Professional Responsibility Law Blog

Lawyers Beware: Criticizing Judges Can Be Hazardous to Your Professional Health

John B. Harris, February 1, 2022

There are times in most lawyers' careers when they encounter judges who outrage them. They may believe the judge's rulings are profoundly wrong. They may believe the judge's political or personal views have infected the process. Or they may believe the judge is so partial to an opposing party or counsel, or so hostile to the lawyer or the lawyer's client, as to create the proverbial "kangaroo court." In each case, the lawyer is confronted with the question of what – if anything – they can or should do about it.

This article considers the professional consequences that may befall lawyers who speak out against judges they perceive to be incompetent, biased or even corrupt. Although many lawyers instinctively believe that the First Amendment broadly protects their opinions and good faith criticism of judges, it is clear that, as 2022 unfolds, lawyers are being sanctioned all over the United States for direct or implied criticism of judges both inside and outside of the courtroom based on violation of a variety of ethical rules.[1]

For lawyers, the message is inescapable. Publicly opining on the character, integrity, competence or motivation of a judge is perilous, and all the more so when a lawyer accuses a judge of bias, corruption or playing politics. Although most states hinge discipline on a finding that a lawyer's comments about a judge are knowingly false or made with reckless disregard for the truth, many recent decisions seem to focus more on lack of decorum than knowing falsity, and many appear to place the burden on lawyers to prove the truth of their statements.[2] Regrettably, because the line is blurred between when a lawyer can safely criticize a judge and when that criticism exposes the speaker to professional discipline, lawyers may choose to remain silent even in the face of actual judicial malfeasance or conflict of interest.[3]

Here is a sampler of what is happening today:

1. *John Morton* (Ohio)

In November 2021, a divided Ohio Supreme Court suspended attorney John Morton for up to a year. Morton claimed judges in Ohio regularly favor the government in tax valuation cases "no matter how unreasonable the government's view" of a property's value. In so doing, judges applied "politics, not law." Morton further alleged that: (a) "only politicians committed to maximizing the revenue of their political cronies" could issue such decisions; and (b) delays in rendering decisions were improperly motivated.

The Cleveland Bar Association filed a complaint against Morton. Rejecting claims that Morton's statements were mere hyperbole, a hearing panel found that Morton had no reasonable factual basis for making the allegations, and found he engaged in undignified and discourteous conduct in violation of Ohio Rule 3.5(a)(6). On appeal, a majority of the Ohio Supreme Court held that a reasonable attorney would have viewed Morton's comments as improper because he relied "solely upon his own interpretation of the facts" and – with respect to his claims of calculated delay – "ignored the possibility" that the delays resulted from high volume. A concurring judge added that Morton took an oath when entering the practice to conduct himself with "dignity and civility" in compliance with ethical rules, and "there are professional consequences for failing to fulfill these duties."

The dissenting judges asserted that Morton should not be disciplined for multiple reasons: (1) Rule 8.2 required analysis of the attorney's subjective state of mind at the time of making the alleged false statement; (2) the need to "protect the appearance of judicial integrity" was not a compelling interest sufficient to abridge an attorney's right to criticize a judicial officer; (3) enforcement of an "objective attorney" test runs the risk that true statements could be disciplined if reasonable attorneys assume they are false, and false statements permitted if reasonable attorneys assume they are true; and (4) none of what Morton said was demonstrably untrue, and all of his opinions were based on fully disclosed facts. *Cleveland Metropolitan Bar Ass'n v. Morton*, Slip Op. No. 2021-Ohio-4095 (November 23, 2021)

2. *Benjamin Pavone* (California)

A California lawyer, Benjamin Pavone filed an appeal in a client's case in which he described a judicial hearing officer as "disgraceful," referencing her ruling as a "succubustic adoption of the defense position," and claiming the judge was determined to evade appellate review. In 2019, the California Bar charged Pavone with "impugning the honesty, motivation, integrity, or competence" of the judge by accusing her of intentionally refusing to follow the law. He was also accused of "gender bias" because the dictionary defines "succubus" to mean "a demon assuming female form to have sexual intercourse with men in their sleep" and a "strumpet." These allegations allegedly violated California Bus & Prof Code § 6068(b), which states that it is an attorney's duty to "maintain the respect due to the courts of justice and judicial officers."

