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SHOULD LAWYERS BE FREE TO PUBLICLY EXCORIATE JUDGES?

*Hal R. Lieberman**

"[J]unk justice."[1] "'[R]acist.'"[2] "'[A]nti-semitism.'"[3] Appellate judges are "'the whores who became madams.'"[4] "'[S]onofabitch.'"[5]

Inflammatory attacks on judges and the judiciary, like the foregoing lawyers' comments reported in the press, are becoming more common. Should such remarks be tolerated under the First Amendment, or are there legitimate limits? From this Author's perspective in the field of disciplinary enforcement, lawyers do not have an unlimited right to make false or reckless personal attacks against sitting judges in the press. Such attacks are proscribed by various provisions of the ABA Model Code of Professional Responsibility ("ABA Code") and its successor, the ABA Model Rules of Professional Conduct ("ABA Rules"), as well as by case law. Additionally, public policy considerations weigh heavily against lawyers communicating to the press whatever mean-spirited thoughts or feelings about judges that may momentarily pop into their heads.

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1. John Shanahan, *Giuliani Calls for Firing Jurist Who Freed Killer*, STAR-LEDGER (Newark, N.J.), Feb. 15, 1996, at 18.

2. *In re* Atanga, 636 N.E.2d 1253, 1256 (Ind. 1994) (finding that a lawyer accused a judge, in a widely circulated newsletter, of being "'ignorant, insecure, and a racist'").

3. Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar*, L.A. DAILY J., June 6, 1991, at 1.

4. James Mills, *I Have Nothing to Do with Justice*, LIFE, Mar. 12, 1971, at 56, 66.

5. Office of Disciplinary Counsel v. Grimes, 614 N.E.2d 740, 740 (Ohio 1993) (finding that a lawyer "referred to [a judge] as a 'sonofabitch,'" which was later reported in a local newspaper).

I. THE REGULATORY SCHEME

At least since the adoption of the ABA Code in 1969,[6] the organized bar has recognized the need to restrict lawyers' statements about judges. Thus, Canon Eight's DR 8-102(B) expressly provides that a "lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."[7] Although DR 8-102(B) only proscribes, for disciplinary purposes, remarks about judges that are "knowingly false," EC 8-6 urges a broader restraint that recognizes the right of a lawyer to criticize a judge publicly. Such criticism, however, must be in a dignified manner so as to further the administration of justice.

> While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.[8]

The aspirational standard in EC 8-6, that a lawyer's public comments critical of a judge or the judiciary should at least be responsible, was to a degree incorporated in Rule 8.2 of the ABA Rules, approved in 1983,[9] which has replaced the ABA Code in all but a handful of states:

> 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.[10]

Thus, in most states today, lawyers may not ethically cast aspersions, which are made with knowledge of their falsity *or* with reckless disregard for the truth, on judges.[11] In the few remaining ABA Code

6. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preface at ix (1985).

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102(B) (1980).

8. *Id.* EC 8-6 (endnotes omitted).

9. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preface at viii (1992).

10. *Id.* Rule 8.2(a) (emphasis added).

11. In addition to the District of Columbia, 36 states follow an amended version of the ABA Rules: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma,

states, the reckless disregard standard, now explicit in Rule 8.2, will likely be applied, and discipline will likely be imposed, even in the absence of proof that the lawyer's statement was knowingly false.[12]

But whether or not a court narrowly interprets the ABA Code's knowingly false standard, or an attorney's utterance is made with reckless disregard for the truth, other provisions in the ABA Code or the ABA Rules may apply which could subject the speaker to disciplinary action.[13] These provisions include the proscription against engaging in "conduct that is prejudicial to the administration of justice";[14] the ABA Code's proscription against engaging in "undignified or discourteous conduct which is degrading to a tribunal,"[15] or its more narrowly drawn ABA Rules counterpart, "conduct intended to disrupt a tribunal";[16] and the ABA Code's proscription against engaging in "conduct that adversely reflects on [the lawyer's] fitness to practice law."[17]

In sum, the letter and spirit of the current regulatory scheme permits public criticism of judges so long as it is reasonably dignified and intended to improve the administration of justice. While the courts will undertake a case-by-case assessment, there can be little doubt that lawyers who make false or reckless charges against sitting judges in pending matters are subject to discipline.

Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Seven of the remaining 14 states still retain a version of the ABA Code (Georgia, Iowa, Maine, Massachusetts, Nebraska, Ohio, and Vermont), six have incorporated a mixture of the ABA Code and Rules (Illinois, New York, North Carolina, Oregon, Tennessee, and Virginia), and California follows neither the ABA Code nor the ABA Rules. *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 5 (4th ed. 1995); *State Ethics Rules*, Laws. Man. on Prof. Conduct (ABA/BNA) No. 165, at 01:3-:4 (May 29, 1995).

12. For example, long before the promulgation of the ABA Rules in 1983, a New York court quoted with approval a referee's finding that a lawyer had made statements concerning a surrogate judge "'with knowledge of their falsity and with *reckless disregard of the truth*.'" Baker v. Monroe County Bar Ass'n, 311 N.Y.S.2d 70, 73 (App. Div. 1970) (per curiam) (emphasis added), *aff'd*, 272 N.E.2d 337 (N.Y. 1971). Similarly, "'the rule is well settled that an attorney who engages in making false, scandalous, *or other improper attacks* upon a judicial officer is subject to discipline.'" *Id.* at 74 (emphasis added) (quoting *In re* Bevans, 233 N.Y.S. 439, 443 (App. Div. 1929)).

13. *See, e.g., In re* Holtzman, 577 N.E.2d 30 (N.Y. 1991) (finding that an attorney's false accusations of judicial misconduct warranted discipline under DR 1-102(A)(6) of New York's Code of Professional Responsibility (now DR 1-102(A)(8)), which prohibits conduct that adversely reflects on a lawyer's fitness to practice law); *see also infra* notes 18-24 and accompanying text.

14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1980).

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(6).

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(c).

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6).

II. CASE LAW

Described below are some of the leading New York, federal, and other recent state precedents under which lawyers were disciplined for exceeding the bounds of decorum and responsibility in their attacks on judges.

A. New York Precedent

In *In re Holtzman*,[18] the leading New York case pertaining to intemperate and/or ill-conceived public criticism of a judge, the New York Court of Appeals did not rely on DR 8-102(B) to uphold a charge of misconduct leveled against the former Brooklyn District Attorney, Elizabeth Holtzman.[19] Instead, the court found that Holtzman had violated New York's disciplinary rule, adopted from the ABA Code's DR 1-102(A)(6), which provides that a lawyer shall not "'[e]ngage in any other conduct that adversely reflects on [the lawyer's] fitness to practice law.'"[20] The charges were based upon Holtzman's release to the media of a false allegation about a judge who presided over a number of cases prosecuted by her office.[21] The appellate division had previously sustained the grievance committee's finding that Holtzman falsely or recklessly asserted that a judge had made a sex crime victim reenact the sexual assault on the floor in his chambers; the incident was reported to Holtzman approximately six weeks later, and she failed to perform any further investigation of the matter before she chose to make the allegations public.[22] Responding to Holtzman's contention that her statements were protected by the First Amendment and the "constitutional malice" standard of *New York Times Co. v. Sullivan*,[23] the court stated that "[a]ccepting [Holtzman's] argument would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth."[24]

Other New York cases also support the proposition that lawyers will

18. 577 N.E.2d at 30.
19. *See id.* at 32, 33.
20. *Id.* at 33 (quoting NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (now DR 1-102(A)(8))).
21. *See id.*
22. *See id.* at 31, 32.
23. 376 U.S. 254 (1964).
24. *Holtzman*, 577 N.E.2d at 34.

