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Clicking “Send”: Possible Consequences of Judicial E-mails

by Keith R. Fisher

A recent decision by the U.S. Court of Appeals for the Seventh Circuit amplifies on state judicial ethics approaches to judges using e-mails. E-mails thought to be private often see the light of day and raise significant judicial ethics issues. They may, for example, be the basis for disqualification. *See, e.g., Frengel v. Frengel*, 880 F.3d 763 (Fla. Dist. Ct. App. 2004). They may also, as in a recent [Colorado case](#), lead to forced resignation or removal from the bench.

The 7th Circuit case is instructive, as it involved e-mails between a judge and former prosecutor colleagues and friends. In *United States v. Atwood*, the court ordered a cocaine defendant sentenced to more than 17 years in prison to be resentenced before a new judge, because the federal judge who imposed the original sentence should have recused himself in view of his ongoing email communications with former colleagues in the U.S. attorney’s office. Like Rule 2.11 of the Model Code of Judicial Conduct, the federal recusal statute, 28 U.S.C. § 455(a), requires a judge to recuse himself from “any proceeding in which his impartiality might reasonably be questioned.”

Judge Colin Bruce had been a federal prosecutor from 1989 to 2013, when he was elevated to the bench. Since then, he had communicated with former colleagues in the U.S. Attorney’s office in more than 100 e-mails, all of which were *ex parte*. The judge’s e-mail proclivities were “outed” in an August 2018 newspaper [article](#) that appeared shortly after the appeal from the sentence was filed. These e-mails, the 7th Circuit opined, “invited doubt about his impartiality.”

The court acknowledged that Judge Bruce’s e-mails never explicitly mentioned the defendant’s case and mostly concerned ministerial matters. The e-mails did, however, show Bruce “cheering on office employees and addressing them by nicknames.” The opinion quoted examples of the judge’s e-mails, including one in which he “expressed exasperation that the novice prosecutor’s weak cross-examination had turned the case ‘from a slamdunk for the prosecution to about a 60-40 for the defendant’

....” Judge Bruce had also in the past written to prosecutors to congratulate and thank them for persuading the 7th Circuit to affirm his decisions.

After the e-mails were publicized, the chief judge of the district removed Judge Bruce from all criminal cases, and the matter was referred to the 7th Circuit Judicial Council, which considered two ethics complaints against the judge. The Council found no evidence that the improper communications affected his decision in any case but rebuked him for violating the Code of Conduct for U.S. Judges.

In Atwood’s criminal appeal, the government conceded that Bruce’s conduct gave the appearance he was biased in favor of the prosecution but argued harmless error. The 7th Circuit disagreed. While Atwood’s sentence fell within the range of applicable federal sentencing guidelines, the court of appeals noted that judges retain discretion when evaluating guidelines factors, and this discretion entailed the risk that personal biases could influence a judge’s decision. Upholding Atwood’s sentence created “a real risk of unfairness to him,” while ordering resentencing created little risk of unfairness to the government. “In sentencing,” the court explained, “the most significant restriction on a judge’s ample discretion is the judge’s own sense of equity and good judgment. When those qualities appear to be compromised, the public has little reason to trust the integrity of the resulting sentence.”

In short, e-mails can have consequences. Here are some cautionary thoughts:

1. It makes no difference, from the judicial ethics perspective, whether the e-mail is sent from an official court address or from a private e-mail account.
2. Do not assume that the use of a pseudonym on a private e-mail account will stop someone from discovering that the sender is a judge. In this era of social media and widespread hacking, anonymity is no longer what it used to be.
3. Do not assume that private e-mails will remain private: Trusted recipients, such as family, friends, and other intimates, may at some point cease to be trustworthy or, in the case of a falling out, may seek to embarrass the judge by publicizing e-mails.