Challenging the complaint, Pavone claimed he "used a colorful (or caustic, depending on one's viewpoint) metaphor to criticize a court ruling," and asserted his First Amendment rights of advocacy and freedom of thought and speech. He described the "succubus charge" as "textbook hyperbole" and "lusty and imaginative criticism" protected by the First Amendment that could not conceivably have been viewed as a statement of fact. Pavone also argued that Section 6068(b) is unconstitutional as applied to rhetorical criticism of judges.

On November 19, 2021, the California court declined to enjoin the Bar proceeding against Pavone. *See Pavone v. Cardona*, 3:2021 cv 01743 (S.D. Cal. Nov. 19, 2021).

3. *Freshub v. Amazon* (Texas)

On December 17, 2021, a federal judge in Texas sanctioned three lawyers from the Kramer Levin law firm who represented an Israeli company, Freshub, in an action against Amazon. After losing at trial, the lawyers filed a motion for judgment n.o.v. asserting that Amazon "played on the stereotype of greedy Jewish executives of an Israeli company allegedly taking advantage of U.S. companies, to trigger religious biases and deepen the 'us vs. them' nationalistic divide in the minds of the jurors." They further claimed that Amazon used a "Jewish stereotype dog whistle" to win the case.

Although the attacks were directed against Amazon, the judge took them as implicit criticism that he had willfully ignored prejudicial statements. "The court did not turn

a blind eye to any racist or anti-Semitic conduct because indeed there was none," the judge wrote. The judge added that, in the absence of concrete evidence that Amazon intentionally played up its adversary's Israeli ties or any witness' race, heritage or religion, "Freshub's inflammatory allegations are nothing but baseless attacks on the integrity of this Court and the reputation of Defendants' counsel." The judge ordered the lawyers to complete 30 hours of ethics-related continuing legal education. *Freshub, Inc. v. Amazon, Inc.* No. 6:21-CV-00511-ADA (W.D. Texas December 17, 2021).

4. *Victor Marshall* (New Mexico)

Victor Marshall is a New Mexico lawyer who represents landowners litigating water rights against the Navajo Nation. In court papers, Marshall suggested that the judge hearing the case failed to disclose a previous relationship with the Navajo Nation before ruling in its favor. As a result, Marshall stated that "the public might reasonably wonder whether the judge fixed this case for his former client."

The judge denied that he had ever represented the tribe, though he acknowledged working for individual members decades earlier on matters unrelated to water rights. Marshall was brought up on disciplinary charges.

On January 14, 2022, the New Mexico Supreme Court indefinitely suspended Marshall. It stated that "our concern is not so much" that Marshall claimed an undisclosed conflict, "but the way that he made it" – implying that the judge had intentionally concealed his relationship, ignored the law and "fixed" the case. *See* "Noted Attorney's License Suspended By New Mexico Supreme Court," *Santa Fe New Mexican* (January 14, 2022).

5. *Steven Donziger/Chevron*

Steven Donziger was a lawyer who won a huge tort judgment in Ecuador against Chevron/Texaco on behalf of indigenous peoples. In extensive proceedings before two New York federal judges (Kaplan and Preska), the courts consistently ruled against Donziger and his clients, ultimately holding him in contempt, subjecting him to home detention and sentencing him to six months in prison. *See* "Lawyer Who Won $9.5 Billion Judgment Against Chevron Reports to Prison," *New York Times*

(October 27, 2021). Donziger was disbarred as an attorney in New York in August 2020.[4]

