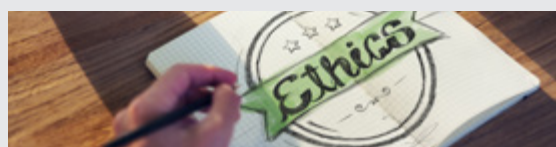
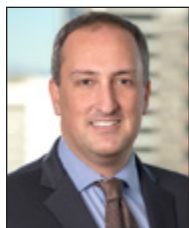


## Q&amp;A



## LAWYER LIABILITY AND ETHICS

## New Mexico Adopts Objective Standard for ER 8.2



Joseph Brophy

are sanctionable.

Lawyer represented clients in a water rights adjudication regarding the rights to the San Juan River. The adjudication concerned rights asserted by the Navajo Nation, United States, the State of New Mexico, and various individuals and water-user associations. Lawyer represented a water-user association and several individuals. The court appointed Judge James Wechsler (ret.) to preside as judge pro tempore. Judge Wechsler approved a settlement agreement between the Navajo Nation, United States and New Mexico over the objections of Lawyer's clients.

On appeal, Lawyer moved to disqualify Judge Wechsler. Lawyer claimed to have heard "disquieting rumors about Judge Wechsler in the New Mexico Legislature, prompting some legislators to ask whether or not the rumors could be substantiated." Lawyer then claimed that the judge

A recent ruling by the Supreme Court of New Mexico in an attorney disciplinary proceeding highlights a split in authority over the standard for determining whether a lawyer's statements about a judge's qualifications or integrity

"previously worked as a lawyer for the Navajo Nation" and exhibited bias in favor of his former clients whose settlement the judge approved. And just to be thorough, Lawyer claimed that the judge lived on the Navajo Reservation in the early 1970s and therefore had "extrajudicial knowledge about the Navajo Nation" from which he could draw in order "to award water to the Navajo people—the people he represented as an attorney."

There was no evidence to support any of Lawyer's allegations except for the part about the judge living on the Navajo Reservation during the early 1970s. There are probably thinner grounds for alleging judicial corruption than having lived in a certain area of the country 50 years ago, but none come to mind. The New Mexico Court of Appeals was not amused and referred Lawyer for discipline. The case reached the Supreme Court of New Mexico, who became the latest court to weigh in on how to interpret ER 8.2.

ER 8.2 prohibits statements concerning the qualifications or integrity of a judge that a lawyer knows to be false or that are made with reckless disregard as to their truth or falsity. Lawyer argued that the court should adopt an "actual malice" standard based upon First Amendment jurisprudence governing civil defamation actions

arising from statements critical of public officials. This is the minority view. The minority view emphasizes the interest in protecting attorney criticism of judges to safeguard public discussion of governmental affairs. Courts that have adopted the minority view reason that restrictions on attorney speech hinder the public's access to the class of people best positioned to comment on the judicial system.

The Supreme Court of New Mexico adopted the majority view, which is that a lawyer makes a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge when the lawyer makes the statement in the absence of an objectively reasonable factual basis. Neither malice nor a showing of actual falsity is required under the majority view of ER 8.2. The majority view believes that because lawyers are in the best position to comment on the judicial system and are viewed as especially authoritative regarding that system, the public's interest is best served by ensuring that an attorney has an objectively reasonable basis for challenging the integrity or qualifications of a judge. Arizona's courts have not weighed in on the subject. The Ninth Circuit follows the majority view.

While Lawyer raised important issues with respect to what the appropriate standard is for attorney criticism of judges, he picked a poor set of facts to argue for the minority view. Lawyer did not merely raise the possibility of a conflict, but strongly suggested that the judge was outright corrupt. The factual allegations were quite weak, even if they were true. Not even the United States Senate has stooped as low as to ask judicial nominees whether they now or have ever lived on the Navajo Reservation as though it is relevant to judicial qualifications (although the Senate will probably reach that point soon enough).

Moreover, rumors and innuendo from legislators (something at which the United States Senate excels) are not a great basis for questioning a judge's integrity.

Nevertheless, like many of the opinions adopting the majority view, the New Mexico court's opinion did not address the relevant United States Supreme Court opinions on the subject (*New York Times v. Sullivan* and *Garrison v. Louisiana*) and relied on dicta from *Gentile v. State Bar of Nevada*, a United States Supreme Court case that courts frequently use to regulate attorney speech despite its modest holding (lawyers in a judicial proceeding cannot make out of court statements that may affect the jury or the outcome of a trial).

For his part, Lawyer went down swinging. When given the opportunity at oral argument to express regret for his conduct and statements, he said he regretted being "put in this position" and stated that, although he could have raised the question of recusal differently, the substance of the pleadings would have been the same. Lawyer told the Supreme Court of New Mexico that he would challenge the conduct of his hearing in federal court on due process grounds. It was somewhat surprising Lawyer did not go all the way and demand an apology from Judge Wechsler and the court. Perhaps Lawyer was saving his apology demand for the final hearing where the court suspended him indefinitely and he never got around to it because the court muted Lawyer's connection because he would not stop talking. ■

*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.*



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