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[COMMENTARY]

LOOSE LIPS MAKE SLIPS

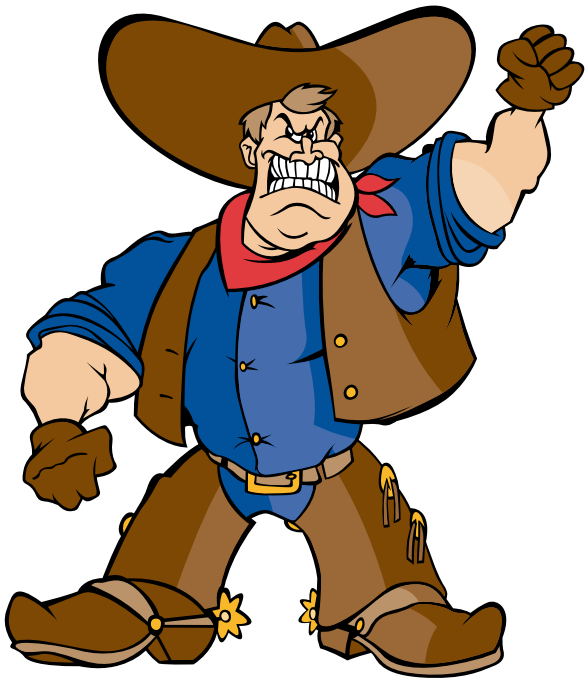
A Primer on What Lawyers Can Say About Judges

by BRUCE A. CAMPBELL

At some point, almost every child hears the phrase, "If you can't say anything nice, don't say anything at all." Usually the admonishment is reserved for children who insult their siblings or who complain about an "evil" teacher who assigned "too much homework." But during the 2008 election season, the question becomes whether this admonition applies to lawyers in their comments about judges.

Attorneys generally are prohibited from making false statements verbally and in writing concerning the qualifications or integrity of judges. Rule 8.02(a) of the Texas Disciplinary Rules of Professional Conduct provides:

> 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 official or public legal officer, or of a candidate for election or appointment to judicial or legal office.



What happens when an attorney makes a false statement about a member of the judiciary? Will the offending attorney be disciplined? Perhaps, but not necessarily. In 1964's *Garrison v. State of Louisiana*, the U.S. Supreme Court held that the First and 14th Amendments to the U.S. Constitution protect lawyers who make false statements about judges from imposition of civil, criminal and disciplinary sanctions unless the statement is made "with knowledge of its falsity or in reckless disregard of whether it was false or true." Indeed, the Colorado Supreme Court noted in 2000's *In the Matter of Green* that "if an attorney's activity or speech is protected by the First Amendment, the disciplinary rules governing the legal profession cannot punish the attorney's conduct."

But attorneys should not view the First Amendment as a license to disparage the judiciary. The test that has been uniformly applied to challenged lawyer statements about judges is a version of that set out in the U.S. Supreme Court's 1964 decision in *The New York Times Co. v. Sullivan, et al.* First, did the disciplinary authority prove that the statement was a false statement of fact or a statement of opinion that necessarily implies an undisclosed false assertion of fact? Second, did the attorney utter the statement with actual malice — that is, with knowledge that it was false or with reckless disregard as to its truth?

A few examples of what lawyers have said and gotten away with are instructive in how courts have applied the standard. For example, according to San Antonio's 4th Court of Appeals in 1974's *State Bar of Texas v. Semaan*, in a letter to the editor criticizing one of the judges in Bexar County, a lawyer called the judge "a midget among giants" in comparison to three other named criminal court judges. The State Bar reprimanded the attorney, but the trial court set aside that judgment, a decision the court of appeals affirmed, because the attorney did not make a false statement nor did he make the statement with reckless disregard of its truth or falsity.

Similarly, the Colorado Supreme Court has recently waded into the issue of lawyer speech. According to its opinion in *Green*, after the lawyer won a victory on behalf of a client, he requested fees, which the trial judge reduced. The lawyer filed a motion to recuse the judge. An appellate court reversed and remanded the fee order. The lawyer then wrote three letters to the judge and filed a second motion to recuse. One of those letters stated, "Those circumstances characterize you [the judge] as a racist and bigot for racially stereotyping me as unable to be an attorney because I was black." Another said:

> I am entitled to and I affirm my right not to have my attorney fees determined by a racist judge. . . . Your dilatoriness in recusing yourself is delaying determination of my fee by a replacement judge. I want my fee determined promptly by another judge. I need not remind you of the dilatoriness standard for judges.

The Colorado Supreme Court noted that disciplinary counsel "brought a complaint against the lawyer, charging him with violating" several Colorado rules of professional conduct. A hearing board of the grievance committee concluded, among other things, that his criticism of the trial judge in his letters and motions to recuse violated several rules. But the Colorado Supreme Court held that the First Amendment banned discipline for the speech, which did not make or imply false statements of fact.

In dismissing the "charges" that the lawyer violated Colorado Rule of Professional Conduct 8.4, the court pointed out that "the right of a lawyer as a citizen to publicly criticize adjudicatory officials . . . is particularly meaningful where, as in Texas, the adjudicatory officials are selected through the elective system."

Perhaps the most famous case is *Garrison*, which involved a district attorney convicted under Louisiana's criminal defamation statute. According to the opinion, the DA was embroiled in a dispute with the eight judges of a parish's criminal district court. The disagreement involved disbursements from a fines-and-fees fund to defray expenses of the DA's office. After the judges ruled that they would not approve payments from the fund to pay the DA's undercover agents investigating allegations of commercial vice in New Orleans' Bourbon and Canal Street districts and one judge released a statement criticizing the DA's conduct, the DA held a press conference, at which he said:

> The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street Clip joints. . . . This raises interesting questions about the racketeer influences on our eight vacation-minded judges.

In *Garrison*, the U.S. Supreme Court reversed his criminal defamation conviction, because there was no "reckless disregard for the truth."

What Not to Do

On the other end of the spectrum, several lawyers have found their law licenses in jeopardy based on their comments about the judiciary. For instance, in *Carter v. Muka*, the Rhode Island Supreme Court in 1985 upheld the disbarment of an attorney. The court noted that, while the lawyer represented a plaintiff in a medical-malpractice case, she filed two documents after the judge directed a verdict for the defendants in the med-mal action. In those documents, wrote the court, the lawyer "made a variety of unsupported allegations against several judges, attorneys, court personnel, and members of the public. The charges included the crimes of conspiracy, obstruction of justice, suborning perjury, 'pay offs,' and membership in the 'Judicial Mafia.' " The court noted that the lawyer had made allegations "either with actual knowledge of the falsity of said accusations or with reckless disregard of whether they were true or false."

Similarly, the Supreme Court of California in 1980's *Ramirez v. State Bar of California* suspended an attorney for 30 days, placed him on probation for 11 months, and ordered him to take and pass the Professional Responsibility Exam. The reason for the discipline was that the attorney had written in court documents related to a client's case that the justices on California's 3rd District Court of Appeals had become "parties to the theft" after ruling against his client, as well as writing, "Money is king, and some judges feel they are there to see that it doesn't lose."

So, as the campaign season continues, keep these examples in mind. The question for lawyers is whether they want to test the limits of free speech or stay in the safe harbor not saying anything if they can't say something nice. TTL

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