JUDGE BASHING

Telling It Like It Is v. Telling It Like It Ain't

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You've really had it with the judge this time. That last ruling was just too much and something has got to be said about it. Particularly since what the judge ruled was just the opposite of what you told your client would happen -- who will blab it all over town! But wait, is it OK to criticize a judge? Do our Rules of Professional Conduct impose restraints on what lawyers may say? Do you have to investigate before you criticize? Is it a defense to disciplinary action if you honestly believed what you said about the judge even though it turned out to be false? Does it make any difference whether the criticism concerns pending litigation, is verbal or written, in or out of court, made in a press release, placed in a newspaper advertisement, or made over the radio or on television?

Professor Monroe H. Freedman in a paper titled *The Threat To Judicial Independence By Criticism Of Judges -- A Proposed Solution To The Real Problem* gives these examples of lawyer judicial criticism and asks whether they call for professional discipline:

> The judge's opinion is "irrational" and "cannot be taken seriously."
>
> "This judge sitting on the bench is a danger to the people of this city."
>
> The state's appellate judges are "whores who became madams …. I would like to [be a judge] …. But the only way you can get it is to be in politics or buy it – and I don't even know the going price."
>
> The judge is "dishonest," "ignorant," a "buffoon," a "bully," "drunk on the bench," and shows "evidence of anti-Semitism."

In Kentucky our professional responsibility Rule 8.2 Judicial and Legal Officials governs the questions posed in the lead paragraph and Professor Freedman's examples. What follows is a review of Rule 8.2 as it applies to criticism of judges so you can analyze for yourself what is OK for Kentucky lawyers to say. This article does not cover other judicial officers or the closely related professional responsibility issues of Rule 3.6 Trial Publicity and judicial elections. In keeping with the intent of these articles to be informative, but not too long, they must await treatment in a later article.

Some Background on Rule 8.2

Most lawyers from either respect for the system or self-preservation are careful not to

bad-mouth judges. Most judges prudently refuse to become embroiled in public controversy over their actions and rely on the bar to protect them from unwarranted accusations. Notwithstanding this norm there are occasions when a judge should be criticized. Who then is better qualified than a lawyer to express to the public just criticism of a judge's performance – especially in Kentucky where judges are elected? These same qualifications, however, make unfair lawyer criticism especially harmful to a judge's reputation and destructive of the legal system. For this reason perhaps there should be some brake on what a lawyer may say. The First Amendment overarches this question because disciplinary rules like Rule 8.2 restrict lawyer speech more than other citizens. Just as important, these rules interfere with the public's right to know about government officials.

There are two primary reasons given for the legitimacy of ethical restrictions on lawyer criticism of judges. First is the need to maintain public confidence in the judiciary. *Kentucky Bar Ass'n v. Heleringer*[1] is a good example of this principle. In *Heleringer* the lawyer at a press conference described a sitting judge's actions as unethical and grossly unfair. The Kentucky Supreme Court found that this was "a charge that Respondent knew, or should have known, was unwarranted, and unethical and unprofessional conduct tending to bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process."

The second reason is that lawyers as officers of the court give up certain rights as members of a regulated profession. The most frequently quoted authority for this proposition is U.S. Supreme Court Justice Stewart's concurring opinion in *In re Sawyer*.[2] After observing that lawyers cannot hide behind the First Amendment for proven unethical conduct, he wrote "obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." In its only consideration of Rule 8.2 the Kentucky Supreme Court in *Kentucky Bar Ass'n v. Waller*[3] endorsed this rationale by holding that "Officers of the court are obligated to uphold the dignity of the Court of Justice and, at a minimum, this requires them to refrain from conduct of the type at issue here." The respondent had used colorful language in court-filed papers in referring to the judge *inter alia* as lying and incompetent.