Donziger's plight drew substantial support from prominent lawyers who are waging a public campaign to expose what they view as unfair and corrupt treatment of him. One lawyer accused the trial judge of allowing the case to "degenerate into a Dickensian farce" because of the judge's "implacable hostility" toward Donziger.[5] Another said the sentencing decision by Judge Preska was part of "a cesspool of improper judicial conduct and corruption."[6] The National Lawyers Guild publicly filed a complaint with the Second Circuit charging that Judge Kaplan "has been acting as a *de facto* lawyer for Chevron," has tried "to destroy Steven Donziger, both personally and professionally" and has engaged in "persecution."[7]

Even a casual reader of this article might well fear that the lawyers campaigning against the treatment of Donziger could run afoul of Rules 8.2 and 8.4(d).

How We Got There

Protecting judges from criticism – and levying punishment against lawyers who make unwarranted, false or undignified comments – has been engrained in the legal profession for decades. Most courts in the United States hold that professional speech by attorneys regarding judges can be restricted and does not extend to the full limits of the First Amendment. See *U.S. Dist. Ct. of Washington v. Sandlin*, 12 F.3d 861, 866 (9th Cir.1993) ("[O]nce a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct."); *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 793 N.E.2d 425, 429 (Ohio 2003) ("The First Amendment does not shield an attorney from discipline for falsely suggesting 'unseemly complicity' by the judiciary in unlawful or unethical practices" or from other false statements made with knowledge of their falsity or reckless disregard for their truth).

The United States Supreme Court has not specifically considered the limits of lawyer criticism of judges in the context of imposing professional discipline. *See Garrison v. Louisiana*, 379 U.S. 64 (1964) (prosecutor could not be held criminally liable for defamation for describing parish judges as lazy or indifferent to vice cases absent "actual malice" as required by *Sullivan*; *In re. Snyder,* 472 U.S. 634, 638 (1985) (lawyer

who wrote to court complaining that "extreme gymnastics" were needed to receive the "puny amounts" authorized for indigent criminal defense was sanctioned by the lower court for statements "totally disrespectful to the federal courts and to the judicial system;" although Court found the letter "exhibited an unlawyerlike rudeness," it nevertheless held that "a single incident of rudeness or lack of professional courtesy" did not merit sanction or discipline, at least in the context of a private letter).

The high-water mark for tolerating lawyer criticism of judges is probably *Standing Committee v. Yagman*, 55 F.3d 1439 (9th Cir. 1995). Dissatisfied with his appearance before a federal judge, Washington attorney Stephen Yagman assailed the judge as "ignorant," "a buffoon," and a "right-wing fanatic," and added that the judge "has a penchant for sanctioning Jewish lawyers ... I find this to be evidence of anti-semitism." Yagman was brought up on disciplinary charges for conduct that "degrades or impugns the integrity of the Court" and interferes with the administration of justice. Applying the "actual malice" standard from *Sullivan,* the lower court found that Yagman had made statements with either knowledge of their falsity or reckless disregard for their truth.

The Ninth Circuit reversed. It stressed that statements impugning the integrity of a judge "may not be punished unless they are capable of being proved true or false." It added that statements of "rhetorical hyperbole" are not sanctionable, nor are statements that use language in a "loose, figurative sense." The references to ignorance, right-wing fanaticism and similar accusations "all speak to competence and temperament rather than corruption" (or criminal acts such as bribery). Together, they conveyed "nothing more substantive than Yagman's contempt" for the judge. As to the allegation of anti-Semitism, the court found the remark protected opinion under the First Amendment given that Yagman disclosed the factual basis for his views.[8]

The court also rejected the claim that Yagman's allegations obstructed or prejudiced the administration of justice. It found that Yagman's statement did not pose a "clear and present danger" or a "substantial likelihood" of disruption While Yagman's criticism of the judge was "harsh and intemperate" and apparently intended to precipitate the judge's recusal, the court noted that "a party cannot force a judge to recuse himself by engaging in personal attacks" – especially given that federal recusal

statutes generally require a showing that the judge "is (or appears to be) biased or prejudiced against a party, not counsel." The mere possibility that judges would remove themselves based on harsh criticism from attorneys did not rise to the high level required for obstruction of justice.

