

HYPOTHETICAL SCENARIOS, WHICH PROVIDE ETHICAL DILEMMAS

- I. Claimant's counsel has filed an original application for benefits involving a questionable on-the-job injury that is denied by the employer and the workers' compensation carrier. Medicals, totaling more than \$200,000, have already been paid by the claimant's health insurance carrier. The claimant has a low average weekly wage and would not be entitled to more than approximately \$10,000 in indemnity benefits. Claimant's counsel wants to collect 25% from the health insurance carrier if he wins the case. The employer offers \$30,000 to settle the case on a denied basis.
 - A. Does claimant's counsel have a duty to the health insurance carrier?
 - B. Does claimant's counsel's interest in collecting a large fee from the health insurance carrier put him in conflict with his own client relative to the \$30,000 generous offer of the employer?

- II. Lawyers on both sides of the fence talk about the strengths and weaknesses of deputy commissioners, as well as full commissioners. How far does freedom of speech allow a lawyer to be critical of the judiciary?

- III. The claimant's lawyer has also been engaged to represent a healthcare provider, which has only been partially paid for services rendered to the injured worker. The claimant has settled a related third-party case for \$75,000 and must spend the entire \$75,000 before he goes back on an open award. The workers' compensation carrier is paying 48% in prorated attorney's fees and costs as these funds are spent by the injured worker. Such expenditures would include medical costs, as well as foregone indemnity benefits in view of the settlement reached. Can claimant's counsel represent both the claimant and the healthcare provider, or does he have a conflict?

- IV. Because there is no physician-patient privilege in Virginia workers' compensation cases, can either a defense or claimant's lawyer instruct, strongly suggest, or with a wink tell the physician that he should not or does not have to talk to the other side?

- V. You subpoenaed the treating physician's medical records. In response to the subpoena, you find a copy of a signed written opinion from the treating physician that was sent to opposing counsel and that was never forwarded to the Commission or to you. What was

forwarded to the Commission was a later draft of this opinion that had been co-authored between the lawyer and the treating physician. In other words, the opposing lawyer “deep sixed” the doctor’s former opinion.

- A. What should your obligations be to the Commission, as well as the state bar?
- B. What should happen to the offending lawyer?

VI. You are claimant’s lawyer and you want to talk to fact witnesses who work for the employer to learn about the accident, what happened, and whether any safety rules were violated by either the employer or the claimant which contributed to the accident. A high powered defense lawyer has been employed to defend the company in the compensation case and the ongoing OSHA investigation. That defense lawyer tells you to stay away from the employees, who are not supervisors, and to go through his law firm for any discussions/depositions.

What should you do?

VII. As most of you know, many lawyers, both on the defense and claimant’s sides, do not file formal withdrawals as counsel of record. This scenario is as follows: It has been years since there has been any litigation between the injured worker and the employer. The worker was previously represented. The insurance carrier wants the defense lawyer to open settlement discussions with the claimant. Does the defense lawyer, under the circumstances, have to check with the lawyer who represented the claimant years ago knowing that it will cost the employers 15-20% more if the workers’ compensation lawyer becomes involved again?

VIII. As a defense lawyer, you receive numerous proposals from private investigators about how to catch claimants exaggerating or even lying about the extent of their personal injuries. May you direct a private investigator to engage in the following activities from a van parked on a public street outside of a plaintiff’s home: (a) use a telephoto lens to videotape plaintiff’s activities? (b) use a camera mounted on top of the van to look over a hedge on plaintiff’s property line? (c) use a camera to look through a window into the plaintiff’s home to record plaintiff’s activity in their home? (d) use a special infrared camera focusing on the plaintiff’s bedroom to determine the validity of their physical disabilities? (e) if you have no contact with the investigator and do not direct them, but they do perform “sleazy” investigation (the old trick of letting the air out of the claimant’s tires on his car or talking directly with a represented claimant), what should you do?

- IX. You are a claimant's lawyer and there is a disgruntled employee within a company that employed your injured client. You receive a plain brown envelope addressed to you in unfamiliar handwriting. The first page is a short note in the same handwriting saying simply, "you need to see these and don't tell anyone how you got them." The envelope contains three documents. From your very quick review, you can see that these are copies of emails from the company's lawyer to the CFO. In the first email you quickly scan, the lawyer chastised the CFO for having destroyed several responsive documents after the workers' compensation claim began in litigation. The lawyer for the company advised the CFO about the severe penalties of spoliation.
- A. Must you refrain from reading the other emails and using them in the litigation?
- B. About an hour after you open the plain brown envelope, you receive an email from your adversary's lawyer. It was clear when you began reading the email that it was intended by the opposing lawyer to go just to the company's CFO. It is marked privileged and confidential, and the first line reads, "I just learned that you destroyed more documents even though I told you never to do that again." Must you refrain from reading the remainder of the email and using it in the litigation?

CRITICIZING JUDGES

Basic Principles

Hypothetical 4

A state bar commission issuing recommendations about lawyers' public communications has now turned to lawyers' criticism of judges. You have been giving some thought to this issue before the commission's next meeting.

- (a) Should lawyers be totally prohibited from criticizing judicial opinions?

NO

- (b) Should lawyers be totally prohibited from criticizing judges?

NO

- (c) Should any limitations on lawyers' criticism of judges apply to nonpublic criticism?

MAYBE

- (d) Should any limit on lawyers' public communications about judges be based on the lawyers' subjective belief in the truth of what she says (as opposed to an objective standard)?

NO (PROBABLY)

- (e) Should any limit on lawyers' public communications about judges apply only to the wording used (as opposed to the substance of the statement)?

NO

Analysis

Introduction

Nonlawyers' criticism of judges implicates basic First Amendment issues, without the ethics overlay.

