

Criticism of Judges

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Ethics Watch

Lawyers are outliers on a number of personality traits, one of which is skepticism. Skeptical people tend to focus on problems rather than what works; they are suspicious, assume the worst, rarely give others the “benefit of the doubt,” lack trust, question assertions made by others, and wonder what the other person’s “real” motive may be. See Dr. Larry Richard, *The Lawyer Personality: Why Lawyers Are Skeptical* (February 11, 2013), www.lawyerbrainblog.com. Mix skepticism with the adversarial training lawyers receive, and it is not surprising that lawyers sometimes feel angry with judges who rule against them. Add verbal fluency and financial interest to skepticism and adversarial training; the result may be that lawyer anger explodes into public criticism of judges, sometimes quite vehement.

Disciplinary proceedings against lawyers for criticism of judges have been around for years, but the advent of the Internet and social media sites has increased the possibility of such proceedings. In the past lawyer criticism of judges usually remained among the lawyer’s inner circle of colleagues, friends, and family. Now through social media such criticism often enters the public realm. Moreover, the permanency of the Internet makes the documentation of such cases much easier. See Keith Kanouse, Jr., *Balancing Judicial Criticism Rules with First Amendment Protections in the Internet Age*, <http://technologyand-justice.com/2013/08/13/balancing-judicial-criticism-rules-with-first-amendment-protections-in-the-internet-age/> (August 13, 2013).

One of the most extreme examples of lawyer criticism of the judiciary is *Grievance Adm’r v. Fieger*, 719 N.W.2d 123 (Mich. 2006). Fieger had obtained a \$15 million verdict in a medical malpractice action. A three-

judge panel of the Michigan Court of Appeals reversed and ruled that the defendants were entitled to judgment notwithstanding the verdict. Three days later on his then-daily radio program, Fieger “declared war” on the three judges and told them to “kiss my ass.” When another person on the program used the word “innuendo,” Fieger stated: “I know the only thing that’s in their endo should be a large, you know, plunger about the size of, you know, my fist.” Finally, Fieger said that the judges had undergone name changes from Hitler, Goebbels, and Eva Braun. Disciplinary authorities accused Fieger of violating various rules of professional conduct including ones dealing with civility and conduct prejudicial to the administration of justice. Fieger claimed that his statements were constitutionally protected under the First Amendment. The Michigan Supreme Court rejected this argument, finding that civility rules were necessary to protect the integrity of the judicial process:

The performance of these responsibilities requires a process in which the public can have the highest sense of confidence, ... one in which the public is not misled by name-calling and vulgarities from lawyers who are held to have special knowledge of the courts, one in which discourse is grounded in the traditional tools of the law—language, precedents, logic, and rational analysis and debate. *Id.* at 132.

The S.C. Supreme Court has not passed on the issue of civility with regard to criticism of judges, but it has held that the civility rules are constitutional when applied to lawyer criticism of other lawyers. See *In re Anonymous Member of the*

S.C. Bar, 392 S.C. 328, 709 S.E.2d 633 (2011) (e-mail in which lawyer accused opposing counsel’s daughter of using cocaine). The Court cited *Fieger* with approval.

Incivility is not the only basis for lawyer misconduct when criticizing judges. Even when the criticism is temperate it may be unethical under Rule 8.2(a), which provides:

- (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.

The standard sounds very similar to the standard adopted by the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which the Court held that in a libel action against a public official, the plaintiff must prove that the statements were made with “actual malice,” consisting of either knowledge of falsity or reckless disregard of whether they were true or false. Further, the plaintiff had the burden of proving actual malice by “convincing clarity” (*id.* at 285-286), which is generally understood to mean by clear and convincing evidence.

However, the vast majority of courts have held that the standard for violation of Rule 8.2(a) is different from the *Sullivan* standard. While the *Sullivan* standard is “subjective,” i.e. the defendant’s good faith is sufficient to defeat liability even if the defendant was acting unreasonably, the standard for violation of Rule 8.2(a) is “objective”: Did the attorney have an objectively reasonable basis for making the statements? The objective rather than the subjective

