The First Amendment and The Legal Profession: Is Silence Golden?

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There has been much debate about the extent to which a lawyer agrees to restrictions on his First Amendment rights in exchange for the privilege of membership in the legal profession. Client confidentiality, attorney advertising, trial publicity and respect for the bench and bar are all arenas in which the legal profession has elected to promulgate guidelines that restrict speech.[1]

Client confidentiality is an underlying premise critical to the integrity of the profession. The exceptions to the requirement to maintain a confidence are often where the debate begins as recently seen in the Illinois case in which two attorneys came forth after twenty six years to reveal that their now deceased client had confessed to a crime for which an innocent man was convicted. The client had consented to have that fact made public after his death.[2]

Advertising guidelines have evolved and are often the subject of debate in both the Constitutional arena as commercial speech and amongst those who woe the day that our profession somehow morphed into a business as opposed to a sacred guild. The issue is generally what is reasonable and not misleading to the public.[3]

Trial publicity and maintaining the respect and integrity of our judicial system are areas understandably supported by rules of professional responsibility; however, they sometimes become disciplinary minefields for attorneys who air their views concerning the legal system or particular participants in the system. When an attorney criticizes a judge, the question becomes is the attorney exercising her First Amendment rights or defaming the entire profession by irresponsible conduct that damages the public perception of the legal system?

A review of the American Bar Association's Model Rules of Professional Responsibility and relevant case law reveals that the analysis is a careful balancing act between ensuring freedom of speech and maintaining a fair and impartial legal system both in fact and in the public perception. So, the first step in the analysis is determining the context in which the statement was uttered.

If the statement was offered while litigation is pending then it is governed by Model Rule 3.6: Trial Publicity.[4] The rule has evolved through time and as a result of case law to state that "A lawyer who is participating or has participated in the investigation of a matter shall not make an extra judicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing any adjudicative proceeding in the matter."[5]

The rule provides a list of statements that are permissible to provide additional guidance.[6] The determination of "likelihood of material prejudice" provides the Constitutional tension that sparks the debate. The players in the adversary process are attempting to promote their individual positions while fair play and a just result is presumably the ultimate goal of the legal system.

Finally, what about a lawyer's rights to speak out about what she believes are injustices in our legal system? Are lawyers not uniquely qualified to comment on the judicial branch of government? Justice Hugo Black opined in 1941:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always in good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[7]

On the other hand, there has been much written on the privilege of membership in the legal profession and the view that it is a "privilege burdened with conditions."[8] One of those burdens being the requirement for "members of the bar to conduct themselves in a manner compatible with the role of the courts in the administration of justice."[9] Compatible behavior has been defined as behavior that does not impugn the integrity of the judge.[10]

The Model Rules address the issue in Rule 8.2: Charges Against Judicial and Legal Officials which states that "a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge. . . ."[11] Once again, it is the application of the rule that results in a disciplinary quagmire for lawyers seeking to understand the extent of their First Amendment rights pertaining to offering commentary on the judiciary.

Rule 8.2 has been adopted and interpreted with various results depending upon the jurisdiction and the context of the comments.[12] The standard set forth in Rule 8.2 is a defamation standard that has been applied both subjectively and objectively. In other words, some courts have evaluated whether a reasonable attorney would have known that the statements were false or that there was a risk of falsity. While other courts have concluded that the analysis involves only whether the particular attorney at issue believed that the statements were true. The later subjective standard permits an attorney arguably greater latitude; however, the discussion becomes further complicated by distinguishing fact from opinion.[13]

The Ninth Circuit looked to the distinction between fact and opinion in the Yagman case.[14] The Court noted that attorneys may only be disciplined for impugning the integrity of a judge if their statements are false and further concluded that opinions "are protected by the First Amendment unless they 'imply a false assertion of fact.'"[15] The Court then discussed the difference between opinions based upon expressly stated facts and those based upon implied, undisclosed facts. In other words, if the reader can readily ascertain the facts upon which an attorney has based his opinion, then the reader may accept or reject the viewpoint after the reader's own analysis. The Court further noted that "statements of rhetorical hyperbole [are] incapable of being proved true or false."[16]

Thus, in Yagman the Court ruled that Yagman's allegation that the judge was anti-semetic was based upon expressly stated facts because Yagman indicated that he and two others Jewish lawyers had been sanctioned by the judge. Further the Court found that the use of the word dishonest amongst other expressions such as "ignorant," ill-tempered," and "sub-standard human being" gave credence the conclusion that "dishonest" was a part of Yagman's rhetorical hyperbole and therefore not capable of being proved true or false.[17]

The Yagman case has been frequently cited as for authority for a lawyer's First Amendment rights, but has also been criticized as an improper analysis that inappropriately expands the perimeters of protected opinion.[18] The question remains what is the proper restraint to be placed upon a lawyer's First Amendment speech when that lawyer has an adverse view of a judge?

There is much discussion concerning the need for civility in the legal profession and some states have added civility and courtesy provisions to their professional conduct codes in an attempt to impact the language and behavior of the legal profession.[19] The case law seems to indicate a higher tolerance for comments that relate to the judicial conduct of the judge as opposed to what appears to be a personal attack upon the integrity of the judge.[20] It is important to understand the perspective and standards applied within a particular jurisdiction and perhaps it is wise to consider the advice that "judges are as human as the rest of us, and it is not wise to awaken the ire of the judge."[21]

End Notes

1. ABA MODEL RULES OF PROF'L CONDUCT (2003) [hereinafter MODEL RULES] see Rules 1.6, 3.6, 7.1, 7.2., 8.2.

2. See Sharon Cohen, A 26-year-old Secret Could Free Inmate (Apr. 12, 2008), http://news.yahoo.com/s/ap/20080412/ap_on_re_us/the26_year_silence.

3. See *Bates v State Bar of Arizona*, 433 U.S. 350, 366 (1977).

4. MODEL RULES R. 3.6 (2003).

5. *Id.*

6. *Id.*

7. *Bridges v. California,* 314 U.S. 252, 270–71 (1941).

8. *In re Snyder*, 472 U.S. 634, 644 (1985) (citing Justice Cardozo's opinion in *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470–471 (1928).

9. *Id.*

10. *In re Sawyer*, 360 U.S. 622, 624–25 (1959).

11. MODEL RULES R. 8.2 (2003).

12. See Angela Butcher & Scott Macbeth, Note, Lawyers Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary, 17 Geo. J. Legal Ethics 659, 668 (2004).

13. *Id.*

14. *Standing Comm. On Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir.1995).

15. *Id.*

16. *Id.*

17. *Id.* at 1440–41.

18. See Angela Butcher & Scott Macbeth, Note, Lawyers Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary, 17 Geo. J. Legal Ethics 659, 676 (2004).

19. See *Fleger v. Mich. Supreme Court*, No. 06–11684, 2006 U.S. Dist. LEXIS 64973, at *2 (D. Mich. Sept. 4, 2007).

20. *Id.*

21. Ronald D. Rotunda &John S. Dzienkowski, Professional Responsibility, A Student's Guide American Bar Association (2007)