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Legally Speaking-Facing Up to Facebook

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LEGAL ISSUES



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Legally Speaking — Facing Up To Facebook

by **Bill Hannay** (Partner, Schiff Hardin LLP, Chicago, IL) <whannay@schiffhardin.com>

In August, a Florida appellate court made the news when it rejected a claim that a judge presiding over a dispute between a law firm and its former client should be disqualified because the judge is a Facebook “friend” with a lawyer representing a potential witness and potential party in the pending litigation. See *Herssein v. United Servs. Auto. Ass’n*, 2017 Fla. App. LEXIS 12035 (3d Dist. 2017). The appellate court didn’t think that being a Facebook “friend” meant much.

For librarians, this case may not seem very relevant to their work or lives, and it probably isn’t unless you happen to be a party to a lawsuit and try to “friend” the judge or *vice versa*. That actually happened in another Florida case. (Is there something in the water?)

A trial judge in Florida sent a “friend” request to a female litigant whose divorce case was pending before him. On advice of counsel, she decided not to respond to the invitation. The judge thereafter ruled against the woman, attributing most of the marital debt to her and providing her ex-husband with a disproportionately excessive alimony award. The woman moved to disqualify the judge in her case. The judge himself heard her motion and not surprisingly denied it as not “legally sufficient.”

To determine whether a motion to disqualify is “legally sufficient,” a court must decide whether the alleged facts which, accepted as true, would prompt a reasonably prudent person to fear that she could not get a fair and impartial trial before that judge. The appellate court granted her motion, holding that:

It seems clear that a judge’s *ex parte* communication with a party presents a legally sufficient claim for disqualification, particularly in the case where the party’s failure to respond to a Facebook “friend” request creates a reasonable fear of offending the solicitor. The “friend” request placed the litigant between the proverbial rock and a hard place: either engage in improper *ex parte* communications with the judge presiding over the case or risk offending the judge by not accepting the “friend” request.

The case is *Chace v. Loisel*, 170 So. 3d 802 (Fla. Ct. of App., 5th Dist., 2014).

So, if you stay out of court, are librarians free from worrying about the legality of Facebook “friending?” Not necessarily. Librarians may be drawn into ethical disputes if they are asked to help do research that involves Facebook or other social media. For example, two New Jersey lawyers have been the target of ethics charges for attempting to gain improper access to Facebook information. *Robertelli v. New Jersey Office of Atty. Ethics*, 224 N.J. 470, 134 A.3d 963 (2016).

The N.J. Office of Attorney Ethics began an investigation of the lawyers representing the defendants in a personal injury case against a municipality, its police department, and a policeman who was involved in the accident. In order to obtain information about the plaintiff (named *Hernandez*), the defense attorneys directed a paralegal employed by their firm to search the Internet. Among other sources, she accessed *Hernandez’s* Facebook page. Initially, the page was open to the public. At a later point, the privacy settings on the account were changed to limit access only to Facebook users who were *Hernandez’s* “friends.” The ethics office claimed that the defense attorneys directed the paralegal to access and continue to monitor the non-public pages of *Hernandez’s* Facebook account. She therefore submitted a “friend request” to *Hernandez*, without revealing that she worked for the law firm representing defendants or that she was investigating him in connection with the lawsuit. *Hernandez* accepted the friend request, and the paralegal was able to obtain information from the non-public pages of his Facebook account. When the plaintiff learned of these facts, he objected to use of the information in the trial and filed a grievance with the ethics office.

The local bar committee refused to docket the grievance on the ground that the allegations, if proven, would not constitute unethical conduct. A state trial court affirmed that decision. The state ethics office disagreed and appealed to the New Jersey Supreme Court (the ultimate authority on ethical matters in the state). The Supreme Court reversed the trial court and ordered that the ethics office

“may ... proceed to prosecute the alleged misconduct in this case.” The high court stated:

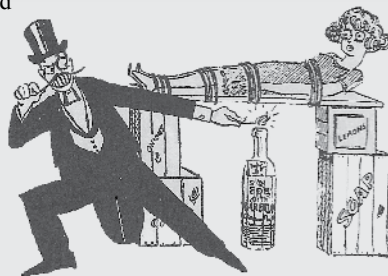
This matter presents a novel ethical issue: whether an attorney can direct someone to “friend” an adverse, represented party on Facebook and gather information about the person that is not otherwise available to the public. No reported case law in our State addresses the question. Consistent with the goals of the disciplinary process, the court rules do not close off further inquiry if a DEC Secretary declines to docket an important, novel issue as to which there is little guidance, or mistakenly declines to docket an allegation of egregious, unethical conduct. The Director of the OAE, by virtue of the broader scope of his position, sees the breadth of issues raised throughout the State and is aware of national trends. The public is best served by a system that permits both volunteers in the DEC’s and professionals in the OAE to assess challenging ethical matters like the one presented in this case.

A similar misuse of Facebook “friending” resulted in a determination by the San Diego County Bar Association in 2011 that an attorney had violated his ethical duty not to deceive. The attorney represented a client in a wrongful discharge action and obtained from his client a list of former co-workers. The attorney sent a Facebook “friend” request to two high-ranking company employees whom the client believed were not happy with their employer and were likely to make disparaging remarks about the employer on their Facebook pages. The “friend” request only included the attorney’s name and did not disclose his representation of the complaining employee or the purpose of the “friending.”

If a librarian is asked to help someone obtain information on Facebook about a third party, it is wise to keep in mind that Facebook users have privacy rights (and privacy settings on Facebook). It is unwise and perhaps even illegal for a librarian to assist someone to evade or penetrate those privacy settings by “friending” in bad faith.

