



A Question of Ethics

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Nightmare in the Blogosphere¹

The famous throughout history have often used pen names to both entertain us and promote their points of view. Samuel Clements was Mark Twain, Eric Blair wrote *Animal Farm* and *1984* as George Orwell, Alisa Rosenbaum used Ayn Rand to write *Atlas Shrugged* and *The Fountainhead*; Alexander Hamilton, James Madison, and John Jay collectively wrote the Federalist Papers under the pen name Publius.

Now it is common place to use blogger names on the Web that can obscure our actual personal identifications; many of us sport “avatars” to play complex electronic simulation games. Is it time to rethink our traditional posture regarding those who hide their identities while joining the ever burgeoning electronic social conversation?

The Scenario

Bill, court administrator in a rural Arizona court, is very concerned about the illegal immigration controversy sweeping the nation and sweeping Arizona. Despite his position with the court, he is driven to express his opinion. Bill arrives at an ingenious solution (or at least he thinks it is ingenious). The local newspaper maintains a website that invites blogger comments. Although the site espouses that all postings are anonymous (unless a commenter chooses to reveal his or her name), Bill is skeptical.

Bill registers with the newspaper blog site using the ID “Liberty 2010,” entering his name as “Roscoe Pound,” and posting a Phoenix zip code. Bill now believes he has constructed an ironclad security firewall ensuring his anonymity; he now begins freely posting comments under his new Liberty 2010 moniker, careful not to reveal either his true identify or any confidential court information.

Soon cases emanating from Arizona’s new immigration law begin filtering into Bill’s court. Ed, a reporter at the local paper (and whose job it is to scan the blogosphere), sees Liberty 2010 postings along with dozens of others. Although the postings never discuss specific cases, Liberty 2010 demonstrates both a surprising knowledge of local court operations and a knowledge of local happenings, an unusual combination in a town so small.

Ed begins digging for details and (with the help of a local computer repair shop owner), tracks the postings to a specific IP address at Bill’s residence. Theorizing who Liberty 2010 really is, Ed calls Bill asking for his response to a story set to run in the next morning’s edition that reveals court staff are posting their strong personal political opinions regarding court cases pending before the court. Bill is devastated.

First Bill reminds Ed of the paper’s advertised policy not to identify blog posters beyond their website IDs. Ed directs Bill to the fine print on the terms of agreement (that Bill agreed to when he signed up) giving the paper non-commercial license to use the postings as they saw fit. Bill then points out that Roscoe Pound posted the blog comments, not Ed. Ed says he used some good old-fashioned investigative journalism to come up with Bill’s IP and home address for the blog postings; besides, how did Bill know the poster’s name was Roscoe Pound anyway? The paper ran the article the next morning; Bill’s attorney filed suit against the paper for unspecified damages.

The Respondents

I asked Frank Maiocco, trial court administrator with the Kitsap County Superior Court in Port Orchard, Washington; Jeff Amram, court administrator for the Clark County Superior Court in Vancouver, Washington; and Scott Crampton, chief

deputy clerk for the United States District Court, Middle District of North Carolina, to respond to questions about the scenario.

Questions

Should Bill be allowed to express his opinion publicly?

Jeff Amram warned that Bill is entitled to express his opinion, however, given his position, his opinion could easily be construed as the same as that of his employer: the court. “Given his position and the possibility that readers might construe his opinion to be that of the court, he should have either taken more precautions, kept his opinion to himself, or written his opinion under his true name and accepted any resulting fallout.”

Frank Maiocco agreed that Bill should be allowed to publicly express his opinion, as long as he makes it abundantly clear that it is his personal opinion. “Since Bill’s written opinions under an assumed name are being published in a public forum where others can read and comment, yes, I would argue that Bill’s remarks constitute a ‘public expression’ of his opinion.”

Scott Crampton disagreed. Although Bill has an inherent right to both hold and express his personal opinions, he must balance that right with the acknowledgement that if a public policy issue is likely (and in this case very likely) to make its way to his court, he must take extra precautions to avoid any appearance of bias. “By taking his oath of office, Bill has waived his right to express his personal opinion in the most public forum (i.e., the World Wide Web) for issues that are likely to appear in his court. By promoting his political views in a public forum, he has tainted the impartiality of the judiciary and created the appearance of bias for the entire court.” Because Bill had administrative control over court operations, the public could reasonably conclude that

he may have altered the judicial process consistent with his political beliefs. “... even the perception of justice directed toward a certain political end is, in fact, justice denied. The credibility of the judiciary is a fragile condition that can’t be compromised by any staff member’s personal actions, especially political actions.”

Do you think Bill took reasonable precautions to ensure his anonymity?

Crampton wondered if the real question was not whether Bill exercised reasonable caution, but rather did Bill fulfill his oath of office as a judicial employee to uphold the independence and neutrality of the judicial branch. In his view, Bill failed miserably and should no longer continue as court administrator.