To date the U.S. Supreme Court has not directly addressed how ethical rules restricting lawyer criticism of judges is to be balanced against a lawyer's free speech rights and the public's right to know. In *Waller* the Kentucky Supreme Court gave short shrift to the lawyer's claim of free speech protection. It was summarily rejected as without merit citing *Heleringer* and *Sawyer*. Based on *Waller*, until the U.S. Supreme Court provides guidance that reduces or eliminates ethical restrictions on a lawyer's ability to criticize judges, Kentucky lawyers should not rely on a free speech defense for judicial criticism that violates Rule 8.2. You need to know what the rule allows and what it restrains.

Rule 8.2 and Its Application

Rule 8.2 is simple enough in expression, but application is another matter. What follows is the rule and its comments with a short take on the key considerations in complying with it.

Rule 8.2 Judicial And Legal Officials

(a) 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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

Comment

(1) Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

(2) When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

(3) To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

What's Not OK To Say About A Judge?

Rule 8.2 forbids a statement about a judge's qualifications or integrity "that the lawyer knows to be false or with reckless disregard as to its truth or falsity." The definition of knows in the Rules of Professional Conduct is: *"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.*

The key issue in deciding whether a lawyer has violated Rule 8.2 is whether disciplinary authorities will use an objective reasonable lawyer standard or a subjective actual malice standard in determining what the lawyer knew when the false statement was made. The definition of "knows" in the Rules indicates an actual malice standard should be used. As described below, however, many states are ignoring the definition.

The U.S. Supreme Court decisions in *New York Times v. Sullivan*[4] and *Garrison v. Louisiana*[5] established an actual malice standard for false statements about public officials in civil and criminal cases. Actual malice is defined as a false statement that is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Garrison* articulated actual malice as a subjective standard that embodied "malice based on intent to inflict harm through falsehood" and "only statements made with a high degree of awareness of their probable falsity." The court in *Garrison* was concerned with the "calculated falsehood" and the "deliberate or reckless falsehood."

The states are split on whether to use the *New York Times/Garrison* actual malice standard or the more restrictive reasonable lawyer standard in judge bashing disciplinary cases. Most, however, use the reasonable lawyer standard as illustrated in the decision of the 9th Circuit Court of Appeals in *Standing Committee on Discipline v. Yagman*.[6] The court rejected Yagman's argument that the actual malice standard should be used in attorney disciplinary proceedings. The court reaffirmed its view that what is prohibited are "[F]alse statements made with either knowledge of their falsity or with reckless disregard as to their truth or falsity, judged from the standpoint of a 'reasonable attorney.'" The court explained that "there are significant differences between the interests served by defamation law and those served by rules of professional ethics . Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. Ethical rules that prohibit false statements impugning the integrity of judges, by contrast are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. … [A]n objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system…." The court defined the standard as "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." The inquiry should focus "on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made."

In contrast to *Yagman* Michigan's Attorney Discipline Board recently adopted the actual malice standard. The lawyer was accused of saying "we got judges appointed to the bench who … have no idea of what they are doing"; "our judiciary is laughed at in the rest of the country"; "[w]e got political hacks"; the county prosecutor was "covering up murder"; and the judge "conspired" with an attorney to dismiss a case in exchange for the attorney providing employment for the judge's daughter. This decision reversed a Board Panel decision that declared Rule 8.2 unconstitutional.[7]

The Kentucky Supreme Court did not address this issue in *Waller* so we have no guidance on whether the standard in Kentucky for Rule 8.2 is actual malice or reasonable lawyer. Your guess is as good as mine, but I anticipate that our high court will adopt the more strict reasonable lawyer standard.

What's OK To Say About A Judge?

1. **The rule applies only to false statements.**

   If what is said is the truth, there has been no ethics violation no matter how rough or whether made maliciously. This conclusion is based on the *New York Times* and *Garrison* decisions that established the actual malice standard for determining free speech rights when making statements about public officials. Actual malice was defined as a false statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." Rule 8.2 uses virtually the same language in restricting lawyer speech about judges.