- See, e.g., Conservatives, Liberals, Media Advocates Rally Behind Man Jailed For Criticizing Indiana Judge, FoxNews.com, Mar. 3, 2013 ("A group of free-speech advocates is rallying behind an Indiana inmate serving two years for

his online rants against a judge who took away his child-custody rights during a divorce case."; "There's no disputing that Daniel Brewington's words were strong and angry -- found in hundreds of emails over the course of the related, two-year divorce case."; "But the group is asking the state's highest court to decide whether they indeed amounted to criminal behavior."; "Brewington was convicted in 2011 of perjury, intimidating a judge and attempting to obstruct justice -- with the attorney general's office successfully arguing that his threat was to expose the judge to 'hatred, contempt, disgrace or ridicule.'"; "However, the group recently filed an amicus brief with the state Supreme Court arguing an appeals court decision in January upholding the felony intimidation charge threatens constitutionally protected speech about public officials."; "The court will decide after the March 11 filing deadline on whether to take up the case."; "The appeals court argued that some of Brewington's claims against Judge James D. Humphrey were false. It also argued their truthfulness were not necessarily relevant to prosecution because the harm, which in this case was striking fear in the victim, occurred 'whether the publicized conduct is true or false,' according to Reason magazine."; "The group is led by University of California Los Angeles law professor Eugene Volokh and includes conservative lawyer James Bopp, a former executive director of the Indiana Civil Liberties Union, the Indiana Association of Scholars, The Indianapolis Star and the James Madison Center for Free Speech."; "Volokh wrote in the brief that the appeals court decision 'endangers the free speech rights of journalists, policy advocates, politicians and ordinary citizens.'"; "In his rants, Brewington called the judge a 'child abuser' and 'corrupt' and accused him of unethical or illegal behavior.").

The ethics rules' limit on lawyers' public criticism of judges includes phrases drawn from another area of the law, but applied very differently.

ABA Model Rule 8.2 limits what lawyers may say about judges.

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

ABA Model Rule 8.2(a) (emphasis added). Interestingly, none of the comments to ABA Model Rule 8.2 actually discuss this black-letter rule. Instead, the first two of the three comments to this Rule deal with judges running for election, and the third comment encourages lawyers to defend unjustly criticized judges.

The ABA Model Code of Professional Responsibility also addressed this issue, and explained one of the reasons why lawyers should refrain from criticizing judges -- because judges are essentially unable to defend themselves.

Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

ABA Model Code of Prof'l Responsibility EC 8-6 (1980) (footnotes omitted; emphases added).

The Restatement follows the same basic formulation.

A lawyer may not knowingly or recklessly make publicly a false statement of fact concerning the qualifications or integrity of an incumbent of a judicial office or a candidate for election to such an office.

Restatement (Third) of Law Governing Lawyers § 114 (2000) (emphasis added).

ABA's Reliance on the *New York Times* Standard

For some reason, the ABA looked to the law of defamation when articulating its limit of lawyer criticism of judges.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 298 (1964), the United States Supreme Court held that a public official could not recover for defamatory statements unless the public official established that the defendant had made a false and defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." In later cases, the United States Supreme Court explained that "reckless disregard" means a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Both standards (knowing falsity and reckless disregard) are purely subjective standards. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974).

Thus, the *New York Times* constitutional malice standard focuses only on defendants' subjective belief in the truth of their statements. Because opinions can never be objectively proven true or false, they cannot support a defamation action under this standard.

Some courts use defamation principles when interpreting the identical language in Rule. 8.2.

- *In re Oladiran*, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the "Dishonorable Susan R. Bolton," and which contained the following language: "This motion is filed by [Oladiran], pursuant to the law of, what goes around comes around. Judge Bolton, I just read your Order and am very disappointed in the fact that a brainless coward like you is a federal judge. . . . Finally, to Susan Bolton, we shall meet again you know where

[followed by a smiley face]." (emphases added); finding a violation of Rule 8.2, but requiring evidence of falsity; "Ethical Rule 8.2(a) applies to statements about judges: 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge[.]' ER 8.2(a). This Circuit has made clear that 'attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false[.]' Yagman, 55 F.3d at 1438 [Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)]. It follows that the statements must be 'capable of being proved true or false; statements of opinion are protected by the First Amendment[.]' Id."; "Mr. Oladiran's motion refers to Judge Bolton as 'dishonorable' and a 'brainless coward.' These statements do not have 'specific, well-defined meanings [that] describe objectively verifiable matters,' but instead appear to be meant in a 'loose, figurative sense.' Id. The statements constitute 'rhetorical hyperbole, incapable of being proved true or false,' and 'convey nothing more substantive than [Oladiran's] contempt for Judge [Bolton].' Id. at 1440. As a result, they are protected by the First Amendment and cannot be found to violate Ethical Rule 8.2(a)."; "Without proof of falsity, Mr. Oladiran's motion is not sanctionable for impugning the integrity of Judge Bolton.").

