170 So.3d 802
District Court of Appeal of Florida,
Fifth District.

Sandra CHACE, Petitioner,

v.

Robert LOISEL, Jr., Respondent.

No. 5D13-4449.
Jan. 24, 2014.

Synopsis

Background: Wife filed petition for writ of prohibition to quash the order of the trial court, Linda D. Schoonover, Respondent Judge, denying her motion to disqualify the trial judge presiding over her dissolution of marriage case.

Holding: The District Court of Appeal, Cohen, J., held that trial judge's ex parte communication with wife presented a legally sufficient claim for disqualification of judge, particularly since wife's failure to respond to judge's social media "friend" request created a reasonable fear of offending judge.

Petition granted.

West Headnotes (6)

Change View

1 **Judges** Sufficiency of objection, affidavit, or motion
If the grounds asserted in a motion for disqualification of judge are legally sufficient to create a well-founded fear in the mind of a party that he or she will not receive a fair trial, it is incumbent upon a judge to disqualify herself.

2 **Judges** Sufficiency of objection, affidavit, or motion
To determine whether the motion for disqualification of judge is legally sufficient, appellate court must resolve 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.

3 **Judges** Sufficiency of objection, affidavit, or motion
Affiant's mere subjective fear is insufficient to form the basis for disqualification

of judge.

4 **Judges** Bias and Prejudice
Judge's ex parte communication with a party presents a legally sufficient claim for disqualification.

1 Case that cites this headnote

5 **Judges** Bias and Prejudice
Trial judge's ex parte communication with wife presented a legally sufficient claim for disqualification of judge in divorce case, particularly since wife's failure to respond to judge's social media "friend" request created a reasonable fear of offending judge; the "friend" request placed wife 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.

2 Cases that cite this headnote

6 **Judges** Standards, canons, or codes of conduct, in general
Judges Bias and Prejudice
Trial judge's efforts to initiate ex parte communications with a litigant is prohibited by the Code of Judicial Conduct and has the ability to undermine the confidence in a judge's neutrality, and appearance of partiality must be avoided.

1 Case that cites this headnote

Attorneys and Law Firms

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Christopher M. Sprysenski of Salfi Sprysenski, P.A., Altamonte Springs, for Respondent.

Opinion

COHEN, J.

Petitioner, Sandra Chace, seeks a writ of prohibition to quash the trial court's order denying her motion to disqualify the trial judge presiding over her and Respondent ***803** Robert Loisel, Jr.'s dissolution of marriage case. Upon review, we conclude that the trial court erred in denying Petitioner's motion.

The following allegations formed the basis for Petitioner's motion to disqualify. Prior to entry of final judgment,

the trial judge reached out to Petitioner, ex parte, in the form of a Facebook "friend" request. Upon advice of counsel, Petitioner decided not to respond to that invitation. Thereafter, the trial court entered a final judgment of dissolution, allegedly attributing most of the marital debt to Petitioner and providing Respondent with a disproportionately excessive alimony award. Following entry of the final judgment, Petitioner filed a formal complaint against the trial judge, alleging that the judge sent her a Facebook "friend" request and then retaliated against Petitioner after she did not accept the request. Respondent later filed a motion for clarification of certain provisions in the final judgment, which is currently pending below. In the meantime, Petitioner had learned of other cases involving similar ex parte social media communications by the judge that resulted in her disqualification. Subsequently, the subject motion to disqualify was filed, a hearing was held on that motion, and the motion was denied as legally insufficient. The instant petition was then filed in this Court.[1]

1 2 3 If the grounds asserted in a motion for disqualification are legally sufficient to create a well-founded fear in the mind of a party that he or she will not receive a fair trial, it is incumbent upon a judge to disqualify herself. *See Fischer v. Knuck*, 497 So.2d 240, 242 (Fla.1986). To determine whether the motion is "legally sufficient," this Court must resolve 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. An affiant's mere subjective fear is insufficient to form the basis for disqualification.*Id.*

4 5 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.

In *Domville v. State*, 103 So.3d 184 (Fla. 4th DCA 2012), *rev. denied, State v. Domville*, 110 So.3d 441 (Fla.2013), 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. *Id.*

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. ***804** 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. *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.[2] 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.

That said, *Domville* was the only Florida case that discussed the impact of a judge's social network activity and, as such, was binding upon the trial judge in this case. *See Pardo v. State*, 596 So.2d 665, 666 (Fla.1992) (explaining that "in the absence of interdistrict conflict, district court decisions bind all Florida trial

courts"). Although this case involves the "friending" of a party, rather than an attorney representing a party, for purpose of ruling on the motion to disqualify we find that the difference is inconsequential. 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.

6 Beyond the fact that *Domville* required the trial court to grant the motion to disqualify, the motion to disqualify was sufficient on its face to warrant disqualification. The trial judge's efforts to initiate ex parte communications with a litigant 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.

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.

PETITION GRANTED.

SAWAYA and PALMER, JJ., concur.

All Citations

170 So.3d 802, 39 Fla. L. Weekly D221

Footnotes

1 On appeal, Respondent argues that the motion to disqualify was untimely under Florida Rule of Judicial Administration 2.330(e). However, the trial court based its denial of the motion on its legal insufficiency, not its untimeliness. Thus, the issue of timeliness is not before this Court. *See Santa Catalina Townhomes, Inc. v. Mirza*, 942 So.2d 462 (Fla. 4th DCA 2006). Rather, this Court must determine only whether the motion to disqualify is legally sufficient.