standard applies in lawyer discipline cases because false criticism of judges by lawyers undermines the administration of justice and reflects adversely on the accuser's capacity for sound judgment. See *Board of Prof'l. Responsibility v. Davidson*, 205 P.3d 1008, 1014-1016 (Wyo. 2009). Thus, in *Davidson*, the lawyer received a suspension for filing a motion for reassignment of the case to another judge accusing the trial judge of having an *ex parte* contact with opposing counsel and stating that it "has been rumored" that the opposing counsel's law firm received favorable treatment from the judge. Similarly, in *Disciplinary Counsel v. Shimko*, 983 N.E.2d 1300 (Ohio 2012), the Supreme Court of Ohio suspended the respondent for numerous accusations of bias and prejudice against the trial judge, including claims that the trial judge "contrived a means" to find that the jury was confused, was "motivated by its own agenda," and had "fabricated allegations of attorney misconduct." *Id.* at 1303-1304. See also *Iowa Sup. Ct. Att'y. Disciplinary Bd. v. Weaver*, 750 N.W.2d 71 (2008) (discussing cases from other jurisdictions and adopting the objective standard).

Sometimes the line between permissible and impermissible statements is difficult to draw. In *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002), the Indiana Supreme Court in a 3-2 decision suspended the attorney for 30 days for violating Rule 8.2(a) by submitting a brief to the court with the following footnote:

Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision). *Id.* at 715-716.

The court found that the statement was made with reckless disregard of whether it was true or false. On rehearing of the case, the court rejected the argument that discipline for this statement violated the

attorney's First Amendment rights, but the court did reduce the sanction to a public reprimand. 782 N.E.2d 985 (2003). However, in *In re Dixon*, 994 N.E.2d 1129 (Ind. 2013), the Indiana Supreme Court found that the respondent was not guilty of misconduct when he filed a motion to disqualify the trial judge on the ground of bias. Respondent alleged that the relationship between the trial judge and her husband, who had advocated as a professor on the subject of the litigation before the judge (constitutional rights of pro-choice groups), meant that "she did not feel duty bound to apply the rule because she was biased in favor of the abortuary" and that she was "willing to ignore the applicable legal standards." The court distinguished *Wilkins* because respondent Dixon was required to allege bias to establish the basis of disqualification. In addition, unlike *Wilkins*, whose charge against the judges on the court of appeals was based on speculation, Dixon supported his claim of bias with an extensive statement of facts in documents totaling more than 40 pages.

To be the basis of discipline, statements must be both factual and false. If the statement is not capable of being proved false, then the lawyer should not be subject to discipline under Rule 8.2(a) (although if the statement is extreme, the lawyer could be subject to discipline for incivility, as in *Fieger*). Thus, statements that use "rhetorical hyperbole" or that employ language in a "loose, figurative sense" should not be the basis of discipline. In *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995), Yagman had written a letter critical of a district judge:

It is an understatement to characterize the Judge as "the worst judge in the central district." It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. *Id.* at 1434 n.4.

The Ninth Circuit found that the letter was intemperate but not

actionable because it amounted to rehetorical hyperbole. *Id.* at 1440. See also *In re Green*, 11 P.3d 1078, 1084 n.4 (Colo. 2000) (en banc) (attorney's statements that trial judge was a "racist and bigot" with a "bent of mind" were opinions not subject to discipline under the First Amendment).

Some scholars have been critical of the objective standard in applying Rule 8.2, arguing that the judiciary is a fundamental part of a democratic society and should be subject to robust criticism, like other branches of government. See Margaret Tarkington, *The Truth be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 Geo. L.J. 1567 (2009) (arguing for the adoption of the subjective *Sullivan* standard to attorney criticism of judges).

I would adopt a fact specific approach to evaluating the propriety of lawyer criticism of judges. Abusive, vulgar comments like those made by Fieger should not receive any constitutional protection. On the other hand, criticisms in the course of official proceedings (e.g. in court or in court documents), particularly when the criticism is in support of a motion for disqualification, should generally not be subject to sanction unless evidence shows that the attorney was not acting in good faith or the attorney's statements seriously disrupted the proceedings. Criticism in the course of official proceedings should receive a heightened measure of protection because of the risk of interference with lawyers' obligations to their clients. Thus, in my opinion the lawyers in cases like *Davidson*, *Shimko*, *Wilkins*, and *Dixon* should not have been subject to discipline. Finally, if the lawyer makes comments not in the course of official proceedings and not on behalf of a client, as in *Yagman*, I would apply the objective standard: The lawyer should not be subject to discipline if there is a reasonable basis for his statements. In these cases the lawyer is not acting on behalf of a client, and the interest of protecting the administration of justice is greater because the lawyer's criticisms are more public than when the criticisms are limited to court proceedings. ■