- Smith v. Pace, 313 S.W.3d 124, 126-27 (Mo. 2010) (reversing a jury's conviction of a lawyer for a criminal contempt resulting from a lawyer's filing of a pleading critical of the presiding judge at the trial court; explaining the factual background; "Smith was prosecuted for criminal contempt of court for strong words he used in petitioning the court of appeals for a writ seeking to quash a subpoena issued for a grand jury in Douglas County. Referring to the prosecuting attorney and the judge overseeing the grand jury, Smith wrote: 'Their participating in the convening, overseeing, and handling the [sic] proceedings of this grand jury are, in the least, an appearance of impropriety and, at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do so.'"; holding that "[w]ith respect to lawyers, however, it is not nearly as clear what protection the First Amendment provides. The United States Supreme Court held that states may use a lesser standard than that applied to non-lawyers to decide if a lawyer should be disciplined for his or her speech."; "Since Gentile [Gentile v. State, 501 U.S. 1030 (1991)], numerous state courts have considered the regulation of lawyer speech. Almost all of these cases, however, have involved situations in which a lawyer is disciplined under his or her state's ethics rules."; "In any event, cases involving lawyers' statements require some knowledge of falsity or, at the very least, a reckless disregard for whether the false statement was true or false. The disciplinary process may be a more suitable forum than a contempt proceeding for ascertaining a lawyer's knowledge as to the truth or

falsity of the lawyer's statements. Monetary sanctions pursuant to Rule 55.03(c) rather than incarceration also may be more suitable." (footnote omitted); finding that the jury was not properly instructed, because the instructions did not require a mental state; "There can be no doubt that the First Amendment protects truthful statements made in judicial proceedings. It is essential, therefore, to prove that the lawyer's statements were false and that he either knew statements were false or that he acted with reckless disregard of whether these statements were true or false. In this case, there was no mental state (mens rea) requirement in the jury instruction. The instruction did not require the jury to find that Smith knew his statements were false or that Smith showed reckless disregard for the truth. The only contested issue the instruction asked the jury to find was whether Smith's written statements to the court of appeals 'degraded and made impotent the authority of the Circuit Court of Douglas County, Associate Circuit Division and impeded and embarrassed the administration of justice.'" (footnote omitted)).

- In re Green, 11 P.3d 1078, 1085 (Colo. 2000) (assessing a lawyer's pleading indicating that a judge was a "racist and bigot"; holding that such statements were pure opinion and therefore incapable of punishment).
- Standing Comm. on Discipline of U.S. Dist. Court v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995) (addressing a lawyer's statement that a judge was "ignorant, ill-tempered, buffoon, sub-standard human, right-wing fanatic, a bully, one of the worst judges in the United States" (internal quotations omitted); declining to impose any sanctions, because the lawyer's statements were rhetorical hyperbole and opinion).

Other courts have explicitly rejected application of the defamation law standard -- instead adopting an objective test in analyzing Rule 8.2.

- Florida Bar v. Ray, 797 So. 2d 556, 558-59 (Fla. 2001), cert. denied, 535 U.S. 930 (2002) ("Although the language of rule 4-8.2(a) closely tracks the subjective "actual malice" standard of New York Times, following a review of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct, we conclude that a purely subjective New York Times standard is inappropriate in attorney disciplinary actions. The purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another's defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.").

- In re Dixon, 994 N.E.2d 1129, 1133-34, 1134, 1136, 1137, 1138 (Ind. 2013) (holding that a lawyer cannot be disciplined for criticizing a judge in filing required support in a motion to disqualify the judge; "The parties dispute the standard that should be used to determine whether an attorney's statement about a judge violates Rule 8.2(a)."; "One possibility is the 'subjective' standard enunciated in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). . . . Although Respondent cites treatises favoring the 'subjective' New York Times test, there appear to be few, if any, attorney discipline actions that apply the Harte-Hanks [Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657 (1989)] test (i.e., serious doubts about the truth of the statement; high degree of awareness of probable falsity)."; "This Court has never decided squarely whether a subjective or objective test applies to the truth or falsity of attorney statements about judges. Our prior cases, though, imply a rejection of the 'subjective' standard applied in defamation cases, and have applied what is in practice an 'objective' test."; "The prohibition against making a statement about a judge that the lawyer knows to be false is fairly straightforward, even though such actual knowledge might be difficult to prove in many cases. Not surprisingly, it is the prohibition against making a statement about a judge with reckless disregard as to its truth or falsity -- as charged in this case -- that is more often disputed. For such cases, we are now persuaded to join the majority view of other jurisdictions and expressly adopt an objective standard for determining when a statement made by an Indiana attorney about a judicial officer violates Rule 8.2(a)."; "Respondent's statements were made not just within, but as material allegations of, a judicial proceeding seeking a change of judge on three grounds, each of which affirmatively requires alleging personal bias or prejudice on the part of the judge."; "But even though Rule 8.2 holds attorneys to a higher disciplinary standard than New York Times does in defamation cases, we also recognize that attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients -- particularly on issues, as here, that require criticism of a judge or a judge's ruling."; "We will therefore interpret Rule 8.2(a)'s limits to be the least restrictive when an attorney is engaged in good faith professional advocacy in a legal proceeding requiring critical assessment of a judge or a judge's decision.").
- Board of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1014, 1016 (Wyo. 2009) (explaining that "[d]eterminations of recklessness under Rule 8.2(a) are made using an objective, rather than a subjective standard. . . . In other words, the standard is whether a reasonable attorney would have made the statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements."; "'Reckless disregard for the truth' does not mean quite the same thing in the context of attorney discipline proceedings as it does in libel and slander cases." (citation omitted); "Numerous courts agree with Graham [In re

Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990)] that the standard for judging whether an attorney has acted with reckless disregard for the truth under rules equivalent to Rule 8.2 is an objective standard, and that the attorney's failure to investigate the facts before making the allegation may be taken into consideration.").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 80 (Iowa 2008) (explaining that "[t]he Supreme Court has not applied the New York Times test to attorney disciplinary proceedings based on an attorney's criticism of a judge. It appears a majority of jurisdictions addressing this issue has concluded the interests protected by the disciplinary system call for a test less stringent than the New York Times standard. . . . Courts in these jurisdictions have held that in disciplining an attorney for criticizing a judge, 'the standard is whether the attorney had an objectively reasonable basis for making the statements.'" (citation omitted).
- In re Cobb, 838 N.E.2d 1197, 1205, 1212 (Mass. 2005) (assessing a lawyer's claim that his adversary "must have some particular power or influence with the trial court judge" because the judge had not sanctioned what the lawyer thought was his adversary's unethical conduct (internal quotations omitted); noting the debate among states about the standard for punishing lawyers; "At least three States have said that disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purposes of First Amendment analysis. They apply the 'actual malice' or subjective knowledge standard of New York Times Co. v. Sullivan, 376 U.S. 254, 279-281, 84 S. Ct. 710, 11 L.Ed. 2d 698 (1964), to such proceedings [listing cases from Colorado, Oklahoma, Tennessee and California] A majority of State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements."; adopting the majority view).
- United States Dist. Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (upholding a six month suspension of a lawyer who accused a judge of altering a transcript; "In the defamation context, we have stated that actual malice is a subjective standard testing the publisher's good faith in the truth of his or her statements. . . . The Supreme Courts of Missouri and Minnesota have determined that, in light of the compelling state interests served by RPC 8.2(a), the standard to be applied is not the subjective one of New York Times, but is objective. . . . We agree. While the language of WSRPC 8.2(a) is consistent with the constitutional limitations placed on defamation actions by New York Times, 'because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate. . . . Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.").

- Committee on Legal Ethics of W. Va. State Bar v. Farber, 408 S.E.2d 274, 285 (W. Va. 1991) ("There is courage, and then there is pointless stupidity. No matter what the evidence shows, respondent never admits that he is wrong. Indeed, sincere personal belief will, in the sweet bye and bye, be an absolute defense when we all stand before the pearly gates on that great day of judgment, but it is not a defense here when the respondent's deficient sense of reality inflicts untold misery upon particular individuals and damage upon the legal system in general."), cert. denied, 502 U.S. 1073 (1992).

Decisions Punishing Lawyers for Criticizing Judges

Numerous courts have sanctioned lawyers¹ for criticizing judges. Some of these decisions rely on the ethics rules, while others rely on statutes, rules or the court's inherent powers.

- Lawrence Buser, Memphis Lawyer Vows To Fight 60-Day Suspension For Criticizing Judge, Commercial Appeal, Jan. 6, 2013 ("Few colleagues have ever accused veteran Memphis lawyer R. Sadler Bailey of being subtle, including the three-member disciplinary panel that recently recommended he be suspended for 60 days."; "The suspension, which Bailey plans to appeal, stemmed from the 'disrespect and sarcasm' in comments he made to Circuit Court Judge Karen Williams during a medical malpractice trial in 2008 that the panel described as 'contentious, combative and protracted.'"; "Bailey called opposing counsel a liar in court and told Williams she might 'set a world record for error' in her rulings."; "'The primary issue before this panel is whether, even under very difficult circumstances, an attorney can justify making rude, insulting, disrespectful and demeaning statements to the judge during open court,' said the opinion of the Tennessee Board of Professional

¹ Most cases, ethics opinions and disciplinary actions involve lawyers' criticism of judges handling cases in which the lawyer is representing a party. However, in some situations courts have had to decide whether a lawyer who was also a party falls under the ethics rules' restrictions. See, e.g., Polk v. State Bar of Texas, 374 F. Supp. 784, 786, 788 (N.D. Tex. 1974) (overturning the Texas Bar reprimand of a lawyer who made the following statement in his capacity as the DUI defendant: This was "one more awkward attempt by a dishonest and unethical district attorney and a perverse judge to assure me an unfair trial."; "This court rejects the contention urged by the defendants that in order to maintain the general esteem of the public in the legal profession both professional and non-professional conduct of an attorney in all matters must be above and beyond that conduct of non-lawyers. While this "elitist" conception may be applicable in non-First Amendment circumstances, the interest of the State in maintaining the public esteem of the legal profession does not rationally justify disciplinary action for speech which is protected and is outside the scope of an attorney's professional and official conduct. Where the protections of the Constitution conflict with the efficiency of a system to ensure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform. For the foregoing reasons this court is of the opinion that the reprimand if issued would be violative of Polk's First Amendment rights.").

Responsibility panel."; "We do not believe that such conduct can be justified no matter how worthy or vulnerable the attorney's client may be, or how poorly the judge may be performing or how difficult or unethical the adversary counsel may be. . . . Simply abusing or insulting the court to get rulings in your favor cannot ever be endorsed or justified by our rules and our system of professional conduct.").

- Disciplinary Counsel v. Shimko, 983 N.E.2d 1300, 1302, 1303, 1303-04, 1304, 1305, 1306, 1307, 1309 (Ohio 2012) (in a 4-3 decision, suspending a lawyer for one year based on the lawyer's criticism of a judge, but staying the suspension; explaining that the lawyer Shimko made the following derogatory comment about the trial judge in the courtroom; "Mr. Shimko: Well, Your Honor, I think we have all avoided speaking about the 400-pound gorilla elephant that's in the room. And I still must go on the record to say that the Angelini Defendants have no confidence that they can obtain a fair trial in this case."; "Mr. Shimko: Unless they call them in their direct case-in-chief, and that's what they did. And I'm entitled to cross-examine in his case-in-chief, Your Honor. The Court: I appreciate your position. Mr. Shimko: Don't appreciate yours."; also explaining that Shimko made the following statements in briefs: "When the trial court realized that the Answers to the Interrogatories mandated a judgment in favor of Jeffrey Angelini and against First Federal, the trial court's bias once again surfaced and he contrived a means to find that the jury was now somehow confused, even though they had followed his instructions to the letter. The court's ruling, motivated by its own agenda, was nothing but an abuse of discretion. Throughout the trial, the trial judge was so vindictive in his attitude toward appellant's counsel that he became an advocate for First Federal. In short, the trial judge was trying First Federal's counsel's case for him."; "The absurdity of the trial court's conduct in this instance ought to underscore the whimsical lengths to which it was willing to go to deny Jeffrey Angelini his verdict. In fact, the trial court felt that its contention that the jury was confused was so thin that it had to resort to manufacturing allegations of attorney misconduct to obscure his own abuse of discretion. When the trial court realized that the jury had returned a verdict for Jeffrey Angelini, he arbitrarily disregarded the protocol he had originally adopted, and fabricated allegations of attorney misconduct to camouflage his own unreasonable and injudicious conduct."; explaining that the lawyer defended himself by arguing that he believed his statements to be true; "Shimko does not deny writing any of the above comments in his briefs or affidavits. He indicates that he believed them to be true. He denies that he intended them to impugn Judge Markus's integrity and claims that to find a violation of Prof. Cond. R. 8.2(a) and 8.4(h) would chill the right of future litigants to file affidavits of bias. Shimko argues that he had a 'firmly held belief that Judge Markus violated his duty as a judge and that Shimko had a right to complain about the conduct of Judge Markus. He refers to Gardner [Disciplinary Counsel v. Gardner], 793 N.E. 2d 425 (Ohio 2003)], which cited

