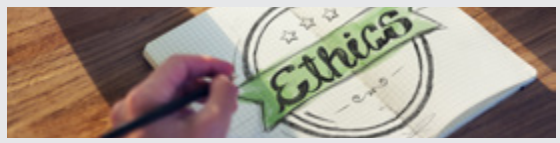
Q&A



LAWYER LIABILITY AND ETHICS

Debate Over Regulation of Lawyer Speech Continues

Joseph Brophy

The last several years have seen a number of cases where courts state bars and courts have sanctioned lawyers for statements about political matters that were unconnected to any judicial proceeding in which that lawyer was involved. Most of these cases involved lawyer statements regarding the disputed 2020 presidential election. A recent case pending in Florida and a statement from the State Bar of Connecticut illustrate that the effort to expand restrictions on attorney speech through the Rules of Professional Conduct are not limited to electoral matters.

In Florida, the Girleys represented a plaintiff in a racial discrimination suit that resulted in a $2.75 million jury verdict. Judge Kevin B. Weiss of the Orlando Circuit Court entered a judgment notwithstanding the verdict one week after the trial ended. The Girleys subsequently gave interviews on two podcasts in which they criticized Judge Weiss's ruling and how the judicial system treats minority litigants. Brooke Girley wrote on social media that "[e]ven if we win, it only takes one white judge to reverse our victory." Brooke Girley called for Judge Girley's removal from office and said that she intended to run against Judge Weiss when he ran for reelection.

The Florida bar found that the Girleys violated ER 8.2 (prohibiting impugning the integrity of the judiciary) by "convey[ing] that the court system is unfair, biased and does not provide equal justice to everyone," and "impugning the integrity of Judge Weiss, the Judiciary, and the court system as a whole." The bar required the Girleys to provide an objectively reasonable factual basis for the opinions they expressed and sanctioned them for failing to do so.

The Girleys have challenged the Florida bar's decision on First Amendment grounds. Specifically, the Girleys argue that: (1) the 1st Amendment permits lawyers to express opinions as long as consumers (clients and potential clients) are not misled and cases in which they represent a party are not prejudiced; and (2) because the Girleys made their comments after the trial concluded, there was no chance that the Girleys' out of court statements could potentially prejudice a pending judicial proceeding. Moreover, if lawyers have to walk around with a burden of proof to show that their political opinions are objectively reasonable, then the political speech of lawyers would be significantly chilled. The Girleys case is on appeal to the Supreme Court of Florida.

Meanwhile, on June 14, 2024, the leadership of the Connecticut bar issued a statement addressing the criticism of prosecution and trial in New York of former President Trump as a politically motivated show trial, stating that such criticism has "no place in the public discourse" and calling on lawyers "to defend the courts and our judges." While the threat to Connecticut lawyers who might express a negative opinion on how the New York trial was conducted was merely implied, it was also unmistakable.

The Girley case and the admonition of the Connecticut bar raise the same issue: what are the rules governing lawyers who speak out about what they believe to be a two-tiered justice system? The courts and state bars have a blind spot in this area. They cannot see the disrepute brought upon them when they punish and silence those who are in the best position to identify problems with the justice system. In the case of the Connecticut bar, the leaders who wrote the above-referenced statement appear to not have considered how demanding that Connecticut's lawyers defend the process and judge in a politically charged case in another jurisdiction might lead to the impression that the people who run America's legal system are committed to enforcing homogenous political thoughts and agendas.

The media is not an informed substitute for lawyers when it comes to informing the public on matters related to the justice system. If you think the media is capable of accurately educating the public on civil or criminal procedure or the justice system, try reading media articles that discuss those topics and see how many years it takes to find even one that is mostly accurate. They do not exist.

Lawyers are by far the most likely group of people to understand if a certain proceeding has gone awry (like a political show trial in New York), or a certain judge is problematic for some reason (i.e., unfair to minority litigants). And lawyers are among the relatively small group of people able to explain the existence and cause of problems in the justice system that is run by the courts (i.e., a two-tiered justice system). Unsurprisingly, the courts, which regulate themselves, do not take kindly when lawyers have the temerity to express a negative opinion about the system or the people who run it. Perhaps the Girleys are wrong about how the justice system treats minority litigants. But a state bar punishing them for giving voice to an opinion that many people in this country have does not help the Florida courts' image. Nor does sanctioning a lawyer who expressed her intent to run for office against a judge as Ms. Girley did with Judge Weiss.

Yes, the case law is replete with statements that the purpose of the Rules of Professional Conduct is to protect the public's view of the judicial system's integrity, not to shield judges from criticism. The fact that they provide such a shield – a shield that the courts have never extended to protect the images of the other branches of government or public figures – is simply a happy and coincidental byproduct of those rules. But as Justice Hugo Black once commented, "an enforced silence [on criticism of the judiciary], 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."

The Girleys have received some help in the form of amicus briefs filed on their behalf by the ACLU on the 1st Amendment issues raised in their appeal. Perhaps the Supreme Court of Florida will provide some additional guidance on the line where a court's authority to regulate attorney speech ends and an attorneys' 1st Amendment rights begin. ■

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