be disciplined, notwithstanding the First Amendment, for spurious attacks on judges. Recently, in *In re Golub*,[25] the appellate division censured a lawyer for making vituperative public remarks about a judge. The lawyer claimed, in the wake of an adverse determination in a high-profile palimony lawsuit, that the judge was "'star-struck'" and her decision constituted a "'love letter'" to the defendant, a well-known actor.[26] Although the lawyer's aspersions in *Golub* were directed at the judge's alleged bias in favor of the defendant, a public denunciation of a judge's adverse ruling in the immediate aftermath of a high-profile case is fairly commonplace.[27]

Of less recent vintage, *In re Markewich*[28] concerned a lawyer who, in a speech at a public meeting, asserted that the decision of a certain judge was dishonest because it favored a special interest group.[29] The lawyer told the gathering that the judge in question "deserved to be impeached," and also stated that "it was fortunate that the Constitution provided for the impeachment of judges, as otherwise the people might resort to the noose, as they did at the time of Charles II."[30] Although the lawyer maintained that he did not intend to offend the judge and later apologized to the court, he was publicly censured.[31] Similarly, in *In re Knight*,[32] the appellate division censured an attorney for writing and publishing various letters which attacked numerous judges and characterized one as "'an incompetent, mendacious and otherwise grossly

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25. 597 N.Y.S.2d 370 (App. Div. 1993).

26. Timothy Clifford, *Hurt Not Married to Dancer: Court*, NEWSDAY (New York City), Oct. 4, 1989, at 4; *see also* Vivienne Walt, *Jennings' Lawyer Is on the Hot Seat*, NEWSDAY (New York City), Oct. 12, 1989, at 31; *Golub*, 597 N.Y.S.2d at 371. The incident arose after New York Supreme Court Justice Jacqueline Silbermann entered judgment for the defendant, movie star William Hurt, in *Jennings v. Hurt*, No. 9736/88, 1989 N.Y. Misc. LEXIS 868 (Sup. Ct. Oct. 3, 1989), *aff'd*, 554 N.Y.S.2d 220 (App. Div. 1990). *See also* Hal R. Lieberman, *Lawyer Incivility Is Also Unethical*, N.Y. L.J., Nov. 15, 1993, at 1.

27. Such public denunciations are not only made by attorneys; government officials have also been involved. The most striking recent example is the uproar following Judge Harold Baer, Jr.'s suppression of drug evidence in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), which he subsequently reversed after an explosive public outcry in *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996). *See generally* Linda Greenhouse, *Rehnquist Joins Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A1; Alison Mitchell, *Clinton Pressing Judge to Relent: President Wants a Reversal of Drug Evidence Ruling*, N.Y. TIMES, Mar. 22, 1996, at A1; Henry J. Reske, *Questions of Independence: Criticism, Political Matters Heat Up Judges Conference*, A.B.A. J., June 1996, at 110.

28. 182 N.Y.S. 653 (App. Div. 1920).

29. *See id.* at 655.

30. *Id.*

31. *See id.* at 655, 657.

32. 34 N.Y.S.2d 810 (App. Div. 1942).

dishonest judge.'"[33] The lawyer also said, with reference to two other judges, that "'[f]or a year and a half, I have been denouncing these two low, skulking rogues from the house tops and to date neither of them has had the guts even to cite me.'"[34]

The one New York case which arguably undermines the regulation of intemperate lawyer attacks is *Justices of the Appellate Division, First Department v. Erdmann*.[35] Erdmann, a well-known Legal Aid lawyer who later became a judge, was the subject of a *Life* magazine article entitled *I Have Nothing to Do with Justice*,[36] in which he was quoted as stating:

> "There are so few trial judges who . . . rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams."
>
> . . . .
>
> "I would like to [be a judge] just to see if I could be the kind of judge I think a judge should be. But the only way you can get [a judicial position] is to be in politics or buy it—and I don't even know the going price."[37]

Although the appellate division censured Erdmann on the ground that he was guilty of professional misconduct for using intemperate, vulgar, and insulting language that undermined the integrity of the courts, the court of appeals reversed in a *per curiam* decision with two judges dissenting.[38] "Without more, isolated instances of disrespect for the law, Judges and courts expressed by vulgar and insulting words or other incivility, uttered, written, or committed outside the precincts of a court are not subject to professional discipline."[39]

