Q&A

LAWYER LIABILITY AND ETHICS

Keep Your Opinions to Yourself—Court Splits Over Limits of ER 8.2

Joseph Brophy

A recent decision of a divided Supreme Court of Ohio in *Cleveland Metro. Bar Ass'n. v. Morton* illuminates the line between politically protected speech and the kind of "undignified and discourteous statements degrading a tribunal" that violate the Rules of Professional Conduct.

The trouble started when attorney Morton sought relief for his client on the tax valuation of real property. After the client lost during the administrative process, he appealed to the Ohio Court of Appeals. The issues were mundane—burden shifting in disputes with the Cuyahoga County Board of Revision. The client lost at the appellate court based upon a 2017 decision of the Supreme Court of Ohio called *Moskowitz*.

The client appealed to the Supreme Court of Ohio. Then things went south. In the petition for discretionary review, Morton accused the *Moskowitz* court of "intentionally misstating the holding of each of the cases it cited," accused the Court of Appeals of "fabricating" Ohio precedent and opined that "only politicians committed to maximizing the revenue of their political cronies could reach such a conclusion." And just in case the Supreme Court of Ohio was not clear about how Morton felt, he named the justices who he believed to be advancing their own political interests rather than honestly interpreting the law. In short, Morton told the Supreme Court of Ohio that it should accept jurisdiction because the court itself and the Court of Appeals were corrupt and pursuing a political agenda. Professor Martin in my law school civil procedure class did not cover this technique for persuading a court to assume discretionary jurisdiction.

The Cleveland Bar Association filed a complaint against Morton. A hearing panel found he had no reasonable factual basis for the allegations he made and that he had engaged in undignified and discourteous conduct in violation of ER 3.5 (impartiality and decorum of the tribunal) and ER 8.2 (prohibiting false statements about judges impugning their qualifications or integrity). Readers should note Ohio's ER 3.5 expressly prohibits lawyers from acting "discourteously" to the court, and Arizona does not have a similar provision.

The thing about attorney disciplinary proceedings arising out of insults hurled at a state supreme court is that those proceedings end up in front of the same judges that the attorney insulted in the first place. And this case was no exception.

On appeal to the Supreme Court of Ohio, Morton argued that his statements constituted constitutionally protected free speech and that the objective standard Ohio adopted for determining whether a lawyer's statement about a judicial officer is made with knowing or reckless disregard of the statement's falsity impermissibly punishes false statements that are negligently made. The court rejected that argument, which was premised on defamation case law from the United States Supreme Court rather than disciplinary proceedings arising from the in-court speech of a lawyer. The difference, the court explained, is that defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. By contrast, ethical rules that prohibit false statements impugning the integrity of judges are not designed to shield judges from unpleasant or offensive criticism, but rather to preserve public confidence in the fairness and impartiality of the justice system.

A concurring justice noted that practicing law is a privilege that comes with the burden of conditions. Among those conditions is the lawyer's oath to conduct himself with "dignity and civility" in compliance with ethical rules. Moreover, "there are professional consequences for failing to fulfill these duties."

Two justices dissented, including Justice Sharon Kennedy, whom Morton named as being one of the allegedly corrupt justices. Justice Kennedy held that lawyers should only be sanctioned for making accusations of judicial impropriety that a reasonable attorney would believe are false. On the record before the court, there was no evidence that Morton did not honestly believe that the court was corrupt or that his opinions were demonstrably untrue. Moreover, Justice Kennedy wrote, the need to protect the appearance of judicial integrity was not a compelling interest sufficient to abridge a lawyer's First Amendment right to criticize a judicial officer.

Justice Pat Dewine's dissent called the majority "thin skinned" and agreed with Justice Kennedy that there was no evidence that what Morton said about the court was untrue. Moreover, the United States Supreme Court has held that judges do not have a special dispensation to punish attorney speech they dislike; instead, judges are no more immune from criticism than anyone else. In fact, according to Justice Dewine, because judges are public officials, criticism of their actions as judges is entitled to robust First Amendment protections.

The crux of the dispute is whether the United States Supreme Court cases of *New York Times v. Sullivan* (under First Amendment principles requiring actual malice for defamation of public figures) and *Garrison v. Louisiana* (overturning conviction of a district attorney for stating that he attributed "a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vaca-

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IN MEMORY

ALLISTER ADEL

November 10, 1976–
April 30, 2022

On Monday, May 9, at St. Francis Xavier Catholic Church, the legal community said goodbye to Allister Adel who passed away on April 30 at the age of 45.

