

Pastor of church challenging stay-home order is Facebook friend with judge

By MAXINE BERNSTEIN
The Oregonian

BAKER CITY — Baker County Circuit Judge Matthew B. Shirtcliff, who invalidated Oregon Gov. Kate Brown's emergency "stay home" orders this week, is Facebook friends with the pastor of the Baker County church that's the lead plaintiff in the case.



Francis



Shirtcliff

The connection in the high-profile case — now before the Oregon Supreme Court — highlights what judicial experts say is an ongoing discussion about the proper use of social media by judges.

It also reveals the practical problem in a sparsely populated county with just a single state judge and one who served as district attorney for almost two decades. Chances are that longtime members of the political and legal community like Shirtcliff know a lot of people who might appear before him.

Among them: Elkhorn Baptist Church Senior Pastor Tim Francis. Francis spent 21 years as a sheriff's deputy in the county and said Tuesday that he sent a friend request to the judge when a recommendation popped up on his screen within the past year.

"I've known the judge over 25 years, but our relationship has always been professional," Francis said.

Francis didn't give the personal Facebook link between the two much thought when the case — brought by his church and nine others — went before Shirtcliff this month, with Shirtcliff ruling on Monday, he said.

"We don't hang out with him or anything," the pastor said. "It doesn't concern me because the judge and I don't have a personal relationship."

Shirtcliff did not respond to emails or a phone message. His judicial assistant, Amy Swiger, said judicial ethics constraints prevent the judge from commenting or granting an interview on a case before him.

Shirtcliff was appointed to the bench Nov. 1, 2019, by Brown after serving as Baker County's top prosecutor for 18 years.

Oregon has no written guidelines on use of social media for judges.

The Oregon Code on Judicial Conduct, along with the American Bar Association's model Code of Judicial Conduct, tells judges they should disqualify themselves in any proceeding



Photo courtesy of Elkhorn Baptist Church

A Baker County judge on Monday granted a preliminary injunction to 10 churches, including Elkhorn Baptist in Baker City, who sued the governor. The judge ruled Gov. Kate Brown's restrictions on religious gatherings "null and void" because her emergency order due to the coronavirus pandemic had exceeded its 28-day limit.

where "a reasonable person would question the judge's impartiality."

According to the Oregon code, that could include a personal bias or prejudice relating to one party in the case, one of the lawyers or personal knowledge of the facts that are in dispute. Other disqualifying circumstances include if a close rel-

anything that would give the impression that they're biased, but just because judges know someone doesn't mean they can't hear the case, he said.

The next question is whether a judge's relationship with the person in question could affect impartial decision-making, Hill said.

Yet, even if the judge

job," she said.

In the Baker County case, Kotey said the same questions could be asked about Shirtcliff's potential bias in relation to the governor because Brown appointed him to the bench.

"I think there's an issue for both sides," she said.

The governor's staff filed an emergency appeal to the Oregon Supreme Court, which has put a hold on Shirtcliff's ruling and set a deadline of Friday to get briefs in the dispute.

Shirtcliff ruled that the governor's executive orders in response to the global pandemic exceeded a 28-day limit adopted by state lawmakers and were no longer valid in response to a suit filed by 10 churches against the governor.

Chief Justice Martha L. Walters recused herself from the high court's decision to put Shirtcliff's decision on hold. Todd Sprague, a Judicial Department spokesman, said justices don't talk about decisions in cases beyond what's written in their opinions or orders.

Nothing in the order explains why Walters didn't participate in the decision. However, Walters has issued orders as chief justice that restricted court operations and limited travel, and has given other directions to courts similar to instructions the governor issued to executive branch agencies amid the coronavirus pandemic. Brown's orders don't apply to the judicial branch.

With the explosion of social media in the last decade, other states have examined how judges should handle their online presence and published judicial ethics opinions.

A 2011 judicial ethics advisory panel in Oklahoma, for example, considered whether a judge with a social media account could add people who may appear in court — including law enforcement officers, social workers and attorneys — as "friends" on the account. The answer? Yes, with restrictions.

ative or friend is involved in the proceeding, if the judge or a spouse has an economic interest in the case or if the judge has made statements that indicate a commitment to a particular result.

Polk County Circuit Judge Norman R. Hill, who chairs the state's Judicial Conduct Committee, said social media and judges is "a hot topic." The committee educates judges on their obligations under the state's judicial code of conduct.

"There's a lot of discussion ... But I don't think there's any court opinions in Oregon that deal specifically with what judges can or cannot do on social media," Hill said.

Much of the debate centers on whether judges should send or accept friend messages on social media from lawyers who appear before them.

"What does it say when I'm friending somebody? It doesn't mean the same thing as that's my 'friend.' That's hard to explain, and it creates issues," Hill said.

