HINSHAW

Alerts

In Florida, Facebook Friendship Alone is Insufficient to Disqualify Judge

November 16, 2018
Lawyers for the Profession®

Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association, No. SC17-1848 (Fla. November 15, 2018)

Brief Summary

In a 4-3 decision, the Florida Supreme Court resolved a conflict between its lower courts as to whether a judge may be a Facebook "friend" with an attorney appearing before the judge. The Third and Fifth Districts had held that mere social media friendship alone is not a sufficient basis to disqualify a judge. The Fourth District had held that recusal is required when a judge is a Facebook "friend" with a prosecutor. Borrowing from the long recognized legal principle of Florida law that a mere traditional friendship between a judge and an attorney, standing alone, is not sufficient to disqualify the judge, the Florida Supreme Court extended that rule of law to social media friendships, holding that "an allegation that a trial judge is a Facebook 'friend' with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification."

Complete Summary

The Action

A law firm sued a former client for breach of contract and fraud. During the litigation, the law firm contended that the former client's executive was a potential witness and a potential defendant. The former client hired a former judge to represent the executive. The law firm moved to disqualify the trial judge on the basis that the former judge was listed as a "friend" on the trial judge's Facebook page. The law firm's representatives signed affidavits stating their fears of not receiving a fair and impartial trial because of the Facebook friendship. The trial court denied the disqualification motion. The law firm filed a petition for writ of prohibition.

The Appellate Decision

The Third District Court of Appeal framed the issue as "whether a reasonably prudent person would fear that he or she could not get a fair and impartial trial because the judge is a Facebook friend with a lawyer who represents a potential witness and party to the lawsuit." The Third District cited the traditional legal principle that mere friendship between a judge and an attorney appearing before the judge, "standing alone," does not warrant disqualification. The Third

Service Areas

Lawyers for the Profession®

District also acknowledged a Fourth District decision that held "recusal was required when a judge was a Facebook 'friend' with the prosecutor." The Fourth District decision had been based on an ethics advisory opinion that judges were prohibited from Facebook friending lawyers who appear before them. The Third District disagreed with the Fourth District based on a subsequent decision in the Fifth District that had "signaled disagreement" with the Fourth District, noting that "[a] Facebook friendship does not necessarily signify the existence of a close relationship." Considering these principles, the Third District denied the law firm's petition.

The Florida Supreme Court Decision

The Florida Supreme Court granted review to resolve the conflict between the district court decisions. The Court first addressed the basic rules relating to disqualification (the moving party is required to affirm a good faith "fear that he or she will not receive a fair trial . . . on account of the prejudice of the judge"). The Court then discussed the broad spectrum of traditional friendship and that the mere existence of friendship does not mean two friends have a close relationship. Florida courts "have long recognized the general principle of law that an allegation of mere friendship between a judge and a litigant or attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification." The Court continued with a comprehensive discussion of Facebook Friending 101, culminating in the following excerpt:

> A Facebook "friend" may or may not be a "friend" in the traditional sense of the word. But Facebook "friendship" is not—as a categorical matter—the functional equivalent of traditional "friendship." The establishment of a Facebook "friendship" does not objectively signal the existence of the affection and esteem involved in a traditional "friendship." Today it is commonly understood that Facebook "friendship" exists on an even broader spectrum than traditional "friendship." Traditional "friendship" varies in degree from greatest intimacy to casual acquaintances; Facebook "friendship" varies in degree from greatest intimacy to "virtual stranger" or "complete stranger."

The Court held "an allegation that a trial judge is a Facebook 'friend' with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification." The Court noted its decision is in line with the majority of state ethics committee opinions and declined to follow the Florida "minority" ethics opinion on this subject. The dissent would have adopted the Fourth District's approach, believing judicial involvement with social media is "fraught with risk that could undermine confidence in the judge's ability to be a neutral arbiter."

Significance of Decision

Florida joins Arizona, Kentucky, Maryland, Missouri, New Mexico, New York, Ohio, South Carolina, and Utah, which all have concluded that the mere existence of a social media friendship between a judge and an attorney appearing before the judge will not, standing alone, be sufficient grounds to disqualify the judge. The Florida Supreme Court cautioned that "particular friendship relationships may present such circumstances requiring disqualification." With three justices dissenting, however, this was a close decision and there are other jurisdictions where social media friendships between judges and attorneys may be prohibited.

A handful of states including California, Colorado, Connecticut, Massachusetts, and Oklahoma have concluded that a judge being friends on Facebook with an attorney appearing in a case before the judge is sufficient grounds for recusal. 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. These courts 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.

In summary, consult your jurisdiction's rules, statutes, case law, and ethics opinions to consider whether being a social media friend with a judge before whom you may appear triggers potential disqualification in pending or future litigation.

For more information please contact Joanna L. Storey