“The fundamental tenant of the judiciary for all employees, not only judges, is absolute neutrality under all circumstances. By taking our oaths of office, we all pledge to honor both the independence of the judiciary from all political influences and not to use our office for personal benefit, including advancement of personal political preferences. More important, we must ensure that the public has no basis, even a marginal one, to question our commitment to those values.

“Under the given fact scenario of a small community in Arizona, and the local and national furor over Arizona’s immigration legislation, Bill should have taken a stance 180 degrees from what he did. Judicial employees (especially those in leadership positions), must be pro active by asserting a constant vigil against even the appearance of partiality. Ensuring anonymity should not be Bill’s objective; ensuring that he fulfills his constitutional mandate to be impartial at all times is paramount.”

Crampton thought Bill's thinly veiled scheme to conceal his identity actually amplified his misconduct, calling into question Bill's personal and professional integrity. "If he is willing to engage in surreptitious conduct in this manner, can he really be trusted with confidential court information and assets?"

On the other hand, both Amram and Maiocco thought Bill had taken a reasonable amount of caution to ensure his anonymity. Maiocco argued that anonymity is, in fact, unnecessary, since Bill's First Amendment rights are not suspended because he is a court administrator. Maiocco commented, "In my mind, Bill's only obligation is to ensure that his personal opinions are articulated as his personal opinions and should not be construed as a statement or representation of the judges or the court. I don't think Bill really needed to do much more than he had in this scenario."

Prominent individuals, including our country's founding fathers, have sported pen names throughout out history. Why shouldn't Bill be allowed to use one?

In Maiocco's opinion, nothing prevents Bill from using a pen name and, frankly, "I think it's a good idea because it does not immediately link Bill, the person, with Bill, the known court leader. I think the issue here is to clearly separate Bill the person, who continues to possess all of his First Amendment rights, from Bill the court professional, who has a unique position of speaking on behalf of his judges and the court. Bill's use of a 'nom de plume' permits Bill to say what he's thinking while clearly establishing himself as a person apart from his professional identity."

Maiocco also thought that Bill does not necessarily need to use a pen name since his constitutional rights are protected

regardless of his occupation. "However, creating an identifiable separation potentially relieves Bill from placing either himself or his judges in an uncomfortable position when others attempt to make or emphasize the nexus simply due to appearances."

Amram conceded that Bill is entitled to his opinion, but he is not necessarily entitled to express it publicly. "Our courts are supposed to be unbiased arbiters. It is possible that Bill's court will enter the fray in an official way, cases brought to the court, etc. Given his position, Bill pretty much has an obligation to at least appear to be unbiased so as not to jeopardize the court's standing."

Doesn't the ethical violation really lie with Ed, who went way too far by tracking down Bill as the court administrator blogger?

Ed the reporter was doing what reporters do, Amram thought. "He [Ed] reminds me of the fable about the little girl who finds the half-frozen snake, warms it under her coat, then is bitten and is angry at the snake for its' lack of appreciation. The snake tells her that she knew he was a snake when she decided to warm him...what did she expect?"

It is readily apparent that Ed violated a number of basic professional and likely journalism-specific ethical standards, according to Crampton. "However, those are irrelevant to Bill's actions. In his highly sensitive judicial position, Bill must be cognizant of the fundamental maxim of professional survival: 'Assume nothing, trust no one, but do the right thing.'"

Maiocco thought Ed potentially violated his ethical obligations by disclosing Bill's identity if he failed to communicate with Bill first. "The boilerplate language in the agreement of terms does not convince me that Ed has been particularly open about the disclosure of blogger's actual identities. Ed's

conversation with Bill regarding disclosure is appropriate, and Bill errs in trying to hide his identity. In fact, Bill should be very open with Ed regarding his reasons for maintaining some semblance of anonymity, with the hope that Ed understands and justifies Bill's desire to separate his personal opinions from his court position. With an understanding of Bill's purpose, Ed is armed with the discretion to disclose his identity in the proper light — or not. I question Ed's ethical integrity if he is aware of Bill's discrete purpose and chooses to disclose his identity anyway.”

I want to thank Jeff Amram, Frank Maiocco, and Scott Crampton for their comments and insights regarding the new and burgeoning area of blogging and the use of electronic pen names. This is probably not the last time we will need to discuss this important and emerging topic.

If you have an ethical issue you would like to have discussed, or you would like to comment on this scenario, please contact me at pkiefer@superiorcourt.maricopa.gov. I would also invite you to visit the ethics page at the NACM website. The page has some of the most recent thinking on a variety of topics.

ABOUT THE AUTHOR

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NOTES

1. The views expressed in this column do not necessarily reflect the opinions or official positions of the Superior Court of Arizona for the County of Maricopa, any of its judicial officers, or of its employees.