

## Alerts

### Wisconsin Court of Appeals Holds Judge's Undisclosed Facebook Friendship with Litigant is Objectively Bias and Violates Due Process

March 13, 2019

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*In re: The Paternity of B.J.M.: Miller v. Carroll, Appeal No. 2017AP2132 (Wisc. App. Ct., February 20, 2019)*

#### Brief Summary

The Wisconsin Court of Appeals has held that the establishment of an undisclosed Facebook connection between a judge and a litigant appearing in ongoing litigation before the judge created a great risk of actual bias resulting in the appearance of partiality in violation of due process.

#### Complete Summary

In August 2016, 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, had engaged in a pattern of domestic abuse against Carroll. After the parties submitted their written arguments, the judge deciding the motion—Judge Bitney—accepted Carroll's friend request on Facebook. Thereafter, Carroll "liked" eighteen of Judge Bitney's Facebook posts and commented on two of his posts. None of the "likes" or the 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, and this activity appeared on Judge Bitney's "newsfeed." One of these shared stories related to domestic violence.

Thereafter, Judge Bitney issued a decision granting Carroll's modification motion. Following the decision, Miller learned 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. The court further concluded that

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although a Facebook friendship does not denote a traditional "friendship," it is unquestionably evidence of some type of affirmative social connection. The appearance of partiality was heightened because the relationship was not disclosed to any of the other parties. Moreover, the court concluded that Carroll's "liking" and "sharing" of posts related to domestic violence was a form of *ex parte* communication that had the possibility of impermissibly affecting 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. As such, the court vacated Judge Bitney's ruling and remanded the matter for re-hearing before a different judge.

### **Significance of Decision**

Although the Wisconsin Appeals Court did not create a bright line rule prohibiting judicial use of social media, the court's holding prohibits a judge from establishing an undisclosed Facebook connection with a litigant appearing before the judge in pending litigation because it gives the appearance of partiality in violation of due process. One should consult your jurisdiction's rules, statutes, case law, and ethics opinions to consider whether it is a violation to be a social media friend with a judge before whom you may appear.

*For more information please contact Terrence P. McAvoy or Robert M. Buchholz*