

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION NO. 1996-1

TOPIC: Statements Concerning Judges.

DIGEST: A lawyer may make public statements critical of the conduct of a particular sitting judge, provided the criticisms are well-founded, and notwithstanding the fact that the Commission on Judicial Conduct declined to pursue the lawyer's complaint of alleged judicial misconduct against the judge. Any such statements should be intended to improve the legal system, and made in a dignified, temperate manner.

CODE: DR 8-102(B), ECs 8-1, 8-6, 9-6.

QUESTION

May a lawyer ethically write an article for a professional journal criticizing a particular judge for abusive and intemperate judicial conduct during a trial, notwithstanding the fact that the New York State Commission on Judicial Conduct did not find a basis for investigating the judge for that conduct?

OPINION

The inquirer is a highly experienced trial attorney. Recently, he represented the defendant in a personal injury case. The jury found the inquirer's client liable, but awarded no damages to the plaintiff. The case is now fully concluded and no appeals are pending. The inquirer believes that the judge committed serious acts of judicial misconduct during the trial, including hostile, belligerent, aggressive, abusive, intimidating and generally intemperate conduct directed at the inquirer and his co-counsel. The inquirer believes that the judge did so because of a combination of incompetence, animus and lack of judicial temperament, and has further reached the conclusion, upon speaking with other attorneys with experience before the judge, that his conduct in this case was typical of him.

The inquirer submitted a letter of complaint to the Commission, which did not find a sufficient indication of judicial misconduct to warrant an investigation. A request by the inquirer for reconsideration of the dismissal of his complaint was denied. The inquirer now wishes to write a letter for publication in a periodical regularly read by the legal community, in which he would discuss the conduct of the judge and of the Commission in declining to take action against the judge. The inquirer's professed motivation is to educate others and allow them to benefit from his experience, as well as to put public pressure on the judge to improve his conduct or face defeat in an upcoming re-election bid.

As a threshold matter, we note that ethical restrictions on criticizing the judiciary have been the subject of a number of cases that have evaluated such restrictions under the First Amendment. See, e.g., *Standing Comm. on Discipline of the U.S. Dist. Court v. Yagman*, 55 F.3d 1430 (9th Cir. 1995); *In re Holtzman*, 78 N.Y.2d 184 (1991), cert. denied, 502 U.S. 1009 (1992); cf. *United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995) (contempt). See also Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. Rev. 922 (1974). Whether the letter the inquirer proposes to write would be protected under the First Amendment is a legal question this Committee cannot address.

The Code of Professional Responsibility requires a lawyer to balance two responsibilities. On the one hand, Canon 8 encourages lawyers to assist in improving the legal system. EC 8-1 specifically acknowledges that attorneys "are especially qualified to recognize deficiencies in the legal system." Thus, under the Code, attorneys are encouraged to assist in improving the legal system through initiating corrective measures in the selection of judges. EC 8-1, 8-6. This responsibility necessarily entails some independent analysis and criticism of the judiciary. At the same time, EC 9-6 exhorts attorneys "to uphold the integrity and honor of the profession; to encourage respect for the law and the courts and the judges thereof . . . ." This duty may at times conflict with the role an attorney takes as a leader in the criticism, reform, and change of the legal system.

EC 8-6 attempts to balance these competing concerns in the context of judicial elections. It provides, in part:

Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench . . . . Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the 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.

Further, DR 8-102(B) admonishes lawyers not to "knowingly make false accusations against a judge or other adjudicatory officer."

Measured against these standards, we are of the view that an attorney may properly criticize a judge for conduct in an action that is no longer pending so long as the attorney is not knowingly making false accusations against the judge and strives to voice the criticisms in a temperate and dignified manner. The criticisms cannot, in any case, be part of a "general course of conduct . . . degrading to . . . the courts, and irrelevant or grossly excessive." *In re the Justices of the Appellate Division, First Dep't v. Erdmann*, 33 N.Y.2d 559 (1973).

Assuming that the inquirer's criticisms are well-founded, he should be permitted to bring his criticisms to the attention of the legal community. The inquirer is not precluded from doing so solely because the Commission on Judicial Conduct determined not to pursue his complaint. There is judicial misconduct that does not warrant an investigation by the Commission, that is, conduct that does not rise to the level of a violation of the Code of Judicial Conduct, but that is nonetheless of sufficient magnitude -- particularly when viewed in the aggregate -- to be worthy of the legal community's attention. However, while the Commission's failure to act in this case is not, in and of itself, a sufficient basis to preclude a lawyer from publicly criticizing a sitting judge, the lawyer should take into account the fact that the Commission did not proceed with his complaint in assessing whether his criticisms are well-founded. In addition, we urge the inquirer to avoid petty criticisms, and to make critical statements only when motivated by a desire to improve the quality of the judiciary and the legal system in general, and then to present his views only in a temperate, dignified manner.

#### CONCLUSION

Subject to the limitations expressed in the foregoing opinion, the question presented is answered in the affirmative.

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