with approval the rationale from courts of other states that 'an objective malice standard strikes a constitutionality permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.'" (citation omitted); rejecting a subjective analysis; "The board found such a subjective test unworkable for the test of falsity or reckless disregard of it. We note that the difference between acceptable fervent advocacy and misconduct is not always distinguishable."; ultimately concluding that the lawyer's statements were false, but not dealing with the reckless disregard standard; "The board considered numerous statements concerning Judge Markus, which Shimko admits to writing. The board concluded that these statements were proved by clear and convincing evidence to be unreasonable and objectively false with a mens rea of recklessness."; "There is, admittedly, a fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science."; "Shimko could have and should have presented his allegations one at a time, pointing to the record and using words that were powerful, but less heated. It is his choice of language, not his right to allege bias in his affidavits and in his appellate briefs, that brought him before the Disciplinary Counsel."; three judges joined in the dissent, which included the following criticism of the majority opinion: "[T]he majority does damage to the bright-line Gardner rule by waxing poetic about the 'fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science.' . . . I do not agree that the line is so fine.").

- John Caber, Albany District Attorney Censured for Criticism of Judge in a Pending Case, N.Y. L.J., May 25, 2012 ("An upstate appellate panel has censured Albany County District Attorney P. David Soares for his 'reckless and misleading' criticism of a local judge who had removed him from a case and appointed a special prosecutor."; "[T]he district attorney released the following statement: 'Judge Herrick's decision is a get-out-of-jail-free card for every criminal defendant in New York State. His message to defendants is: 'if your District Attorney is being too tough on you, sue him, and you can get a new one.' The Court's decision undermines the criminal justice system and the DAs who represent the interest of the people they serve. We are seeking immediate relief from Judge Herrick's decision and to close this dangerous loophole that he created.'").
- Scialdone v. Commonwealth, 689 S.E.2d 716, 718 (Va. 2010) (reversing and remanding a contempt finding entered by a trial court judge against two lawyers for allegedly tampering with evidence and violating a Virginia statute by using a Yahoo username "westisanazi" during a case presided over by Judge Patricia West; explaining that Judge West found (among other things) that the lawyers violated Virginia Code Section 18.2-456 [which indicates that

the "courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following: . . . (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect to any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding"]; ultimately holding that the trial court had not provided sufficient due process before holding the lawyers in contempt).

- Moseley v. Virginia State Bar ex rel. Seventh Dist. Comm., 694 S.E.2d 586, 588, 589 (Va. 2010) (suspending for six months a lawyer for criticizing a judge; "Moseley sent an email to colleagues in which he stated that the monetary sanctions award entered by the circuit court judge was 'an absurd decision from a whacko judge, whom I believe was bribed,' and that he believed that opposing counsel was demonically empowered." (emphasis added); "Moseley clearly made derogatory statements about the integrity of the judicial officer adjudicating his matters and those statements were made either with knowing falsity or with reckless disregard for their truth or falsity. Therefore we hold that Moseley's contentions that Rule 8.2 is void for vagueness and that his statements were not a proper predicate for discipline under that Rule are without merit.").
- In re Oladiran, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the "Dishonorable Susan R. Bolton," and which contained the following language: "'This motion is filed by [Oladiran], pursuant to the law of, what goes around comes around. Judge Bolton, I just read your Order and am very disappointed in the fact that a brainless coward like you is a federal judge. . . . Finally, to Susan Bolton, we shall meet again you know where [followed by a smiley face]." (emphases added); finding a violation of Rule 8.2, but requiring evidence of falsity; "Ethical Rule 8.2(a) applies to statements about judges: 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge[.]' ER 8.2(a). This Circuit has made clear that 'attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false[.]' Yagman, 55 F.3d at 1438 [Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)]. It follows that the statements must be 'capable of being proved true or false; statements of opinion are protected by the First Amendment[.]' Id."; "Mr. Oladiran's motion refers to Judge Bolton as 'dishonorable' and a 'brainless coward.' These statements do not have 'specific, well-defined meanings [that] describe objectively verifiable matters,' but instead appear to be meant in a 'loose, figurative sense.' Id. The statements constitute 'rhetorical hyperbole, incapable of being proved true or false,' and 'convey

nothing more substantive than [Oladiran's] contempt for Judge [Bolton].' Id. at 1440. As a result, they are protected by the First Amendment and cannot be found to violate Ethical Rule 8.2(a)."; "Without proof of falsity, Mr. Oladiran's motion is not sanctionable for impugning the integrity of Judge Bolton.").