2 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. Most judges have standing orders of recusal in such circumstances, or absent such an order, can be subject to a motion to disqualify.

Make sure that the proffered evidence can actually be authenticated pursuant to FRE 901and object when it cannot. Is the sponsoring witness someone with knowledge? Based on the security settings of the Facebook user, only certain individuals may have actual knowledge of the content on a given day. If the sponsoring witness could not have accessed the electronic content, that person cannot offer testimony with knowledge.

The comparison method also helps to dis-authenticate certain electronic evidence. When seeking to prove that electronic evidence is not what it purports to be, again, think of the methods used with other more traditional forms of evidence. For example, if a client alleges that a medical record has been doctored, test the allegation by reviewing the records for inconsistencies. The same is true of electronic evidence.

If Facebook evidence is being offered to suggest that a client "liked" pornographic material related to children, review the complete Facebook activity log and obtain a forensic examination of the client's computer hard drive. If that "like" is the only indication that the client has accessed inappropriate (or illegal) electronic porn, an argument can be made that the activity cannot be sufficiently authenticated when compared to other aspects of that client's digital footprint.

A parent in a paternity case might create a false Facebook profile for the other parent, posting inappropriate things. Again, the activity log provides insight into the legitimate nature of the page. Has there been any activity since page creation? Is there any personal information or "distinctive characteristic" on the page or in the profile? Are the language patterns consistent between the page and known writings of the parent?

When your client denies the post, e-mail, or text, ask for her computer and mobile devices. Then retain an expert to examine those devices for evidence of hacking or spyware. Proof of hacking has been sufficient grounds to exclude electronic evidence. A Google search for "social media forensic experts" yields numerous advertisements and links to professional websites. Law enforcement (both local and federal) utilize experts in criminal matters and also can be good starting points to locate qualified experts who have already testified in your jurisdiction.

As the old saying goes, however, an ounce of prevention is worth a pound of cure. Include in your engagement letter a recommendation that your client disable or deactivate (but not delete) all social media accounts while the case is pending. At the very least, security settings should be such that only "friends" or those specifically authorized, can view social media information. Request that, absent an absolute emergency, all communication with the other party be via one e-mail address. Ask that either you or a neutral (CASA, GAL, parenting coordinator) be copied on those e-mail communications. Having a second recipient virtually eliminates the likelihood that altered versions of the communications will be offered as evidence.

As with all evidence decisions, the admission or exclusion of electronic evidence is at the broad discretion of your local judges. Initiate dialogues in your legal community so that the bench and bar can share their perspectives on proper authentication of electronic evidence.

Authentication is but one of the evidentiary landmines you must navigate when offering evidence--electronic or otherwise. Be aware of hearsay and relevance objections. Lastly, please remember that being able to admit electronic evidence doesn't mean you should.No trier of fact wants to see 156 Instagram selfies in an evidence binder.

How to Produce the Facebook Activity Log

1. Access the Facebook account from a computer or Web browser (rather than a tablet or smartphone app).

2. Click on the downward-facing carrot in the upper-right corner of the user's Facebook page and scroll down to "Activity Log." The log will populate recent activity, which can be printed from the Web browser.

If a log of activity prior to the time that is automatically populated must be produced, use the timeline located on the right side of the activity log to access and print earlier activity.

--M.K.R.

Case Studies

Identifying distinctive characteristics

United States v. Grant (A.F. Ct. Crim. App. 2011). The defendant's name accompanied each Facebook message, and each message contained his photo. Thus "the appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances may be sufficient to [authenticate pieces of evidence]."

Campbell v. Texas (Tex. Ct. App. 2012). Facebook messages authenticated and admitted as (1) the messages contained Defendant's unique speech patter (the defendant spoke in a Jamaica dialect); (2) the communications referenced the underlying nature of Defendant's charge known to only a few people; (3) Campbell indisputably used the Facebook account; (4) only he and one other person had access to the account; and (5) the messages at issue contained Campbell's electronic signature.

California v. Archuletta (Cal. Ct. App. Apr. 9, 2013). The court held that the fact that Facebook sites are password protected would allow a reasonable jury to conclude that the person whose page it is authored the posts.

Tienda v. Texas (Tex. Crim. App. 2012). A combination of different factors sufficiently authenticated the MySpace page. These factors included: (1) the numerous pictures of Tienda on the page that displayed his unique tattoos; (2) the reference to the victim's death and details about the victim's funeral; (3) a connection between the MySpace page and an e-mail address resembling Tienda's name; and (4) witness testimony speaking to the MySpace subscriber reports.

Illinois v. Mateo (Ill. App. Ct. 2011). The court held that the extensive corroborating circumstances surrounding the identity of the victim and Defendant as authors of messages on MySpace properly authenticated the correspondence.

Burgess v. State (Ga. Apr. 29, 2013). The court held that MySpace content was properly authenticated because the State confirmed Defendant's use of a nickname used repeatedly on the page, the defendant's sister confirmed that Defendant used the name, and an officer compared known pictures of the defendant to pictures on MySpace and determined the person to be the same.