   Giving Rule 8.2 a plain meaning of the words interpretation it is obvious that the first ground for discipline, "statements the lawyer knows to be false," applies only to false statements.[8]

   Because of the way the rule is written it is not as clear that this is true for the second ground for discipline, a statement made "with reckless disregard as to its truth or falsity." Ethics authorities agree, however, that this ground also only applies to false statements.

2. **Lawyers may criticize the state of the law.**

   Sawyer is the leading case for this proposition.. The lawyer made an emotional speech at a rally denouncing the law and the system as it applied to a case in trial. The U.S. Supreme Court wrote "We start with the proposition that lawyers are free to criticize the state of the law. … To say that the 'law is an ass, a idiot' is not to impugn the character of those who administer it." The Court further reasoned that lawyers and others say judges are wrong on the law everyday. "The public attribution of honest error to the judiciary is no cause for professional discipline in this country." Comments about the state of the law, police corruption, and prosecutor misconduct should not be construed as impugning the character of the presiding judge. *(While statements about the state of the law during a pending case may not violate Rule 8.2, they could be in violation of Rule 3.6 Trial Publicity if they "will have a substantial likelihood of materially prejudicing an adjudicative proceeding.")*

3. **Statements of opinion about a judge are OK as long as they do not imply a false assertion of fact.**

   This proposition is well explained in the 9th Circuit's decision in *Yagman*. *Yagman* is the source of Professor Freedman's example of the lawyer who said the judge was "dishonest," "ignorant," a "buffoon," a "bully," "drunk on the bench," and shows "evidence of anti-Semitism." The Court found that most of Yagman's criticisms were opinions that were "statements of rhetorical hyperbole, incapable of being proven true or false" and, therefore, not a basis for discipline. The statement about anti-Semitism was found to be an opinion based on disclosed facts. It "did not imply the existence of additional, undisclosed facts; it was

carefully phrased in terms of an inference drawn from the facts specified rather than a bald accusation of bias against Jews." The "drunk on the bench" statement was ruled not to be an opinion or hyperbole, but failed as a basis for discipline because the Standing Committee did not prove it was false. Yagman walked.

Yagman is a good analysis of restraints on lawyer speech and is a valuable reference for that reason alone. I doubt Yagman would have fared so well in Kentucky. The 9th Circuit's application of its legal analysis to the facts seems strained. Under its approach almost every criticism of a general nature is an opinion not provable as true or false. When a superficially correct factual basis is provided for an opinion it is protected speech no matter how irrational and hurtful to the judge. (Note that I am exercising my right to attribute honest error to judges which is OK criticism.) The Kentucky case, *Heleringer*, concerned a lawyer who called a judge "highly unethical and grossly unfair" after stating that the judge failed to delay a case as requested. The lawyer was publicly reprimanded. Were these comments an opinion based on disclosed facts? Are they hyperbole not subject to proof of truth or falsity? If so, they are OK in the 9th Circuit, but not in Kentucky.

The propriety of bar associations conducting lawyer opinion judicial polls came up in Kentucky several years ago. In KBA E-278 (1983) the KBA Ethics Committee found that "polls aid in ensuring that qualified candidates are acknowledged for the benefit of the general public and are permitted …. Certainly, if there is a duty upon a lawyer to see to it that corrupt judges are removed, there is a duty to see to it that the best candidate is elected to our Court of Justice."

4. **False statements that do not violate Rule 8.2 are OK.**

In *Garrison* the U.S. Supreme Court established the principle that even honestly believed false statements "contribute to the free interchange of ideas and ascertainment of truth" and, therefore, are not actionable without something more. *Yagman*, applying a prior 9th Circuit decision, held that "Lawyers may freely voice criticisms [of the judiciary] supported by a reasonable factual basis even if they turn out to be mistaken." As long as the lawyer did not make the false statement with knowledge or reckless disregard for its truth the lawyer has not violated Rule 8.2.

