



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1040 (12/9/14)

Topic: Judge (Lawyer responding to unfair criticism), Prejudicing client

Digest: A lawyer ordinarily may respond to unjust criticism of a judge in the media. However, a lawyer with a case pending before the judge should consider whether support of the judge is likely to cause the public reasonably to question the impartiality of the judge in presiding over such matter, and hence cause the judge's recusal. If so, and if the judge's recusal would prejudice or damage a client of the lawyer, the lawyer may not publicly support the judge.

Rules: 1.1(c), 8.2

FACTS

1. A judge has been accused in the media of impropriety on the bench. In the lawyer's experience, the judge is hardworking, intelligent and even-handed, and the lawyer believes the accusations in the media are unfounded.

QUESTION

2. Where a lawyer believes that the media has unjustly accused a judge of impropriety on the bench, may the lawyer – either individually or as one of multiple signatories sending an open letter or other communication to the media and/or to investigating authorities – publicly express support for that judge, if the lawyer has a case pending before the judge?

OPINION

Defending Judges Against Unjust Accusations

3. It has long been the tradition of lawyers, individually and collectively (often through bar associations), to come to the aid of judges they believe have been unjustly criticized in the media. As stated in Comment [3] to Rule 8.2 of the New York Rules of Professional Conduct (the "Rules"): "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."

4. Comment [3] is merely the most current reflection of this long tradition. EC 9-6 of the 1970 New York Code of Professional Responsibility ("Code"), the predecessor to the Rules, exhorted attorneys "to uphold the integrity and honor of the profession; to encourage respect for the law and the courts and the judges thereof . . ." EC 8-6 of the Code provided that "Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism." Even earlier, Canon 1 of the 1908 Canons of

Professional Ethics¹ provided: “Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor.” The 1887 Alabama State Bar Association Code of Ethics, which was a model for many later codes of lawyer ethics, provided in Rule 4:

Courts and judicial officers, in their rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is the attorney’s duty to give them his moral support in all proper ways

5. Preserving the quality and independence of the judiciary has been a key goal of lawyers and the Bar over the years. Lawyers individually and the Bar as the collective voice of the legal profession frequently work to maintain and support public confidence in the judiciary by providing timely assistance to members of the bench in responding to adverse publicity, misinformation, or unwarranted criticism of an individual judge or the judiciary. The effectiveness of our justice system depends in large measure on public confidence. Inaccurate reporting and unjust criticism in the media regarding judges, courts or the system of justice erodes public confidence and weakens the administration of justice. It is vital that all members of the public – litigants and non-litigants alike – have faith that the courts, their procedures and their decisions are fair and impartial.

6. It is important for lawyers to ensure the accuracy of information published about the actions of judges because it is unethical for judges to answer criticism of their actions regarding pending or impending matters. *See* Code of Judicial Conduct (“CJC”), Canon 3(B)(8) (A judge shall not make any public comment about a pending or impending proceeding in any court in the U.S.). Responses by members of the profession to inaccurate information about judges promote the dignity of the administration of justice, prevent interference with pending litigation, and affirm the commitment to an independent judiciary – a judiciary dedicated to decision making based on facts and the law.

7. For these reasons, numerous bar associations have encouraged attorneys to respond accurately, quickly and fairly to criticism of judges and courts that is unwarranted.² *See, e.g.,* American Board of Trial Advocates, *Responding to Unfair Criticism of Judges*; American Bar Assn. Standing Committee on Judicial Independence, *Rapid Response to Unfair and Unjust Criticism of Judges* (April 2008); Philadelphia Bar Assn. Special Committee to Respond to Attacks on the Judiciary (April 30, 1998); Nebraska State Bar Assn. Policy for Responding to Unjust Criticism (Nov. 3, 2006); 63 Bench & Bar of Minnesota, No. 6 (July 2006).

Effect on Appearances Before the Judge

8. An individual lawyer who responds to criticism of judges may wish to consider whether such support for the judge might be viewed as cause for the judge to be biased in favor of the lawyer. The issues that arise from such support are similar to those that arise where a judge may

¹ For an exhaustive treatment of the history of the 1908 Canons, see James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 Fordham L. Rev. 2395 (2003).

