2017, Christopher Weller, individually and on behalf of others similarly situated, filed class actions in the Eastern District of Pennsylvania to pursue claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., the Pennsylvania Minimum Wage Act of 1968, 43 P.S. § 333.101, et seq., the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1, et seq., and for common law unjust enrichment against the Dollar General Corp. and Dolgencorp, LLC.

In August 2018, Weller moved for conditional certification of the proposed FLSA collective action and certification of the proposed classes for the state law claims under Fed. R. Civ. P. 23. For the FLSA claim, Weller sought certification of a class consisting of "non-exempt, hourly employees" at Dolgencorp's distribution centers in 14 states, including one in Bethel, Pennsylvania. For the state law claims, Weller requested certification of a class consisting of "non-exempt, hourly employee[s]" in Pennsylvania.

In September 2018, defendant Dolgencorp's counsel visited the Bethel Distribution Center in Pennsylvania, interviewed 16 employees, and obtained declarations from some of them, which Dolgencorp subsequently used in support of its opposition to Weller's motion to certify the classes.

In response, Weller sought sanctions against Dolgencorp's counsel on the basis that the *ex parte* communication with the 16 employees—who were putative members of the collective and class actions—was prohibited under Pennsylvania law, which treats putative class members as represented parties until a certification decision is made.

The court concluded that, although some *ex parte* communications between defense counsel and putative class members might be permitted in FLSA cases, such communications are not permitted under Pennsylvania law. Specifically, class actions brought under Pa. R. Civ. P. 1701 and Fed. R. Civ. P. 23 both require class members to opt out of the class and are governed by the Pennsylvania Rules of Professional Responsibility, which prohibit lawyers from engaging in *ex parte* communications with a represented party. Accordingly, Dolgencorp's *ex parte* communications with the 16 hourly employees—who were putative class members—was improper and prejudiced Weller because it allowed Dolgencorp, which already had some influence over the putative class members as their employer, to present the case in a way that may have been more favorable to it.

Rather than striking the declarations and summaries, the court concluded that any prejudice could be cured by allowing Weller to depose the 16 hourly employees, as well as any other hourly employees interviewed by Dolgencorp's counsel, to explore the issues raised in the declarations and Dolgencorp's response. The court further concluded that Dolgencorp's counsel knew or should have known about the ban on *ex parte* contact with putative class members and ordered Dolgencorp to pay plaintiff's costs and expenses relating to the 16 depositions.

**Risk Management Solution:** All states, like Pennsylvania, limit *ex parte* communications with represented parties through their versions of ABA Rule of Professional Conduct 4.2. In order to avoid possible rule violations leading to discipline, defense counsel should not attempt to communicate with putative opt-out class members prior to certification, unless class counsel is present. If defense counsel is uncertain whether planned communications are permitted by the Rules, it should (as suggested by RPC 4.2) seek court authorization or consent of opposing counsel.

## Social Media – "Friending" Between Judges and Litigants

*Note: We also covered the lower court's decision in this case in a March 13 Hinshaw Lawyers for the Profession® Alert.*

***In re: B.J.M.: Miller v. Carroll*, No. 2017AP2132, 2019 Wisc. App. LEXIS 86, at *1 (Ct. App. Feb. 20, 2019)**

**Risk Management Issue:** What are the risks and remedies when a litigant is a social media "friend" of the judge presiding over the litigant's case?

**The Opinion:** The Wisconsin Court of Appeals opinion prohibits a judge from establishing an undisclosed Facebook connection with a litigant appearing before the judge in pending litigation, reasoning that such a connection gives the appearance of partiality in violation of due process.

In this paternity action, Angela Carroll filed a motion to modify a court order concerning the joint legal custody and shared physical placement of her son on the basis that the father, Timothy Miller, engaged in a pattern of domestic abuse against Carroll. After an evidentiary hearing and the parties' written arguments, the judge deciding the motion—Judge Bitney—accepted Carroll's friend request on Facebook. The Facebook connection was not disclosed to Miller or his counsel. Thereafter, Carroll "liked" eighteen of Judge Bitney's Facebook posts and commented on two of his posts. None of the "likes" of those comments related to the pending litigation. Judge Bitney did not "like" or comment on any of Carroll's posts, nor did he reply to any of her comments on his posts. During the same timeframe, Carroll also "liked" multiple third-party posts and "shared" one third-party photograph related to domestic violence. Though there was no evidence Judge Bitney viewed the posts, there was no dispute this activity could have appeared on Judge Bitney's "newsfeed."

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Thereafter, Judge Bitney issued a decision granting Carroll's modification motion. Following the decision, Timothy Miller learned, through the guardian ad litem, that Judge Bitney and Carroll were Facebook friends during the period prior to making his ruling, and moved to reconsider the judge's decision, which was denied.

On appeal, the Wisconsin Court of Appeals noted that the issue was one of first impression. Although it declined to establish a bright-line rule prohibiting judges from using social media, the court held that Judge Bitney's actions created an appearance of partiality. The court noted that Carroll and Judge Bitney becoming Facebook "friends" would cause a reasonable person to question the judge's partiality because Carroll was a current litigant in a proceeding in which Judge Bitney was the sole decision-maker. Carroll wasn't one of the thousands of people who had requested to friend Judge Bitney before she was a litigant in his court, so the timing created a great risk of actual bias. The court further concluded that although a Facebook friendship does not denote a traditional "friendship," it is unquestionably evidence of an affirmative social connection. The appearance of partiality was heightened because the relationship was not disclosed to any other parties. The court also concluded that Carroll's sending a "friend request," as well as "liking" and "sharing" of posts related to domestic violence were all forms of *ex parte* communication that had the possibility of impermissibly influencing Judge Bitney's decision.

Accordingly, the court held that the establishment of an undisclosed Facebook connection between a judge and a litigant appearing in ongoing litigation before that judge created a great risk of actual bias resulting in the appearance of partiality in violation of due process. The court noted that judges must recognize that online interactions, like real-world interactions, need to be treated with care, and the judge was not acting with the required degree of care when accepting Carroll's friend request. On this basis, the court vacated Judge Bitney's ruling and remanded the matter for re-hearing before a different judge. A petition for review by the Wisconsin Supreme Court is currently pending.

**Editors' Comment:** Despite its ruling on the facts of this case, the Wisconsin court relied on *Law Offices of Herssein and Herssein PA et al. v. United Services Automobile Association,* 229 So.3d 408 (Fla. Dist. Ct. App. 2017), a decision featured in a previous Lawyer's Lawyer Newsletter (Vol 23, Issue 3, Sep. 2018), and several other persuasive authorities to conclude that judicial use of social media, standing alone, does not require judicial disqualification.

Numerous states have considered whether a *lawyer's* social media friendships with the judge create the appearance of impropriety or bias. Arizona, Florida, Kentucky, Maryland, Missouri, New Mexico, New York, Ohio, South Carolina, Utah, and now Wisconsin (pending the Supreme Court's review) have all declined to require judicial recusal solely based on the fact that an attorney and the judge presiding over the case are social media friends. 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. In these states, it is likely that a court would apply similar reasoning where a judge is the social media friend of a litigant.

**Risk Management Solution:** Because of the wide variety of state-specific decisions, lawyers should consult their jurisdiction's rules to determine whether the lawyer or her client being a social media friend with a judge will have consequences on the disposition of the matter.