- Board of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1013, 1014, 1016 (Wyo. 2009) (suspending a lawyer for two months and awarding costs of the proceedings, for a number of acts of wrongdoing, including alleging that the presiding judge must have had an improper ex parte communication with the adversary; rejecting the lawyer's argument that she was merely stating an opinion; finding that the statement accused the judge of actually engaging in ex parte communications; also rejecting a lawyer's argument that "even if the statements were false, she did not know them to be false, and under the applicable objective standard, she did not recklessly disregard the truth"; explaining that "[d]eterminations of recklessness under Rule 8.2(a) are made using an objective, rather than a subjective standard. . . . In other words, the standard is whether a reasonable attorney would have made the statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements."; "'Reckless disregard for the truth' does not mean quite the same thing in the context of attorney discipline proceedings as it does in libel and slander cases." (citation omitted); "Numerous courts agree with Graham [In re Disciplinary Action Against Graham], 453 N.W.2d 313 (Minn. 1990)] that the standard for judging whether an attorney has acted with reckless disregard for the truth under rules equivalent to Rule 8.2 is an objective standard, and that the attorney's failure to investigate the facts before making the allegation may be taken into consideration.").
- Columbus Bar Ass'n v. Vogel, 881 N.E.2d 1244, 1247 (Ohio 2008) (suspending for two years an Ohio lawyer for interfering with a trial by insisting that he represented the criminal defendant whom he was never appointed to represent; noting that the lawyer told the judge: "This is an attempt to force this young man [Winbush] to make a plea for ten years to something that he didn't do. And forgive me, but this is a result of collusion between yourself and the prosecutor's office.").
- Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 79, 80, 82, 90 (Iowa 2008) (suspending for three months a lawyer (and former judge) for accusing the judge handling a DUI case against him of "not being honest" in statements to a reporter; also analyzing the lawyer's second drunk driving charge, and finding that the offense "reflected adversely on his fitness to practice law"; explaining that "[w]hether an attorney's criminal behavior reflects adversely on his fitness to practice law is not determined by a mechanical process of classifying conduct as a felony or a misdemeanor";

explaining that in any analysis of the lawyer's criticism of a judge, "truth is an absolute defense" (citation omitted); further explaining that "[t]he Supreme Court has not applied the New York Times test to attorney disciplinary proceedings based on an attorney's criticism of a judge. It appears a majority of jurisdictions addressing this issue has concluded the interests protected by the disciplinary system call for a test less stringent than the New York Times standard. . . . Courts in these jurisdictions have held that in disciplining an attorney for criticizing a judge, 'the standard is whether the attorney had an objectively reasonable basis for making the statements'" (citation omitted); ultimately concluding that "[w]e are persuaded by the rationale given in support of applying an objective standard in cases involving criticism of judicial officers"; ultimately finding that the lawyer's statements about the judge could result in discipline; "We conclude Weaver did not have an objectively reasonable basis for his statement that Judge Dillard was not honest when he stated his reasons for sentencing Weaver to the Department of Corrections. Therefore, Weaver's conduct reflects a reckless disregard for the truth or falsity of his statement. Accordingly, this statement is not protected speech"; "Weaver did not claim he was expressing an opinion that Judge Dillard was 'intellectually dishonest,' in the sense that Judge Dillard's sentencing decision might have been based upon an unstated premise or hidden bias. . . . Instead, Weaver accused a judge of a specific act of dishonesty which he characterized at the hearing before the Commission as a 'knowing concealment' of the judge's reasons for sentencing him. He was utterly unable to provide a reasonable basis for this charge at the hearing. Under these facts, we conclude that the First Amendment does not protect Weaver from being sanctioned for professional misconduct.").

- Jordana Mishory, Attorney who pleaded guilty to disparaging remarks about a judge says they fall under protected speech, Daily Business Review, July 16, 2008 ("Fort Lauderdale criminal defense attorney Sean Conway agreed he was in the wrong when he called a controversial Broward judge an 'evil, unfair witch' and 'seemingly mentally ill' two Halloweens ago.").
- Williams & Connolly, LLP v. People for Ethical Treatment of Animals, Inc., 643 S.E.2d 136, 138-39, 142, 144, 145, 146 (2007) (affirming the entry of sanctions against several lawyers from Williams & Connolly for having filed a pleading accusing Fairfax County Circuit Court Judge David T. Stitt of allegedly improper ex parte communications with PETA, Williams & Connolly's client's adversary; noting that pleadings filed by Williams & Connolly lawyers accused Judge Stitt of "inexcusable" consideration of PETA's ex parte communication and of "ignoring the basic tenets of contempt law"; "Initially, we are compelled to observe that the Feld Attorneys' [Williams & Connolly and a Virginia firm] brief filed with this Court contains a striking omission. The Feld Attorneys do not mention the fact that in the motions, they used language that directly accused Judge Stitt of unethical