Erdmann, whether or not still good law, is clearly distinguishable from *Holtzman* and other New York precedents. For one thing, Erdmann's was a generic attack on the judiciary as a body "outside the precincts of a court," whereas in *Holtzman* and the other reported New York cases, the lawyers' words were directed against a specific, sitting

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33. *Id.* at 813.
34. *Id.*; *see also* Baker v. Monroe County Bar Ass'n, 311 N.Y.S.2d 70, 73 (App. Div. 1970) (per curiam) (suspending an attorney who made a statement to a county bar association in which he referred to "crooked judges" and attacked the integrity of the surrogate's court), *aff'd*, 272 N.E.2d 337 (N.Y. 1971).
35. 301 N.E.2d 426 (N.Y. 1973), *rev'g per curiam* 333 N.Y.S.2d 863 (App. Div. 1972).
36. Mills, *supra* note 4, at 56.
37. *Id.* at 66.
38. *See Erdmann*, 301 N.E.2d at 427.
39. *Id.*

judge before whom legal business was being conducted. This is an important distinction; while statements that gratuitously demean the judicial system should be avoided, attacks are far more harmful and cause far more disrespect when directed at individual judges, who do not have the means to defend themselves.[40] This is particularly true when a case is ongoing.

Of additional significance, Erdmann's comments, in context, reflected no more than his opinion as to the state of the judiciary, albeit in vulgar and unnecessarily provocative terms. By contrast, the comments which most often lead to discipline are assertions about particular judges (for example, "racist" or "crooked") which are amenable to the same type of analysis concerning their falsity or recklessness as were the actionable statements made by Holtzman, Golub, Markewich, and Knight.

B. Federal Precedent

The distinction between critical remarks that represent merely the speaker's subjective opinion versus false or reckless allegations of fact lies at the heart of recent federal case law on this subject. In *United States District Court v. Sandlin*,[41] attorney John Sandlin appealed the imposition of a six-month suspension. The lower court found that his accusation, that a judge had tampered with a judicial transcript, was made in reckless disregard for the truth.[42] Although the Ninth Circuit noted that a lawyer "does not surrender his freedom of expression" upon admission to the bar, "he must temper his criticisms in accordance with professional standards of conduct."[43] Sandlin's allegations led the FBI to examine the court reporter's notes and the tape recording, but the Bureau found no evidence of any illicit alteration.[44] Nonetheless, the lawyer argued that his accusations had been made in good faith, shown by his having passed two polygraph tests, thereby rendering the statements protected speech under the First Amendment.[45] The Ninth Circuit, however, rejected his claim that the statements were constitutionally protected. While agreeing that a subjective standard is employed in defamation actions, the court stated that because of compelling state interests an objective standard is warranted in the attorney disciplinary

40. *See* discussion *infra* Part III.
41. 12 F.3d 861 (9th Cir. 1993).
42. *See id.* at 864.
43. *Id.* at 866.
44. *See id.*
45. *See id.* at 866, 867.

context. "'[B]ecause of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate.'"[46]

Subsequently, in *Standing Committee on Discipline v. Yagman*,[47] the Ninth Circuit reaffirmed the so-called "objective" test first enunciated in *Sandlin*.[48] Stephen Yagman had made a series of disparaging remarks about a federal judge which included accusations that the judge's rulings provided "'evidence of anti-semitism'" and that he was "'drunk on the bench.'"[49] However, in reversing the sanction which the federal district court imposed, the Ninth Circuit concluded not only that an allegedly offensive comment must be viewed objectively, but also added a requirement that the statement be shown to be factually false.[50] The disciplinary prosecutors, however, had offered no evidence that Yagman's statements were in fact false.[51]

Following *Yagman*, the Seventh Circuit decided *In re Palmisano*,[52] which involved an Illinois lawyer's reciprocal disbarment in federal court for accusing certain judges of corruption, including allegations that "'Judge Frank Siracusa is a crooked judge, who fills the pockets of his buddies'" and "'Judge Lewis, another crook, started in about me.'"[53] The court held that lawyers do not enjoy a constitutional right to accuse judges of dishonesty when they have not investigated the truth or falsity

46. *Id.* at 867 (quoting *In re* Westfall, 808 S.W.2d 829, 837 (Mo. 1991) (en banc)).