When announcing her passing, her husband David DeNitto, said: "This May we would have celebrated 20 years of marriage. My family and I are utterly heartbroken by this unimaginable loss. We are so proud to call Allister wife and mom."

Allister was the first female Maricopa County Attorney. The Maricopa County Board of Supervisors appointed her as acting county attorney in 2019 when Bill Montgomery was appointed to a seat on the Arizona Supreme Court. She was elected to the position in November 2020.

Allister began her legal career in 2004 with the Maricopa County Attorney's Office. As deputy county attorney she served in the vehicular crimes, gang and drug enforcement bureaus. In 2011 she became an administrative law judge for the Arizona Department of Transportation and then served as general counsel for the Arizona Department of Child Safety. Before her appointment to MCAO, she served as our MCBA executive director for two years.

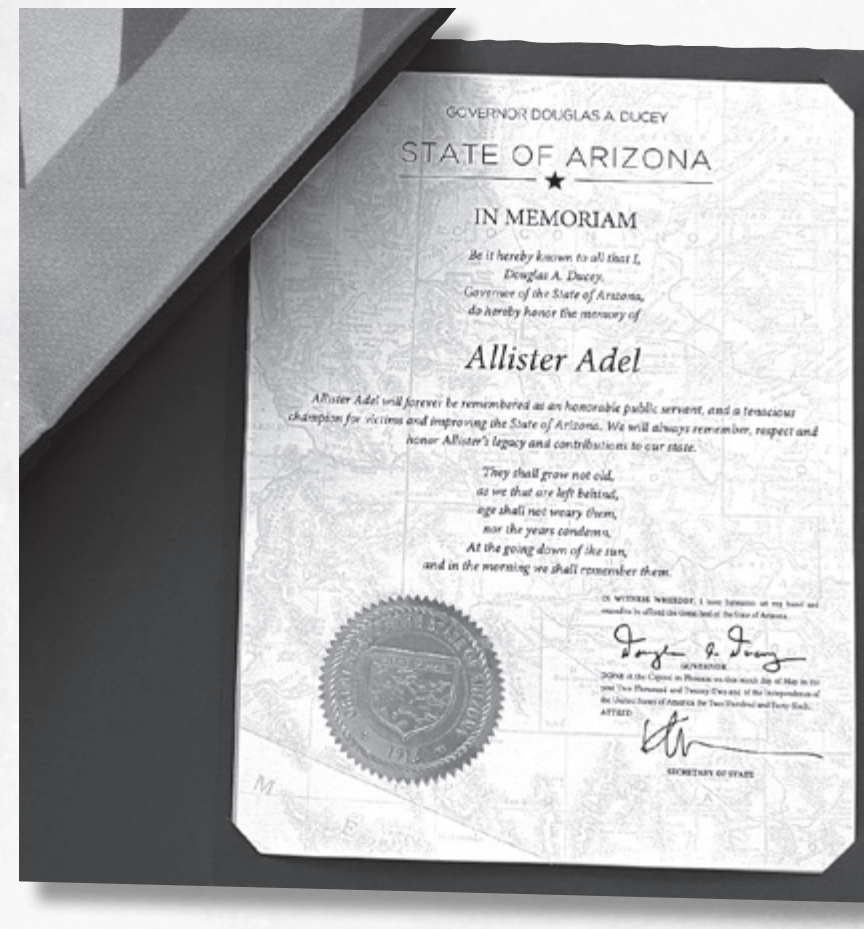
Allister was born in Dallas, Texas, and attended the prestigious Hockaday School before earning her bachelor's degree in political science in 1999 from the University of Arizona and her JD from the ASU College of Law in 2004.

In addition to her work, Adel was involved in her community. A member of Phoenix Rotary 100, the oldest and largest Rotary club in Arizona, she served as the 2017-2018 president. She worked to fight human trafficking and raised funds for a fellowship space and butterfly garden at Starfish Place, a housing facility for trafficking survivors and their families.

As important as her work and community involvement were to Allister, there was nothing more important to her than her husband David, sons Mason and Spencer, and their dogs. She is also survived by her father, John.

In a tribute to Allister, Governor Doug Ducey addressed her sons, saying their mother loved them dearly.

"Be proud of her and all she accomplished," he said, "because it was a lot." ■



GOVERNOR DOUGLAS A. DUCEY

STATE OF ARIZONA

IN MEMORIAM

Be it hereby known to all that I,
Douglas A. Ducey,
Governor of the State of Arizona,
do hereby honor the memory of

Allister Adel

Allister Adel will forever be remembered as an honorable public servant, and a tenacious champion for victims and improving the State of Arizona. We will always remember, respect and honor Allister's legacy and contributions to our state.