Yagman applied the *Sullivan* test based not on the lawyer's subjective knowledge and belief, but based instead on the viewpoint of a reasonable, objective lawyer. Virtually all of the courts that have considered the issue have applied this more stringent "objective lawyer" analysis to attorney criticism of judges, which in some cases appears to have been outcome-determinative. *See In re. Mire*, 2015-B-1453 (Sup. Ct. La. 2016) (attorney disciplined despite her subjective view that court transcript had been doctored; majority finds that a reasonable lawyer would have found "no evidentiary support" for the doctoring claim and would not have made the charge).[9]

The Crazy Quilt of Decisions

A review of cases from around the country shows that lawyers who engage in hyperbolic criticism of judges have had decidedly mixed results under the ethical rules. Indeed, one needs to look hard to find published cases from around the country where courts have *not* sanctioned lawyers who disparaged judges, and most of those cases date back many years.

- *In re Erdmann,* 33 N.Y.2d 559, 347 N.Y.S.2d 441, 441, 301 N.E.2d 426, 427 (1973) (reversing sanction against attorney who criticized trial judges in magazine article for not following the law, and appellate judges for being "the whores who became madams");
- *State Bar v. Semaan,* 508 S.W.2d 429, 431-32 (Tex. Civ. App. 1974) (remark that judge was "a midget among giants" was not sanctionable because it could not be proved true or false);
- *Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958 (Sup. Ct. Oklahoma 1988)(attorney's statement that judge "showed all the signs of being a racist" and never gave him "an impartial trial" were not sanctionable based on attorney's subjective belief; while remarks were disrespectful and "extremely bad form," they were protected).
- *In re Kuby*, (D. Conn. Aug. 18, 1993) (remarks that judicial decision reflected "overt racism" and that defendants had no more chance of a fair hearing before

the judge as before the Ku Klux Klan were "intemperate, incivil and immature," but not a basis for discipline);

- *In re Green*, 11 P.3d 1078, 1084 n.4 (Colo. 2000) (en banc) (statement that trial judge was a "racist and bigot" with a "bent of mind" were opinions not subject to discipline under the First Amendment).

Cases going the other way are far more common:

- *In re Raggio*, 87 Nev. 369, 371 (1971) (lawyer reprimanded for calling a Nevada Supreme Court decision "most shocking and outrageous," saying it was "an example of judicial legislation at its very worst," "semantical gymnastics," and "unexplainable, and in my opinion totally uncalled for");
- *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 166 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981) (attorney reprimanded for calling a judge "highly unethical and grossly unfair" at a press conference);
- *Matter of Kuntsler*, 194 A.D.3d 233 (N.Y. 1st Dep't 1993)(attorney in highly-charged Central Park jogger case publicly censured after being held in contempt for calling judge partisan and a "disgrace to the bench;" the contempt was upheld because his words disrupted the courtroom and undermined the "dignity and authority of the court"),
- *Matter of Atanga*, 636 N.E.2d 1253, 1258 (Ind.1994)(referring to judge as "ignorant, insecure, and a racist" violated Rule 8.2(a) because "there [was] no basis upon which to conclude that [those] comments were anything else but reckless");
- *Matter of Reed*, 716 N.E.2d 426, 427 (Ind. 1999) (attorney was publicly reprimanded for stating in interview in local press that a trial judge's "arrogance is exceeded only by her ignorance");
- *Matter of Wisehart*, 281 A.D.2d 23 (N.Y. 1st Dep't 2001) (attorney suspended for seeking judge's recusal based on her "Draconian and bizarre decision and demeanor" and alleged political cronyism; court finds that attorneys who make "false, scandalous or other improper attacks" against judges are subject to discipline;
- Debra Cassens Weiss, "Lawyer Makes Amends for 'French Fries' Remark," *ABA Journal* (June 21, 2007) (lawyer ordered to take on-line ethics classes after stating to a judge: "I suggest with respect, Your Honor, that you're a few French fries short of a Happy Meal in terms of what's likely to take place").
- Debra Cassens Weiss "Lawyer Agrees to Reprimand for Blog Tirade About Judge," *ABA Journal* (June 11, 2008) (Florida attorney Sean Conway reprimanded for describing judge's "ugly, condescending attitude," saying she was "clearly

