Civil Practice and Procedure

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"Did I Do That?" Recent Blunders Teach the Rules

Steve Urkel's catchphrase always followed some humorous calamity that he had obviously and innocently caused, but which often led to someone else's humiliation. When lawyers blunder, the consequence is rarely humorous and often causes both the lawyer and the client to suffer damage. Seeing how others have failed to avoid such incidents can be instructive in knowing about and preventing such circumstances from occurring in the future.

Facebook Friends With a Judge?

In Florida, a party filed a motion to force the recusal of a trial judge in a matter in which a lawyer representing a non-party is Facebook friends with the judge. When the trial judge refused to recuse herself, the matter then proceeded to the Third District Court of Appeal for the State of Florida on a writ of prohibition. *Law Office of Herssein and Herssein, P.A. v. United Services Auto. Ass'n*, 2017 Fla. App. LEXIS 12035, *1 (Fla. 3rd DCS Aug. 23, 2017). The lawyer in question is a former judicial colleague of the judge. Florida Supreme Court's Judicial Ethics Advisory Committee has issued an opinion stating that judges should not be "friends" on a social networking site with lawyers who may appear before them. Florida Supreme Court Judicial Ethics Advisory Committee, Op. No. 2009-20 (Nov. 17, 2009), at http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2009/2009-20.html

The appellate court held that recusal was not required and in distinguishing a prior appellate opinion, *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012), and the ethics opinion held that acceptance of a Facebook "friend" did disqualify a judge and stated:

> In fairness to the Fourth District's decision in *Domville* and the Judicial Ethics Advisory Committee's 2009 opinion, electronic social media is evolving at an exponential rate. Acceptance as a Facebook "friend" may well once have given the impression of close friendship and affiliation. Currently, however, the degree of intimacy among Facebook "friends" varies greatly. The designation of a person as a "friend" on Facebook does not differentiate between a close friend and a distant acquaintance. Because a "friend" on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook "friend" with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend." On this point we respectfully acknowledge we are in conflict with the opinion of our sister court in *Domville*. *Law Office of Herssein and Herssein, P.A.*, 2017 Fla. App. LEXIS 12035 at *10.

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This conflict in Florida law illustrates that it is probably best not to interact with members of the judiciary on social media. Rule 62—Canon 2 of the Illinois Code of Judicial Conduct states: "[a] judge should avoid impropriety and the appearance of impropriety in all of the judge's activities." The appearance of impropriety may be too strong and, in a given circumstance, could lead to a judge being forced to recuse himself or herself from a case in which the judge's impartiality should never have been called into question in the first instance. As a result, it is likely best to refrain from interacting with judges on social media.

Failure to Follow Formatting Requirement Draws Rebuke from Two Federal Judges

Judge James Boasberg of the United States District Court for the District of Columbia recently struck a brief filed by the Office of the Comptroller of the Currency which had 48 footnotes spanning 300 lines of text. *Conference of State Bank of Supervisors v. Officer of the Comptroller of the Currency*, No. 17-CV-763, Doc. 8 (D.D.C. Aug. 2, 2017). The court ordered the government to file a new brief containing no more than 10 footnotes with no more than 50 lines of text.

In another instance, Judge Joan Lenard of the United States District Court for the Southern District of Florida chastised defense counsel for failing to use proper line spacing, font size, and the excessive use of footnotes in a motion for summary judgment. *Equal Employment Opportunity Commission v. Darden Restaurants, Inc.*, No. 15-cv-20561, Doc. 237 (S.D. Fla. July 25, 2017). In a case of taking a mile after having been given an inch, the court was especially irritated because it had relaxed the page limit requirements in the case, but the court insisted that the dispensation did not affect the formatting requirements. The court also expressed dismay with the references to the record through the use of a "Citation Chart" as opposed to references to the numbered paragraphs of the statement of material fact.

Violating page, font, and spacing limits often irks courts in the extreme and can be the basis for a court to deny a motion or strike a brief, even if it has merit. As is often said, "they are called briefs for a reason." In the United States District Court for the Northern District of Illinois, Local Rule 5.2(c) regulates spacing and font size to 12 point for the regular text and 11 point for footnotes and Local Rule 7.1 limits briefs to 15 pages. Individual federal judges may have additional limits. In addition, many local circuit court rules limit page counts for briefs and some trial judges have their own limits, especially for reply briefs. Particularly in jurisdictions or in front of judges before whom you do not normally practice, it is best practice to consult the local rules and any standing orders to make sure that you comply with the rules. All federal judges have their standing orders online, as do most state circuits, and many state court judges also now provide copies of their standing orders online. A few minutes of internet research before drafting a motion or brief can save a lot of problems later in the case.

Failure to Follow Appellate Procedural Rules Leads to Stricken Brief

As if violating the formatting rules of the district courts was not bad enough, violating the substantive rules of the Court of Appeals for the Seventh Circuit with respect to confirming the court has jurisdiction could be even worse. In two recent appeals, Judge Diane Wood, Chief Judge of the Seventh Circuit, struck the briefs of the appellees in two cases in which she entered a consolidated order. *Baez-Sanchez v. Sessions*, 862 F.3d 638 (7th Cir. 2017). The appellees failed to properly set forth whether the court had jurisdiction. *Baez-Sanchez*, 862 F.3d at 642.

Seventh Circuit Rule 3(c)(1) requires the appellant to file a docketing statement that includes the jurisdictional basis for the appeal. Seventh Circuit Rule 28(a) also requires the appellant to state the basis for jurisdiction in the opening

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brief. Federal Rule of Appellate Procedure 28(a)(4) requires that all jurisdiction statements set forth the following: (1) the basis for the district court or agency's jurisdiction; (2) the basis of the appellate court's jurisdiction; (3) the relevant dates demonstrating that the appeal or petition is timely; and (4) information establishing either finality or the existence of a relevant exception to the final judgment rule.