² For a discussion of possible boundaries of a lawyer’s criticism of a judge see N.Y. City 1996-1 (1996).

learn of a lawyer's contribution to a judge's reelection campaign. *See* N.Y. State 574 (1986), N.Y. City 893 (1978). Under the Code of Judicial Conduct, a judge must disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including where the judge has a personal bias toward a party's lawyer. CJC Canon 3E(1). The judge therefore will have to determine whether his or her impartiality might reasonably be questioned as a result of the lawyer's support. This requires determinations of fact and law that are beyond the jurisdiction of our Committee.³

9. Our prior opinions have considered whether the lawyer should withdraw under the Rules or the judge should be disqualified under the CJC where the lawyer and the judge have prior connections that might affect the judge's impartiality. N.Y. State 574 (1986) thoroughly reviewed the authorities and held that:

Where a judge and a lawyer have had previous connections, the question of whether the judge should be disqualified from sitting or the lawyer should be disqualified from appearing should be governed primarily by the Code of Judicial Conduct. N.Y. State 548 (1983), N.Y. State 384 (1975), ABA Inf. 1331 (1975). N.Y. State 548 extensively reviewed Codes governing lawyers' and judges' conduct and concluded that, absent statutory prohibition or special circumstances, *the lawyer is not required to disqualify himself by reason of a relationship with the judge. Rather, it is the judge's duty to consider disqualification.* [Emphasis added.]⁴

10. Also relevant to our analysis is Rule 1.1(c)(2), which provides that a lawyer shall not intentionally "prejudice or damage the client during the course of the representation" If the lawyer's defense of the judge is likely to cause the judge to recuse himself or herself on grounds that the judge's impartiality toward the lawyer might reasonably be questioned, and if the judge's recusal is likely to prejudice or damage the client, then the lawyer may not publically support the judge. Rule 1.1(c)(2) would likely apply, for example, if (i) the lawyer is representing a client in a matter that has been long pending before that judge or the matter is on the eve of trial, and (ii) the lawyer's public support of the judge is likely to cause the judge's recusal, and (iii) reassignment of the matter to another judge would cause delay to the prejudice of the client.

Effect on Future Clients

11. If the lawyer has no pending matters before the judge, the question of the judge's recusal may arise with respect to future matters. Nevertheless, the lawyer does not have obligations to future clients under Rule 1.1(c). First, the rule by its terms applies only to actions by the lawyer

³ Thorough discussions of the circumstances that might lead to a judge's disqualification are found in N.Y. State 574 (1986) and N.Y. State 602 (1989). N.Y. State 602 involved a lawyer who had been subpoenaed to testify before the Commission on Judicial Conduct in a proceeding brought against a judge. We noted that, regardless of whether the witness' testimony would support the judge's position in those proceedings, the witness would be perceived to have some power to influence its outcome, and thus would have significant power over the judge's reputation and career. It is not clear that the same conclusion would apply to a lawyer's response to criticism of a judge in the media, as opposed to a judicial conduct proceeding. Ultimately, the judge would have to determine whether the lawyer's defense of the judge against criticism in the media would be perceived as reasonably calling into question the judge's impartiality toward the defender.

⁴ To the same effect is N.Y. State 673 (1995), where the lawyer was a relative of judge.

"during the course of the representation." In any event, even if the judge were to determine that his or her impartiality might reasonably be questioned, it is unlikely that the judge's recusal and the assignment of a new proceeding to another judge would prejudice or damage the client within the meaning of Rule 1.1(c).

CONCLUSION

12. A lawyer individually or the Bar collectively ordinarily may respond to unfair criticism of a judge in the media. Before responding as an individual or in a small group of lawyers, however, a lawyer with a case pending before the judge should consider whether support of the judge is likely to cause the public reasonably to question the impartiality of the judge in presiding over such matter, and hence cause the judge's recusal. If so, and if the judge's recusal would prejudice or damage a client of the lawyer, the lawyer may not publicly support the judge.

(45-14)