47. 55 F.3d 1430 (9th Cir. 1995).

48. "[Attorney disciplinary] proceedings are governed by an objective standard, pursuant to which the court must determine 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.'" *Id.* at 1437 (quoting *Sandlin*, 12 F.3d at 867).

49. *Id.* at 1434.

50. *See id.* at 1441-42. A careful reading of *Yagman* would support discipline in many cases because, as the court held, even statements of opinion can be the basis for sanctions if such opinion can "reasonably be understood as declaring or implying actual facts capable of being proved true or false." *Id.* at 1439. The court illustrated this point by providing the following example:

> The statement, "I think Jones is an alcoholic," for example, is an expression of opinion based on implied facts, because the statement "gives rise to the inference that there are undisclosed facts that justify the forming of the opinion." Readers of this statement will reasonably understand the author to be implying he knows facts supporting his view—*e.g.*, that Jones stops at a bar every night after work and has three martinis. *If the speaker has no such factual basis for his assertion, the statement is actionable, even though phrased in terms of the author's personal belief.*

Id. (emphasis added) (citations omitted).

51. *See id.* at 1438, 1441.

52. 70 F.3d 483 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1854 (1996).

53. *Id.* at 485.

of their statements.[54] While purportedly adopting the same objective standard that the Ninth Circuit applied in *Yagman*, the court evidently disagreed with *Yagman*'s conclusion—that it was up to the disciplinary prosecutors to supply evidence of falsity.[55]

> If Palmisano had furnished some factual basis for his assertions, then we would need to determine whether either the Constitution or principles of sound judicial administration permit a sanction—for an attorney is not absolutely liable for every statement that turns out to be incorrect. It would unduly quell investigation and exposure of corruption to disbar an attorney who publicized suspicious conduct, just because the suspicions were dispelled. Palmisano lacked support for his slurs, however. Illinois concluded that he made them with actual knowledge of falsity, or with reckless disregard for their truth or falsity. So even if Palmisano were a journalist making these statements about a public official, the Constitution would permit a sanction. False statements, made with reckless disregard of the truth "do not enjoy constitutional protection."[56]

C. *Other State Court Precedents*

Similar to New York and federal courts, an abundance of state courts have decided cases throughout the country supporting the principle that lawyers cannot, on the pretext of exercising First Amendment rights, simply vent their frustrations with the judicial system, or with particular judges and their decisions, by accusing them of bias, incompetence, or corruption. Thus, numerous state courts have issued opinions imposing discipline on lawyers for making intemperate, disrespectful, unwarranted,

54. *See id.* at 487.

55. The court noted that "[e]ven a statement cast in the form of an opinion ("I think that Judge X is dishonest") implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty." *Id.*

56. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964)); *accord In re* Evans, 801 F.2d 703, 706 (4th Cir. 1986); *In re* Grimes, 364 F.2d 654, 656 (10th Cir. 1966).

Compare *Palmisano* to the reasoning forwarded by the court in *United States v. Brown*, 72 F.3d 25 (5th Cir. 1995). In *Brown*, the court ruled that a lawyer's motion for a new trial, which included claims that the trial judge's gestures, facial expressions, and comments showed bias against the lawyer's client, did not warrant suspension, *see id.* at 27, 28, under ethical rules prohibiting "remarks about a judge that are false or made with a reckless disregard as to their truth or falsity." *Id.* at 27. The court concluded that the lawyer's comments were made in the context of the judicial process and that lawyers "should be free to challenge . . . a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court." *Id.* at 29.

or contumacious public accusations against judges or their actions.[57]

