

Volunteer Lawyers Program Thanks Attorneys

The Volunteer Lawyers Program thanks the following attorneys and firms for agreeing to provide pro bono representation on cases referred by VLP to help people with low incomes. VLP supports pro bono services of attorneys by screening for financial need and legal merit and provides primary malpractice coverage, verification of pro bono hours for CLE self-study credit, donated services from professionals, training, materials, mentors and consultants. Attorneys who accept cases receive a certificate from MCBA for a CLE discount. For information on rewarding pro bono opportunities, please contact VLP Director Roni Tropper at 602-258-3434 x2660 or Rtropper@clsaz.org or enroll with us at clsaz.org/volunteer-lawyers-program. ■

VLP THANKS THE FOLLOWING ATTORNEYS AND FIRMS FOR ACCEPTING CASES FOR REPRESENTATION:

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Coppersmith Brockelman PLC

BANKRUPTCY

Diane L Drain – Two Cases
Law Office of D L Drain PA

ADULT GUARDIANSHIP/CONSERVATORSHIP

Kevin J. Walsh
Quarles

LANDLORD/TENANT

Betty L Hum – Two Cases
CLS/ VLP Certified Pro Bono Counsel

CONSUMER

Veronika Fabian
Choi & Fabian PLC
Joshua Blake Mayes
Mayes Telles PLLC

MINOR GUARDIANSHIP/ CONSERVATORSHIP

Michelle P Roddy
Roddy & Urness, PLLC

VLP THANKS THESE VOLUNTEERS WHO PROVIDED OTHER LEGAL ASSISTANCE DURING THE MONTH:

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VLP THANKS THE FOLLOWING VOLUNTEER ATTORNEYS WHO RECENTLY ENCOURAGED COLLEAGUES TO VOLUNTEER WITH VLP

London Burns **Steven Cole** **Travis M. Wheeler**

PRO BONO SPOTLIGHT ON CURRENT NEED FOR REPRESENTATION

Attorneys are needed to help consumers with contract matters.
Attorneys' fees can be claimed if litigation is required.

The Volunteer Lawyers Program provided \$2,034,915 in measurable economic benefit to families in 2022, in addition to improving safety and well-being for children and adults.

The Volunteer Lawyers Program is a joint venture of Community Legal Services and the Maricopa County Bar Association

Q&A



LAWYER LIABILITY AND ETHICS

California Judge Defends Lawyer Speech



Joseph Brophy

The last few years have seen a troubling trend in which lawyers who have made statements to the media or on social media have been subjected to discipline for those statements, even though the statements made were not averse to the interests their clients and were unconnected to any judicial proceeding. The most prominent examples of this troubling trend were Rudy Giuliani in New York and Jenna Ellis in Colorado, each of whom was punished (Giuliani was disbarred, and Ellis was censured) for claiming to the media and on social media that Donald Trump won the 2020 election. Neither lawyer was punished for conduct nor for statements connected to the judicial process.

Meanwhile, the legal profession has largely slept as the Rules of Professional Conduct (primarily ER 8.4(c), which only applies to conduct and does not apply to speech) have for the first time been interpreted to limit a lawyer's political speech in the court of public opinion, probably because most members of the profession dislike the lawyers who have been punished. The courts issuing these opinions have largely not pretended to have precedent supporting their rulings.

However, in October 2023, Judge Dennis Saab of the State Bar of California, issued an opinion that offered the first pushback against this trend of courts purporting to have the power to punish attorney speech outside of the judicial process.

The trouble here started, as it so often does, on the internet. Lawyer was a resident of Los Angeles. She had a personal Twitter account under a pseudonym that identified her occupation as a lawyer. In late May 2020, protests in Los Angeles over the death of George Floyd devolved from peaceful into full scale riots, with widespread acts of violence against citizens and police, theft, arson and destruction of property. Stores near Lawyer's residence were looted and a police station set on fire.

