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The Volokh Conspiracy

The law of "friending"

By Eugene Volokh January 30, 2014

Last week's *Chace v. Loisel* (Fla. Ct. App. [5th Dist.] Jan. 24, 2014) talks about whether judges should be recused simply because they are Facebook friends with a lawyer:

> In *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012), the Fourth District addressed a Facebook issue with regard to judges "friending" attorneys through social media. That court determined that a judge's social networking "friendship" with the prosecutor of the underlying criminal case was sufficient to create a well-founded fear of not receiving a fair and impartial trial in a reasonably prudent person.
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> We have serious reservations about the court's rationale in *Domville*. The word "friend" on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger. A Facebook friendship does not necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and any other friendship a judge might have.
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> *Domville*'s logic would require disqualification in cases involving an acquaintance of a judge. Particularly in smaller counties, where everyone in the legal community knows each other, this requirement is unworkable and unnecessary. Requiring disqualification in such cases does not reflect the true nature of a Facebook friendship and casts a large net in an effort to catch a minnow.
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> [Footnote: Of course, there are situations in which a relationship between a judge and a litigant or attorney is so close that a judge should recuse himself or herself.]

Here's the contrary analysis from *Domville*, which relies on a Florida Judicial Ethics Advisory Committee opinion:

> We find an opinion of the Judicial Ethics Advisory Committee to be instructive. See Fla. JEAC Op. 2009-20 (Nov. 17, 2009). There, the Committee concluded that the Florida Code of Judicial Conduct precludes a judge from both adding lawyers who appear before the judge as "friends" on a social networking site and allowing such lawyers to add the judge as their "friend." The Committee determined that a judge's listing of a lawyer as a "friend" on the judge's social networking page — "[t]o the extent that such identification is available for any other person to view" — would violate Florida Code of Judicial Conduct Canon 2B ("A judge shall not… convey or permit others to convey the impression that they are in a special position to

> influence the judge.")....
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> "The issue ... is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a 'friend' on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted." Fla. JEAC Op. 2009-20. Thus, as the Committee recognized, a judge's activity on a social networking site may undermine confidence in the judge's neutrality. Judges must be vigilant in monitoring their public conduct so as to avoid situations that will compromise the appearance of impartiality.
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> The Commentary to Canon 2A explains that being a judge necessarily limits a judge's personal freedom: "A judge must avoid all impropriety and the appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

Other states have also chimed in; see this Oklahoma Judicial Ethics Opinion, which summarizes the views of other states and offers its own. Ilya also blogged about the subject here.

At the same time, even the court in *Chace* holds that a judge's "friending" a litigant, while the litigant's case is pending, is grounds for recusal:

> In our view, the "friending" of a party in a pending case raises far more concern than a judge's Facebook friendship with a lawyer.... The trial judge's efforts to initiate ex parte communications with a litigant [i.e., communications without the presence of the other party] is prohibited by the Code of Judicial Conduct and has the ability to undermine the confidence in a judge's neutrality. The appearance of partiality must be avoided. It is incumbent upon judges to place boundaries on their conduct in order to avoid situations such as the one presented in this case.
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> Because Petitioner has alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, we quash the order denying the motion to disqualify and remand to the trial court for further proceedings consistent with this opinion. We trust that the issuance of a formal writ will be unnecessary.

Interestingly, in this case the objector was a litigant whom the judge "friended," but who refused the "friend" request. The litigant argued that the judge had retaliated against her because of her un"friend"liness, and that the judge's conduct created enough of "a well-founded fear of not receiving a fair and impartial trial" to "a reasonably prudent person" that the judge should be disqualified. The court of appeals in *Chace* agreed.

Eugene Volokh teaches free speech law, religious freedom law, church-state relations law, a First Amendment Amicus Brief Clinic, and tort law, at UCLA School of Law, where he has also often taught copyright law, criminal law, and a seminar on firearms regulation policy. Follow @volokhc