In one of the few divergent state court decisions, *State ex rel. Oklahoma Bar Ass'n v. Porter*,[58] the Oklahoma Supreme Court refused to impose discipline upon a lawyer who, immediately after the sentencing of his client, told the news media that the presiding judge "'showed all the signs of being a racist during the trial.'"[59] Because the lawyer had convinced the trial masters below that he "had a rational basis for having concluded that the remarks had a factual basis,"[60] the court based its rejection of discipline on First Amendment grounds and evaluated his conduct on that basis.[61] Although the court noted that it had imposed discipline in other cases where attorneys' comments had been "untrue or outrageous to the point of demonstrating within their four corners that they were wholly improbable and plainly false,"[62] in the case before it "no evidence was introduced to demonstrate that the statements were false or that they were insincerely uttered by a speaker having no basis upon which to found them."[63]

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57. *See In re* Riley, 691 P.2d 695, 704 (Ariz. 1984) (in banc) (public censure; lawyer's statement that the "'state simply doesn't get a fair trial in [that judge's] court'"); Florida Bar v. Kleinfeld, 648 So. 2d 698, 701 (Fla. 1994) (three year suspension; lawyer impugned the "fairness and honesty of a judge for the sole purpose of shopping for a more favorable forum"); *In re* Jafree, 444 N.E.2d 143, 149 (Ill. 1982) (disbarment; lawyer made "numerous scurrilous and defamatory statements about the judiciary, and certain judges"); *In re* Atanga, 636 N.E.2d 1253, 1256 (Ind. 1994) (30 day suspension; lawyer accused a judge, in a widely circulated newsletter, of being "'ignorant, insecure, and a racist' and 'motivated by political ambition'"); *In re* Frerichs, 238 N.W.2d 764, 765 (Iowa 1976) (public admonishment; lawyer's statement, in a petition for rehearing, that the court was "'willfully avoiding the substantial constitutional issues'" in the case); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 166 (Ky. 1980) (public reprimand; lawyer characterized a judge's decision as "'highly unethical and grossly unfair'" at a press conference); Louisiana State Bar Ass'n v. Karst, 428 So. 2d 406, 408 (La. 1983) (one year suspension; lawyer's public accusation that a judge was "'dishonest, corrupt,'" and was either "'blackmailed'" or "'accept[ed] bribes to influence his decision'"); *In re* Raggio, 487 P.2d 499, 500 (Nev. 1971) (per curiam) (public reprimand; lawyer, a district attorney who was a potential candidate for governor or U.S. senator, characterized a Nevada Supreme Court decision as "'shocking and outrageous,'" and as "'judicial legislation at its very worst'"); Office of Disciplinary Counsel v. Grimes, 614 N.E.2d 740, 740 (Ohio 1993) (public reprimand; lawyer, while speaking with a reporter, "referred to [a judge] as a 'sonofabitch'"); *In re* Lacey, 283 N.W.2d 250, 251 (S.D. 1979) (public censure; lawyer remarked to the press that "'state courts were incompetent and sometimes downright crooked, Judge Adams excepted'"). *See generally* W.E. Shipley, Annotation, *Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action*, 12 A.L.R.3d 1408 (1967).

58. 766 P.2d 958 (Okla. 1988).

59. *Id.* at 961.

60. *Id.* at 969.

61. *See id.* at 966-69.

62. *Id.* at 968.

63. *Id.*

Foreshadowing the standard later enunciated in *Yagman*, the decision in *Porter* forwarded an objective test which requires a showing that a lawyer's statement is actually false, if the lawyer subjectively believed that the statement was truthful, before discipline can be imposed.[64] In contrast, most jurisdictions, including New York, use a much narrower objective test to evaluate the falsity of a lawyer's statements.[65]

Finally, in *Committee on Legal Ethics v. Farber*,[66] the West Virginia Supreme Court dealt with a lawyer who accused a judge of covering up an arson. When confronted by the government with the inaccuracy of his assertion, the lawyer further alleged that the judge was part of a Masonic conspiracy.[67] The court rejected, in strong terms, the defense that the lawyer's subjective belief in the veracity of his accusations constituted sufficient justification for protection under the First Amendment:

> 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.[68]

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64. Going one step further, concurring Justice Opala urged for the adoption of a completely subjective test: "Even if . . . the Bar had followed up with a formal and particularized offer to prove that the respondent's remarks were false in fact, no discipline would be imposable here. Respondent's constitutional freedom of speech does not depend on the truth of its content." *Id.* at 970.