unfit for her position" and was an "evil, unfair witch." Court described the comments as "arrogant, discourteous and impatient speech");

- *In re Bank*, 20-90010-am (2nd Cir., May 3, 2021) (public reprimand for attorney whose conduct included responding to an appellate judge's questions during oral argument by stating, "Are you serious, Judge?" and sarcastically commenting, "I see that you read the briefs thoroughly"; court rejects as unsupported and irrelevant lawyer's defense that his contumacious comments were triggered by judges' poor treatment of him).

Even more likely to end in discipline are situations where lawyers accuse judges of corruption or politically motivated behavior. *See, e.g., Matter of Dinhofer*, 257 A.D.2d 326, 328 (N.Y. 1st Dept 1999) (three-month suspension for calling a federal judge "corrupt" during a telephone conference); *Attorney Grievance Committee of Maryland v. Frost*, Misc. Docket AG No. 69, Sept. Term, 2012 (Md. Ct of Apps. 2014) (while respondent's criticism of judge as "lawless" or "weak" might not violate Rule 8.2, those phrases "were used in conjunction with false factual allegations of corrupt activity"); "Connecticut Judge Disbars Divorce Lawyer, Saying Her Efforts to Disrupt Case with 'Empty and Malicious Threats" Threatens Courts' Ability to Hand Down Justice," *The Hartford Courant* (January 28, 2022) (court summarily disbars attorney who accused judge of a corrupt conspiracy against non-Jews and the disabled; because public assumes lawyers speak truthfully, the court said it was obliged to expose their lies).[10]

Conclusion

During and before his Presidency, Donald Trump (a non-lawyer) regularly castigated judges, accusing the jurists presiding over the Trump University and Roger Stone cases of overt bias and hostility; labeling judges whose decisions he didn't like as "Obama judges" or "political;" and describing the Ninth Circuit Court of Appeals as "out of control." [11]

In the current climate, what would befall a a lawyer in the United States who made the same comments? Plainly, allegations that judges render decisions based on politics or personal bias tend to diminish public confidence in the judiciary. But should these comments be treated more harshly when made by an individual lawyer than when made by the President? And are these comments better treated as merely rude under *Snyder* or rhetorical hyperbole under *Yagman*?

All of this begs the further question of whether lawyers are at greater risk of discipline for criticizing judges than they have been in the past. The statistical answer is unclear, but the risk to lawyers is real. A number of the recent decisions appear to be based largely on indecorous language – as in *Marshall*, the "way" things are said – rather than consideration of whether the remarks were false, matters of opinion or actually affected judicial independence. Other cases, like *Freshub*, are notable because lawyers were sanctioned in part for *implicit* criticism of judges. Finally, and counter-intuitively, one may wonder whether individual lawyers who rail against judges are more vulnerable to discipline than a groundswell of critical lawyers, as in the Donziger case.

At the very least, the state of free speech in the legal profession in 2022 strongly counsels caution before a lawyer criticizes judges for their political leanings, integrity, intellect or motivation. Whether this chill is a good thing may depend on one's current view of the need to protect the judiciary. But, in reviewing the nature and extent of recent lawyer discipline in this area, there is good reason to question whether the disciplinary risks facing outspoken lawyers are fairly proportional to the harm their words would cause.