Garrison raises the question whether honestly believed false statements about judges are a defense in bar disciplinary actions. Jurisdictions that apply a reasonable lawyer standard for determining what lawyers will be held accountable for knowing have not accepted honest belief as determinative.[9] The crux of the matter is summed up beautifully in *West Virginia Committee on Legal Ethics v. Farber*:[10]

> There is courage, and then there is, pointless stupidity. No matter what the evidence shows, respondent never admits that he is wrong. Indeed, sincere personal belief will, in the sweet bye and bye, be an absolute defense

> when we all stand before the pearly gates on that great day of judgment, but it is not a defense here when respondent's deficient sense of reality inflicts untold misery upon particular individuals and damage upon the legal system in general.

Other Considerations

How the criticism is communicated does not affect whether a lawyer is subject to discipline for violating Rule 8.2. *Sawyer* concerned statements made during a pending trial. Other cases involved oral statements in and out of court, court-filed papers, letters, press releases, newspaper advertisements, and comments made over the radio and on television. The message -- not the medium -- is the ethics issue.

The courts are split on who has the burden to substantiate an alleged false statement, the lawyer or the disciplinary authorities. *Yagman* put the burden on the disciplinary authorities which is consistent with the usual prosecutorial burden of proof. Other jurisdictions require the lawyer to offer evidence of the basis for the statement.[11]

Should a lawyer investigate before issuing a criticism of a judge? One lawyer who issued a press release with false allegations of judicial misconduct by a judge in a criminal trial without looking further into the matter was disciplined. The accusation was that the judge humiliated the victim by requiring her to demonstrate the position she was in when sexually assaulted. This was not true. The lawyer relied on the written report of an inexperienced member of her office. She released the letter containing the accusation to the press without reading the trial transcript, without discussing the matter with court officers or counsel, and without discussing the incident with the trial assistant who had prepared the written report.[12] It seems only prudent to verify in some degree a belief that a judge has done something for which criticism is warranted.[13]

Conclusion

Lawyers face something of a dilemma when deciding whether to criticize a judge. On the one hand it may be just plain dumb to take the judge on. On the other hand, lawyers have a special responsibility to help inform the public about the judiciary, good or bad – especially in a state where we elect our judges. There is, in fact, considerable latitude for lawyers to vigorously, and even erroneously, comment on the judiciary without fear of disciplinary action. As Professor Charles W. Wolfram cautions, however, "Nonetheless, lawyers of a flamboyant turn of phrase should be aware that a disturbing number of decisions show open hostility toward claims of First Amendment rights for strongly worded lawyer criticism of judges."

What should not be lost in this consideration of judge bashing is the strong encouragement in the comments to Rule 8.2 for lawyers to continue their traditional role of defending judges and courts unjustly criticized. Maintaining the fair and independent administration of justice is an essential aspect of what it means to be an officer of the

court. Our Kentucky judges and citizens more than deserve that kind of respect and support.

Endnotes

[1]Ky., 602 S.W.2d 165 (1980)
[2]360 U.S. 622 (1959)
[3]Ky., 929 S.W.2d 181 (1996)
[4]376 U.S. 254 (1964)
[5]379 U.S. 64 (1964)
[6]55 F.3d 1430, (9th Cir. 1995)
[7]*Grievance Administrator v. Fiegler*, Mich Atty DiscBd, No. 94-186-GA, 9/2/97; 14 Law Man. Prof. Conduct 17
[8]"Although not so limited expressly, the second ground obviously should extend only to false statements." Wolfram, *Modern Legal Ethics* Sec.11.3.2
[9]*E.g., In Re Graham*, 453 N.W. 2d 313 (1990)
[10]408 S.E.2d 274 (1991)
[11]Annotated Model Rules of Prof. Conduct, 3rd Ed. at 545
[12]*Matter of Holtzman*, 577 N.E. 2d 30 (1991)
[13]See *In re Kelly*, 808 F.2d 549 (7th Cir.1986) for a discussion of how much a lawyer should investigate before commenting on a judge.