65. For example, a lawyer, unhappy with a judge's decision, alleged that there was a conspiracy between the judge and the opposing party. *See In re* Disciplinary Action Against Graham, 453 N.W.2d 313, 318 & n.3 (Minn. 1990). Despite the lawyer's apparently genuine belief that his statement was true, he had no facts to support his accusation and was suspended for 60 days; the court specifically articulated an objective test. *See id.* at 322, 324.

In a similar ruling, a lawyer was disciplined for asserting that the judge had "'made up his mind'" before hearing the case. *In re* Westfall, 808 S.W.2d 829, 832 (Mo. 1991) (en banc). The court rejected the lawyer's claim that his actionable statement was only an opinion, not a statement of fact, calling that argument an "artificial dichotomy" and noting that a lawyer cannot screen himself from the disciplinary rule by adding "I believe" to the beginning of otherwise offensive comments. *Id.* at 833.

66. 408 S.E.2d 274 (W. Va. 1991).

67. *See id.* at 283-84.

68. *Id.* at 285.

III. PUBLIC POLICY

Lawyers' intemperate, personal attacks against sitting judges, let alone statements lawyers make that are knowingly false or in reckless disregard of the truth, severely undermine the administration of justice. Lawyers are not merely "officers of the court" in a legal or theoretical sense; in the public's eye, they are knowledgeable, professional spokespersons whose seemingly authoritative comments are accorded greater attention and deference than statements of any other observers.

The reasons for restricting lawyers' unwarranted criticisms of judges, especially in pending cases, are thus readily apparent. Irresponsible attacks have a very real likelihood of subverting the dignity and authority of the courts. They also detract from other effective and far more appropriate remedies for a judge's poor decisions, including appeal to a higher court, collateral relief, or referral to a state commission on judicial conduct in cases that raise serious issues of misconduct. Moreover, in many state systems judicial accountability is ultimately dealt with by election or the reappointment process.

If lawyers' statements are accorded greater attention and credence than comments by others, then lawyers can also do far more damage to a judge's professional reputation by making unwarranted attacks. Unlike other public officials, judges are barred by law and judicial ethics from defending their actions or commenting publicly on matters pending in any court.[69] Perhaps for that reason, the duty of lawyers to speak out *against* improper personal attacks on judges is explicitly recognized in the Ethical Considerations of the ABA Code, which provide that "[a]djudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism."[70] The corollary to this proviso is also found in the ABA Rules: "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."[71]

From the standpoint of fundamental fairness then, lawyers should be limited to criticism that is offered in a courteous and professional manner for the purpose of improving the administration of justice and, for the

69. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (1990).
70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-6 (1980).
71. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 cmt. (1992).

same reason, should be the first to speak out against irresponsible attacks.

IV. CONCLUSION

It is beyond dispute that the substance of a judicial decision or opinion is an appropriate topic for public discussion. Moreover, when a lawyer on a case disagrees with a determination, the disagreement can be zealously articulated on appeal, by way of a collateral proceeding, or before a judicial conduct commission in appropriate cases where misconduct may be involved. Lawyers on a case also have the right to publicly criticize the substance of a decision in a professional, temperate manner.

However, when comments to the press turn from criticism of a decision on the legal or factual merits to personal attacks on the judge or his or her motives, especially in the absence of evidence to support such allegations, they impugn the entire judiciary and undermine public confidence in the judicial system. Moreover, individual judges are not free to refute such aspersions in a pubic forum. For these reasons, whenever the line is crossed from legitimate criticism to spurious attack, attorney discipline is warranted in order to maintain the integrity of the bar and the dignity of the courts.