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[1] Most notable is Model Rule of Professional Conduct 8.2(a), which echoes the "actual malice" standard in defamation cases announced in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge ..."). *See also* Rule 8.4(d) (lawyers may not engage in conduct "that is prejudicial to the administration of justice'); *see, e.g.,* N.C. Rule 3.5(a)(4)(B) (barring "undignified or discourteous conduct that is degrading to a tribunal") N.Y. Rule 3.3(f) (barring "undignified or discourteous" conduct before a tribunal).

[2] Raising concerns in formal motion papers or seeking a judge's recusal doesn't necessarily insulate the criticism, even though seeking recusal is the preferred route for raising challenges to judicial bias. *See In re. Zalkind*, 872 F.2d 1 (1st Cir. 1989) (reversing sanction for criticism in recusal motion that judge pre-determined the merits and showed animus toward movant). Lawyers who are found

to have made false allegations in seeking recusal have been repeatedly disciplined. *See*, e.g., *Matter of Mire*, 2015-B-1453 (Sup. Ct. La. 2016) (divided Louisiana Supreme Court sanctions lawyer who filed motion claiming that judge improperly altered transcript; the dissent noted: "This court does justice no favor by punishing the whistleblower").

[3] Remaining silent about a judge's actions arguably can itself be unethical. The preamble to the ABA's Model Rules asserts that, as a public citizen, a lawyer should seek "improvement of the law" and "the administration of justice." Although that mandate does not invite unwarranted criticism of judges, the current atmosphere may chill criticism that *is* warranted.

[4] *Matter of Donziger*, 186 A.D.3d 27 (1st Dep't 2020) (referencing evidence of corruption of a court expert, obstruction of justice, witness tampering, and judicial coercion and bribery).

[5] John Keker, as quoted in "How the Environmental Lawyer Who Won a Massive Judgment Against Chevron Lost Everything," *The Intercept*, (January 29, 2020).

[6] Martin Garbus, as quoted in April 20, 2021 press release of Frente de Defensa de la Amazonia, available at https://www.makechevroncleanup.com/press-releases/2021/4/12/lawyers-accuse-trial-judge-kaplan-of-vindictive-corporate-prosecution-of-human-rights-attorney-steven-donziger-in-contempt-case.

[7] The National Law Guild's statement is available at https://nlginternational.org/2021/09/450-lawyers-and-legal-organizations-support-steven-donziger-at-his-sentencing-hearing.

[8] Yagman was also reported to have told others privately that the judge had been "drunk on the bench." The court found that the disciplinary authorities introduced no evidence that the statement was false, and the lower court therefore improperly presumed falsity.

[9] *See also Matter of Holtzman*, 78 N.Y.2d 184 (1991) (District Attorney sanctioned for falsely alleging that judge demeaned rape victim, notwithstanding her reliance on a subordinate's memo of the events; faulting her for not reading the trial

transcript or discussing the matter with the subordinate or court officers before publicizing the accusation, the court noted: "[I]t seems only prudent to verify in some degree a belief that a judge has done something for which criticism is warranted").

[10] *See also* these New York cases: *Matter of Albert,* 193 A.D.3d 51, 54 (N.Y. 4th Dep't 2021) (lawyer suspended for six months for saying there was 'no doubt" town justice was "in the ... pockets" of law enforcement officials); *Matter of Oberlander*, 177 A.D.3d 72 (N.Y. 2d Dep't 2018)(attorney suspended for one year for engaging in "undignified and discourteous" conduct by accusing federal judges of "'active, collusive criminal" conduct and running a "star chamber;" attorney also made a "blatant and outrageous comparison" of the judge to Senator McCarthy by quoting Joseph Welch's 'Have you no decency?' rebuke).

[11] *See, e.g.*, "Trump Slams 'Out of Control Ninth Circuit Court," *Fox News* (November 23, 2018); "So-Called Judge Ridiculed by Trump is Known as a Mainstream Republican," *The New York Times* (February 4, 2017).

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