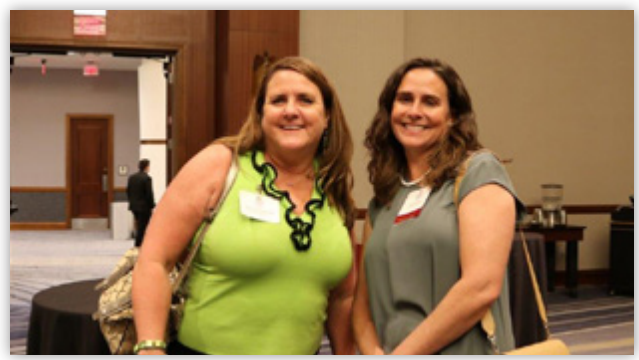
They shall grow not old,
as we that are left behind,
age shall not weary them,
nor the years condemn.
At the going down of the sun,
and in the morning we shall remember them.

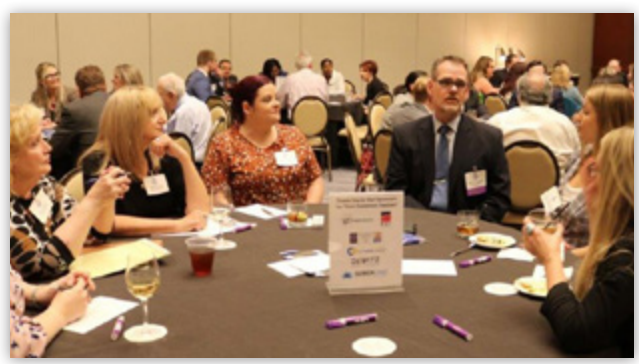
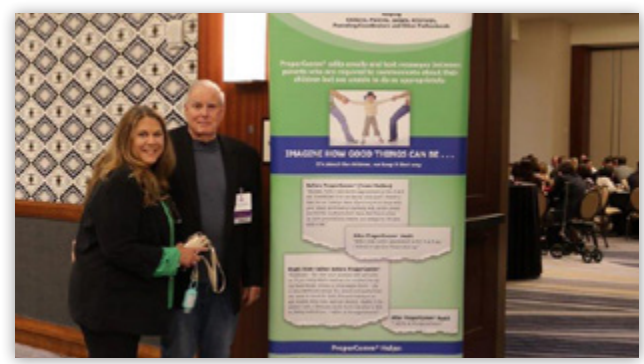
Gov. Doug Ducey issued a proclamation in memory of Allister Adel, November 10, 1976 to April 30, 2022.

Speed Networking with the Family Law Judges—April 27







Keep Your Opinions

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tions" of particular judges and mused about possible "racketeer influences on our eight vacation-minded judges") apply to attorney criticism of judicial officers.

After *Garrison*, the ABA expressly adopted the *Sullivan* standard for Model Rule 8.2 for regulating lawyer speech regarding the judiciary, and therefore the rule requires that lawyers are only prohibited from making statements that the lawyer knows to be false or with reckless disregard to the truth of the qualifications or integrity of the judge. But despite the ABA expressly adopting those decisions, the courts (i.e., the ones having their integrity or qualifications impugned) have not followed the ABA's lead and have instead read *Sullivan/Garrison* out of ER 8.2 and allowed punishment of speech that impugns the integrity of the judiciary without a showing of knowledge of or reckless disregard to falsity.

The *Moton* dissent had the better argument. The notion that if a lawyer expresses a negative opinion about a judge, then the legitimacy of the judiciary in the eyes of the public is somehow threatened, is farfetched. After all, the American experiment has survived 245 years with substantial portions of the public believing (with some justification) that the executive and legislative branches are populated exclusively by all manner of scoundrels, thieves and reprobates. Moreover, the *Morton* court did not appear to consider whether and to what extent the judiciary is brought into disrepute by punishing those who dare to criticize them. Punishing criticism from lawyers, who are in the best position to assess the integrity and qualifications of a judge, may suggest to the public that the lawyers are being punished not because they are wrong but because they are right.

Justice Hugo Black put it eloquently when he wrote: "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 with perfect 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."

This is not to say that Morton is a martyr to be honored. He lost his client's case and the name calling in this petition to the Ohio Supreme Court could not have helped, and likely put the justices in the position of feeling that if Morton were not sanctioned they would be tacitly conceding the truth of his allegations. But while it is critical for the courts to be respected as an institution, it is doubtful that suspending Morton's license for a year improved the Ohio court's standing with anyone. ■

Joseph Brophy is a partner with Jennings Haug Keleher McLeod in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@jhkmlaw.com.