In addition, Judge Wood noted that Seventh Circuit Rule 28(b) requires that the appellee's brief to state "explicitly whether or not the jurisdictional summary in the appellant's brief is complete and correct." *Id.* at 641.The appellee has the same requirement to set forth jurisdiction, but can be satisfied by stating that the appellant's jurisdictional statement is both complete and correct. *Id.* Simply stating that it is complete is insufficient.

The appellees' jurisdictional statements in both cases failed to state that the appellants' statements were complete *and* correct and were therefore stricken by the court. *Id.* at 641-642. The court granted leave for the appellees in both cases to submit proper jurisdictional statements. *Id*. at 642. The court stated that it continually sees such deficient jurisdictional statements from appellees and that is the reason the chief judge went out of her way to make the point. *Id.* Practitioners are wise to heed Judge Wood's warning and make sure they comply with the rules. The next time this happens, the court may not be quite as forgiving.

Technology Continues to Vex Attorneys

The ubiquity of electronic discovery and communication has led to it being an issue in nearly every case that extends beyond the most basic. Though not specifically stated, the obligation to competently deal with technology, including e-discovery software is likely required under Illinois Rule of Professional Conduct 1.1. Comment 8 to Rule 1.1 of the ABA Model Rules states: "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

In the category of, "but for the grace of God go I", two attorneys recently suffered technological snafus that exposed them and their clients to unwanted results. In the first circumstance, counsel for Wells Fargo was tasked with responding to a subpoena issued in a defamation case against one of its employees. Debra Cassens Weiss, *Lawyer's e-discovery error led to release of confidential info on thousands of Wells Fargo clients,* ABA JOURNAL (Jul. 27, 2017, 9:20 AM), http://www.abajournal.com/news/article/lawyers_e_discovery_error_led_to_release_of_confidential_wells_fargo_ client.

The law firm representing Wells Fargo used e-discovery software to review the documents that the software identified as responsive and produced the documents to the requesting attorney. Unfortunately for both the lawyer and Wells Fargo, contained within the documents produced was "'a vast trove of confidential information about tens of thousands of the bank's wealthiest clients' including customer names, Social Security numbers and financial data." *Id.*

In explaining the production in an affidavit, the lawyer responsible for the production explained that when she conducted the review of the documents, she was using "a view" of the documents, which only included a subset of the documents produced. *Id.* As a result, some of the documents produced were not reviewed prior to production. The judges presiding over the cases involved have impounded the documents and ordered that they not be produced further. *Id.*

There are two lessons here. First, reliance on e-discovery software to conduct a search is not sufficient. To the extent possible, every document to be produced should be reviewed by counsel at least once to ensure that privileged or confidential documents are not produced. Second, when the Illinois Supreme Court Rules were amended in 2014 to

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update them to conform with the increased use of electronic discovery, Rule 201(p) was added, which allows documents inadvertently produced to be "clawed back." Ill. Sup. C. R. 201(p). Counsel who handle matters involving electronic discovery should familiarize themselves with this rule in order to take advantage of the protection it provides.

In the second circumstance, a lawyer missed a deposition because the notice went into his junk e-mail folder having been identified as spam. *Fader v. Telfer*, No. 2:16-cv-1107, Docs. 8-14 (E.D. Wis. Jun. 7, 2017-July 12, 2017) As a result of missing the deposition, the case faces dismissal because discovery was not completed within the time frame ordered by the court. In arguing in opposition to the motion to dismiss, counsel for the plaintiff asserted that it was unreasonable for defendant's counsel not to have called to ensure that the notice was received and certainly when the deposition was scheduled to begin and counsel for plaintiff did not appear.

Managing spam settings is increasingly important to the practice of law. Hacking of law firms large and small is often precipitated by phishing and social engineering scams. This is at the same time that notice of motions, depositions, and requests to admit are increasingly being transmitted by e-mail. Properly using spam filters to keep the malicious e-mails out, while at the same time allowing the proper e-mails to get through, can be a real challenge.

Using a spam filter that notifies the receiver of the e-mail that an e-mail has been quarantined can be of great assistance in accomplishing both goals. Such filters often notify the sender that the e-mail has not been received. Counsel should also make a habit of reviewing any e-mails that find their way into the junk folder. As e-mail service becomes more widely used, courts may be less tolerant of excuses related to not receiving e-mail notice.

Bomb Threat to Delay Hearing

We have all had a hearing we were dreading or wished we were somewhere else as a judge was taking us to task. The stress of practicing law can seem overwhelming. But hopefully you have never called in a bomb threat to avoid the hearing. Unfortunately, a New York attorney did just that when she called the daycare at a federal court house and made a bomb threat to avoid a sanctions hearing. Amanda Griffin, *New York Attorney Called in Bomb Threat to Daycare,* JD JOURNAL (Aug. 18, 2017), https://www.jdjournal.com/2017/08/18/new-york-attorney-called-in-bomb-threat-to-daycare. The lawyer was recently sentenced after pleading guilty and was ordered to pay a $20,000 fine with one year of probation, but escaped jail time.

Takeaways

The continued evolution of the practice of law presents new challenges that have to be dealt with in order to avoid some of the pitfalls described above. The usual solution to these problems is a moment of sober reflection, a conversation with a colleague, reference to applicable rules, or a combination of all of these. Learning from the mistakes of others can be helpful too.

About the Author

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort

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defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

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The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.

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