Most judges, Hill said, would likely advise it's better not to be on Facebook or accept friend requests from lawyers but there's no "bright line rule."

The judicial conduct code clearly says judges can't do

has no bias, Hill noted: "Could a reasonable person in the community raise a legitimate question about your bias? That's a slippery concept because what's reasonable?"

Senior Judge Phyllis Williams Kotey, who teaches professional ethics at Florida International University's College of Law in Miami, said there's been an evolution over the years as to "what it means to be a friend" on Facebook or another social media account.

Kotey said judges should disclose any relationships they have with a party in the case, but that doesn't mean they must step aside from hearing a matter.

In today's world of social media, it's sometimes impossible for judges to know who all their friends are on a social media account, said Kotey, who has been on the faculty of the National Judicial College for 20 years.

That's why she said she tends not to accept law school students as Facebook friends.

"It really is going to depend on the nature of the relationship," she said.

In a small county or town, if judges "conflicted out of all of their cases based on who they knew, they wouldn't be able to do their

State economists: Oregon budget has a \$3 billion gap

Federal aid and cuts needed to cushion blow on state services

By PETER WONG
Oregon Capital Bureau

SALEM — Gov. Kate Brown says federal aid must go hand in hand with spending cuts to offset almost \$3 billion that state tax collections and other sources will be short.

Brown made her statement on Wednesday after state economists told lawmakers the COVID-19 coronavirus pandemic has resulted in an unprecedented economic downturn from shutdowns in business activity and public life.

Oregon's unemployment rate jumped from a modern low of 3.5% in March to a modern high of 14.2% in April. Oregon's state general fund budget draws more than 90% of its money from personal and corporate income taxes. The combined general fund and lottery budget for the 2019-21 cycle is about \$23.7 billion, and virtually all of the potential spending cuts of \$2.7 billion will fall within the second year starting July 1.

"The steepness of this decline is unprecedented," State Economist Mark McMullen said during a video conference of the House and Senate revenue committees.

While he and Senior Economist Josh Lehner said they expected a quick economic recovery when business activity resumes — as early as the second half of 2020, and an "all clear" by mid-2021 — "it takes a full year or more before pain is realized."

They also projected that state coffers will get less than originally forecast in the following two budget cycles. Oregon did get \$1.4 billion as its share of \$150 billion in federal aid from the recent CARES Act, although \$415 million is tentatively earmarked for local and tribal governments other than Portland, Multnomah County and Washington County.

"As a state, we took action to shutter our economy in order to save lives in the middle of a once-in-a-century crisis," Brown said. "Now it's time for Congress and the president to step up and provide once-in-a-century support for important state services, including schools, health care, and public safety."

More federal aid uncertain

The Democratic-led U.S. House passed a \$3 trillion aid bill on May 15 with \$500 billion for states and \$375 billion for local governments. But the Republican majority in the U.S. Sen-

ate has balked at the price tag, and President Donald Trump has taken a wait-and-see stance, so more aid for states does not appear to be imminent.

Brown has received agency plans she ordered earlier this month for \$3 billion in spending cuts, amounting to 17% of their general fund support starting July 1. But no one expects those cuts to pass the Legislature. Brown has the authority to make across-the-board spending cuts, but only lawmakers can approved selected cuts.

Brown also could impose a hiring freeze — although she has said more workers have been needed at the Employment Department and other agencies affected by the pandemic and the downturn — or employee furloughs.

"The latest forecast for state revenue makes it clear that we have tough choices ahead," she said in her statement Wednesday. "We will need to tighten our belts. I am working with legislative leaders to preserve critical state services, find efficiencies, and prepare for potential budget cuts."

But neither she, Senate President Peter Courtney of Salem, nor House Speaker Tina Kotek of Portland have said when a special legislative session might occur. Kotek, in a video conference on Tuesday sponsored by the Portland Business Alliance, said lawmakers still need to assess other sources of aid stemming from the \$3 trillion CARES Act.

She did say that a session is likely before August, and that lawmakers cannot put off action until their next regular session starts Jan. 11, 2021.

Other sources

Lawmakers were told that the state has \$1.6 billion in its two main reserve funds — one generated by lottery proceeds for education, the other from income taxes for general programs — plus \$1 billion in ending balances that lawmakers could tap. The reserve funds have had a chance to grow since the most recent downturn a decade ago, but lawmakers are barred from using all of the money in a single budget cycle.

The forecast by state economists also projects a 23% decline (\$364 million) in Oregon Lottery proceeds, the lion's share of which is generated by video machines — which are mostly in restaurants, bars and taverns that have been shuttered since March 16. Lottery proceeds go to economic development and education, but voters have earmarked shares for an education stability fund, parks and watersheds, veterans' programs and outdoor schools. Lawmakers also have used lottery proceeds to repay bonds

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