And if that’s not enough of a problem, some states have entered the fight over Facebook “friends” by passing laws making it illegal for state teachers to “friend” their students

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Questions & Answers — Copyright Column

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QUESTION: *A college librarian asks about possible copyright violations when using lecture capture and that lecture includes copyrighted materials.*

ANSWER: The first important follow up question deals with how is the lecture captured. Podcast with sound only? Or is it filmed? Further, much of the answer depends on what the college does with the lectures at that point. Are they posted on the web? Available over Youtube? Posted in a course management system available only to members of the class?

If the lecture capture is sound only, there is unlikely to be a problem at all. Section 110(1) of the *Copyright Act of 1976* permits the performance of nondramatic literary and musical works in a classroom in a nonprofit educational institution as a part of instruction. Therefore, capturing the reading of a poem, an essay, etc., or singing of a song is not problematic. Where the lecture is then stored and who may access may be a problem; that will be discussed below. If the lecture is videorecorded, then graphic works and photographs may be captured, and section 110(1) permits that. Note that audiovisual works are not included. Section 110(1) does not permit the performance of entire audiovisual works without permission of the copyright owner even in the course of instruction. But small portions of such works included in a lecture capture are likely fair use.

Placing captured lectures on the web so that anyone may access them is not a good idea. Putting them in a course management

system with access restricted to students enrolled in the course causes no copyright problems even if the lecture includes portions of copyrighted audiovisual works. Section 110(2) of the *Act* allows transmission of performances or displays of nondramatic literary or musical works and portions of audiovisual works without permission of the copyright owner if access is restricted to students enrolled in the course. Transmitting a captured lecture that contains an entire audiovisual work and making it available even to enrolled students requires permission of the copyright owner.

QUESTION: *A university librarian asks about works created through artificial intelligence (AI) and who owns the copyright in such works.*

ANSWER: Copyright experts debated this issue for years before there were actual creative works produced by a computer. Today, there are many types of computer-generated works including poetry, paintings, software and music, etc. According to news reports, Google has even created sounds that no human has heard before. The courts in the United States have always held that only works of human authorship may receive a copyright. Consider the reason that copyright exists in this country, to enable owners to reap the economic benefit from their works that, in turn, will encourage them to continue to produce copyrighted works, which thus benefits the public. Would awarding a copyright to a computer encourage it to create additional works? No.

This is similar to the way courts have dealt with whether animals can own copyright. The answer has also been no, because only human authors can make the decisions about whether to grant licenses for the use of their works, etc.

With AI created works increasing, it may be that **Congress** and the courts will have to revisit this issue in the future. As we learn more about animal intelligence and creativity perhaps, the human authorship requirement should also be reconsidered for works by animals.

QUESTION: *A library director asks what has happened with the suit Louisiana State University (LSU) filed against Elsevier over a contract dispute about whether the LSU School of Veterinary Medicine was included in the overall university contract for access to Elsevier's journals.*

ANSWER: The short answer is that the case has settled. The suit was filed in May 2017 in Louisiana state court. (Contract disputes typically are matters governed by state law and decided in state courts.) The vet school had separately subscribed to **Elsevier** content but decided that the contract would not be renewed when it expired in 2016 because the university's contract covered its 35,000 students, staff and faculty,

and the vet school is a part of the university. In October, **Elsevier** cut off vet school access; **LSU** wrote to **Elsevier** and had that access reactivated. The vet school asked to add some medical and veterinary titles to **LSU's** 2017 subscription. **Elsevier** quoted a price and **LSU** confirmed its acceptance of these terms. Nevertheless, in January 2017, access was again terminated.

According to **LSU**, **Elsevier** then refused to honor the agreement or to license any of the agreed upon titles to **LSU**. So, the question before the court was whether there was a valid offer and acceptance. By letter in April, **Elsevier** suggested that **LSU** add the desired veterinary medicine titles to its existing contract and pay an additional \$170,000 in subscription costs plus \$30,000 as a cost increase to the overall contract. **LSU's** existing contract with **Elsevier** is about \$1.5 million annually.

Elsevier says that the dispute arose because **LSU**, without paying for it, was asking the publisher to add a school that previously was separate. The **LSU** contract did not include the vet school, further, neither was there any merger of the university and the school for the contract negotiated.

An interesting issue the case raised was jurisdiction. **Elsevier** is a Dutch company and its contracts usually require that litigation take place in the Netherlands. This is common for corporations whether foreign or domestic. U.S. companies typically would specify the state in which the company headquarters is located as the jurisdiction for lawsuits. A problem for state supported colleges and universities is that they are often required by state statute to sign contracts only if the contracts specify that state as the jurisdiction for any disputes to be settled.

QUESTION: *A publishing librarian asks whether the exceptions for nonprofit educational uses in a classroom and for distance education also apply to nonprofit educational publishers.*

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on Facebook. In 2011, **Governor Jay Nixon** signed Missouri State Bill 54, which bans students and teachers from communicating and being "friends" on the social networking site. (The law is intended to prevent inappropriate relationships between children and teachers.) So if you are a librarian in a state school, you should check out your state's laws before "friending" a student ... for any reason. 🐾

Bill Hannay is a partner at the Chicago-based law firm, Schiff Hardin LLP, a regular speaker at the Charleston Conference, and a frequent contributor to Against the Grain. In his spare time, he is an Adjunct Professor of Law at IIT/Chicago-Kent law school and a playwright.