Lawyer decided that this state of affairs required her public commentary on Twitter. The tweets that caught the attention of the State Bar of California were (all grammatical errors are in original): "Can't wait. At last a reason to shoot them"; "So let CVS leave the neighborhood. Along with Whole Foods and every other quality business. And then watch these sand thugs complain about no businesses In The area"; "They need to be shot"; "Shoot the protesters"; "Omg Scarborough you've hit a new low in stupidity. Let's go burn your house down with you in it"; "Yes and they should be shooting the looters";

"They should be shot. And if it was your business, you'd pull the trigger."

The California bar brought formal charges against Lawyer, alleging moral turpitude by directing others to commit acts of violence and committing a criminal act that reflects adversely on her fitness as a lawyer by violating 18 U.S.C. § 2101 (inciting riot). It is unclear what good faith basis the bar had to make the incitement claim given that none of Lawyer's tweets were "liked, replied to or retweeted, the bar was unable to produce even one of Lawyer's whopping 200 Twitter followers who did in fact go out and shoot looters, and Lawyer was not charged with violating § 2101 or any other crime.

The bar claimed a right to impose professional discipline on Lawyer based on the thoughts and viewpoints she expressed on her personal Twitter account because her biography page described her as an attorney. This is exactly what the Giuliani and Ellis courts based their decision on—the notion that the mere status of being a lawyer somehow limits a lawyer's right to free speech.

Judge Saab dismissed all charges against Lawyer based on certain precepts that, until recent years, were uncontroversial - the Rules of Professional Conduct governing lawyers cannot punish activity that is protected by the 1st Amendment. There are really only two exceptions to this rule – statements made in connection to a specific judicial proceeding that have the potential to obstruct or prejudice the administration of justice and certain rules on attorney advertising and solicitation. To illustrate, lawyers who bring frivolous bar charges on behalf of the state bar purporting to claim the right to regulate the political speech of lawyers because they do not like the content of that speech would be an example of lawyers who can and should be punished for the content of their speech because it is made in connection with a judicial proceeding.

Beyond the aforementioned exceptions, lawyers have the same 1st Amendment protections as anyone else, which means courts do not have the power to punish attorney speech just because they do not like the content of that speech. Whether it is a good idea to shoot rioters who are engaging in violence against police and innocent citizens is a matter of public policy (Napoleon's famous "whiff of grapeshot" was certainly effective in putting down Revolt of 13 Vendemiaire in 1795) to which all citizens (including lawyers) are allowed to speak free from government punishment.

Burning down poor Joe Scarborough's house with him inside to prove a point is probably a closer question, but unless Law-

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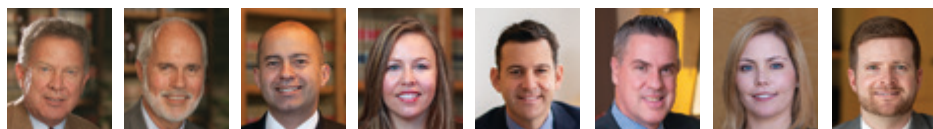
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California Judge

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yer's statements were made under circumstances where that result was imminent and likely to occur (real incitement as opposed to what the California bar claimed Lawyer did), then a state bar or a court has nothing to say about it. Judge Saab correctly identified Lawyer's statements as provocative opinions rather than directives to anyone who was able or willing to act on those statements over 3,000 miles away where Mr. Scarborough lives.

State bars have an important job, which is to protect the judicial process and clients from dishonest or incompetent lawyers. Punishing lawyers for saying stupid things that do not affect clients or the administration of justice is not part of that job, nor is it within the power of the courts. As Judge Saab put it, "while the

State Bar may have a special interest in regulating attorney conduct, this does not give the State Bar the unfettered authority to regulate attorneys in their daily lives to censor unfavorable speech that it deems 'reprehensible, unethical, and outside the bounds of good moral conduct expected of attorneys.'" Bravo to Judge Saab for being one of the very few judges in the last two years to say so.

Naturally, the California State Bar, which absolutely believes it has the right to regulate attorney speech unconnected to the legal profession, as well as nothing better to do, is appealing the ruling. Stay tuned. ■

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@jhbklaw.com.

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Arbitration Fee Donations Help

Partnering with the Maricopa County Superior Court, the Maricopa County Bar Foundation (MCBF) is once again encouraging attorneys assigned to arbitration to donate the \$75 fee to the Foundation's fundraising efforts.

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