conduct. These allegations of unethical conduct were stark and sweeping, stating that Judge Stitt '[v]iolated [h]is [e]thical [o]bligations,' 'ignored his ethical responsibilities,' and 'acted directly counter to [those ethical responsibilities].' We therefore must consider the Feld Attorneys' arguments in the additional context of those written statements contained in the motions."; "Although the Canons of Judicial Conduct are not a source of law, we nevertheless consider the cited provision from the Canons because they are 'instructive' on a central issue before us, namely, whether the Feld Attorneys had an objectively reasonable basis in law for contending that Judge Stitt violated his ethical duties in considering the ex parte petition and in issuing the rule to show cause."; "Reasonable inquiry by the Feld Attorneys would have shown that the routine practice of the Circuit Court of Fairfax County is to consider ex parte petitions for a rule to show cause and to issue rules to show cause upon the filing of a sufficient affidavit by the petitioning party. At the time the Feld Attorneys made the motions, there was a long-standing published order entered in the Circuit Court of Fairfax County stating: 'It is the practice of this Court to issue summons on a rule to show cause upon affidavit or ex parte evidence without notice. . . .' The published order in Alward, available upon simple legal research, would have informed the Feld attorneys that Judge Stitt merely followed the routine practice of the Circuit Court of Fairfax County when he considered the petition and issued the rule to show cause. In addition, the record shows that counsel for PETA obtained this same information concerning this routine practice of the Circuit Court of Fairfax County by placing a telephone call to a deputy clerk of the circuit court."; "The fact that the Feld Attorneys were seeking the recusal of the trial judge did not permit them to use language that was derisive in character. Yet they liberally employed such language. As stated above, the Feld Attorneys alleged in the motion to recuse that Judge Stitt 'ignore[ed] the basic tenets of contempt law,' 'create[d] an appearance, at the very least, that [he] will ignore the law in order to give a strategic advantage to PETA,' and 'ignored his ethical responsibilities [and] acted directly counter to them.'"; "We hold that the record before us demonstrates that the Feld Attorneys' motions were filed for an improper purpose and, thus, violated clause (iii) of the second paragraph of Code § 8.01-271.1. Contemptuous language and distorted representations in a pleading never serve a proper purpose and inherently render that pleading as one 'interposed for [an] improper purpose,' within the meaning of clause (iii) of the second paragraph of Code § 8.01-271.1. Such language and representations are wholly gratuitous and serve only to deride the court in an apparent effort to provoke a desired response."; upholding that Judge Stitt's imposition of \$40,000 sanctions against the lawyers, and revoking pro hac vice admission of a Williams & Connolly lawyer).

- Brandon Glenn, Lawyer's 'Happy Meal' comment eats at judge, Crain's Chicago Business, May 29, 2007 ("A Chicago lawyer's comment to a

bankruptcy judge in court has gotten him in some hot water, or perhaps more appropriately, hot oil. 'I suggest with respect, Your Honor, that you're a few french-fries short of a Happy Meal in terms of what's likely to take place,' William Smith, a partner with Chicago-based McDermott Will & Emery LLP, said during a hearing May 7 in Miami in front of Judge Laurel Myerson Isicoff, according to court documents. Mr. Smith's comment represents 'conduct that appears to be inconsistent with the requirements of professional conduct,' Judge Isicoff wrote in an order for Mr. Smith to appear before her June 25 'to show cause why he should not be suspended from practice before this court.' Though he's not licensed to practice in Florida, Mr. Smith has been granted permission to appear in this particular case. Judge Isicoff could revoke that permission at the June 25 hearing. Mr. Smith, a clerk for the court, both parties in the case and a lawyer from the opposing firm did not return calls seeking comment. In a statement, McDermott Will & Emery said: 'We expect our lawyers to observe established rules and protocols of professional conduct in the courtroom. Any departure from that standard is of concern to us and we look forward to a resolution of this matter.'" ((emphasis added)).

- Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281, 1284-86 (Pa. 2006) (disbarring a Pennsylvania lawyer for an escalating series of criticisms of a judge; noting that the criticisms began in 1997, and included such statements as allegations that the judge "'has a personal bias or prejudice,'" "'has knowledge of criminal misconduct in this matter,'" "'engages in criminal misconduct,'" engages in conduct that "'was similar to that of priests who molested young boys,'" is a "'despicable person'" who was "'perpetrating more harm to America than the Al Quida [sic] bombers did on September 11, 2001.'" (internal citations omitted)), cert. denied, 549 U.S. 1181 (2007).
- Taboada v. Daly Seven, Inc., 636 S.E.2d 889, 890 (Va. 2006) (suspending a well-known Roanoke, Virginia, lawyer's right to practice before the Virginia Supreme Court for one year and fining him \$1,000; explaining that the Virginia Supreme Court held that a well-known Virginia lawyer had violated the Virginia equivalent of Rule 11 by including intemperate language in a petition for rehearing in the Virginia Supreme Court; as the Virginia Supreme Court explained, "Barnhill made numerous assertions in the petition for rehearing regarding this Court's opinion. Barnhill described this Court's opinion as 'irrational and discriminatory' and 'irrational at its core.' He wrote that the Court's opinion makes 'an incredible assertion' and 'mischaracterizes its prior case law.' Barnhill states: 'George Orwell's fertile imagination could not supply a clearer distortion of the plain meaning of language to reach such an absurd result.' Barnhill argued in the petition that this Court's opinion 'demonstrates so graphically the absence of logic and common sense.' Barnhill wrote in boldface type that 'Ryan Taboada may be the unfortunate victim of a crazed criminal assailant who emerged from the dark to attack him.

But Daly Seven will be the unfortunate victim of a dark and ill-conceived jurisprudence.' Barnhill also included the following statement in the petition: "[I]f you attack the King, kill the King; otherwise, the King will kill you."").

- Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 512 n.4, 514 n.7 (Conn.) (assessing a lawyer's letter to the court staff accusing the judge of "abuses" and "extortion," and calling the judge "not merely an embarrassment to this community but a demonstrated financial predator of its incapacitated and often dying elderly whose interests he is charged with the protection" (internal quotations omitted); holding that the disciplinary authorities bear the "initial burden of evidence to prove the ethics violation by clear and convincing evidence," after which the lawyer must "provide[] evidence that he had an objective, reasonable belief that his statements were true"; finding that the lawyer had failed to defend his statements, and could be punished despite acting pro se as a conservator of his mother's estate; rejecting the lawyer's First Amendment argument; affirming a public reprimand), cert. denied, 549 U.S. 823 (2006).
- Anthony v. Va. State Bar ex rel. Ninth Dist. Comm., 621 S.E.2d 121, 123 (Va. 2005) (affirming a public reprimand of Virginia lawyer Joseph Anthony, who had written several letters directly to the Virginia Supreme Court, accusing its justices of "'an extreme desire/need to protect some group and/or person'" because the court had declined to disclose what Anthony alleged to have been improper ex parte communications between the Supreme Court justices and parties in a case that he was handling; rejecting Anthony's First Amendment claims), cert. denied, 547 U.S. 1193 (2006).
- Pilli v. Va. State Bar, 611 S.E.2d 389, 392, 397 (Va.) (suspending for 90 days a lawyer who filed a pleading in which he accused a state court judge of "negligently and carelessly" failing to consider matters, "'skewing . . . the facts,'" and "'failing to tell the truth'"; noting that the lawyer wrote that "I cannot tolerate a Judge lying He is flat out inaccurate, and wrong." (internal quotations omitted); upholding a 90-day suspension; noting that the pleading attacked the judge's "qualifications and integrity" in "the most vitriolic of terms" -- even though Rule 8.2 goes only to the substance of the criticism and not the style; finding that the lawyer's statements were fact rather than opinion, and therefore concluded that "we need not address the issue whether statements of pure opinion, in the absence of any factual allegations, are subject to disciplinary review under Rule 8.2"; not addressing the lawyer's First Amendment argument, because the lawyer had not raised it before the disciplinary authorities), cert. denied, 546 U.S. 977 (2005).
- In re Cobb, 838 N.E.2d 1197, 1205, 1212 (Mass. 2005) (assessing a lawyer's claim that his adversary "must have some particular power or influence with the trial court judge" because the judge had not sanctioned what the lawyer

thought was his adversary's unethical conduct (internal quotations omitted); noting the debate among states about the standard for punishing lawyers; "At least three States have said that disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purposes of First Amendment analysis. They apply the 'actual malice' or subjective knowledge standard of New York Times Co. v. Sullivan, 376 U.S. 254, 279-281, 84 S. Ct. 710, 11 L.Ed. 2d 698 (1964), to such proceedings [listing cases from Colorado, Oklahoma, Tennessee and California] A majority of State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements."; adopting the majority view).

- In re Nathan, 671 N.W.2d 578, 581-82, 583 (Minn. 2003) (indefinitely suspending a lawyer who wrote that one judge was "a bad judge" who "substituted his personal view for the law" and "won election to the office of judge by appealing to racism"; also noting that "[t]wo days later Nathan sent the judge a letter stating that if the judge did not schedule a hearing and provide 10 items of relief he was requesting, he would publish an article in area newspapers. Enclosed was an article entitled The Young Sex Perverts with the judge's name prominently displayed below the title. Nathan published the article in the St. Paul Pioneer Press as a paid advertisement on November 3, 2000, shortly before election day.").
- In re Wilkins, 777 N.E.2d 714, 715-16 (Ind. 2002) (addressing the following footnote from the brief filed by an experienced appellate lawyer from the large Indianapolis, Indiana, law firm of Ice Miller who was signing as local counsel; "Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."; initially suspending Wilkins for thirty days, although later reducing the punishment to a public reprimand. In re Wilkins, 782 N.E.2d 985 (Ind.), cert. denied, 540 U.S. 813 (2003)).
- Hanson v. Superior Court, 109 Cal. Rptr. 2d 782 (Cal. Ct. App. 2001) (upholding contempt finding against a lawyer who told the jury that his criminal defense client had not received a fair trial).
- In re Delio, 731 N.Y.S.2d 171 (N.Y. App. Div. 2001) (lawyer censured for calling judge irrational, pompous, and arrogant).
- In re McClellan, 754 N.E.2d 500 (Ind. 2001) (publicly reprimanding lawyer for filing a pleading in which the lawyer criticized a decision as being like a bad lawyer joke).

- In re Dinhofer, 690 N.Y.S.2d 245, 246 (N.Y. App. Div. 1999) (suspending lawyer for 90 days for telling a judge she was "corrupt" in a phone conference).
- Idaho State Bar v. Topp, 925 P.2d 1113 (Idaho 1996) (public reprimand of lawyer for statements to the media that the judge was motivated by political concern), cert. denied, 520 U.S. 1155 (1997).
- Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 181, 182 (Ky. 1996) (noting that a lawyer had included the following language in his memorandum entitled "Legal Authorities Supporting the Motion to Dismiss": "Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade"; noting that the lawyer had included the following statement in another pleading: "Do with me what you will but it is and will be so done under like circumstances in the future. When this old honkey's sight fades, words once near seem far away, the pee runs down his leg in dribbles, his hands tremble and his wracked body aches, all that will remain is a wisp of a smile and a memory of a battle joined -- first lost -- then won."; noting that the lawyer had responded to a motion to show cause why he should not be held in contempt in a pleading entitled: "Memorandum In Defense of the Use of the Term 'As-Hole' (sic) to Draw the Attention of the Public to Corruption in Judicial Office"; noting that the lawyer had added the following "P.S." in another pleading: "And so I place this message in a bottle and set it adrift on a sea of papers -- hoping that someone of common sense will read it and ask about the kind of future we want for our children and whether or not the [corruption in] the judiciary should be exposed. My own methods have been unorthodox but techniques of controlling public opinion and property derived from military counter-intelligence are equally so. My prayer is that you measure reality not form . . . [o]r is it too formitable (sic) a task and will you yourself have to forego a place at the trough? There is a better and happier way and -- with due temerity I claim to have found it -- it requires one to identify an ass hole when he sees one." (alterations in original), cert. denied, 519 U.S. 1111 (1997).
- In re Palmisano, 70 F.3d 483, 485-86, 486, 487 (7th Cir. 1995) (affirming disbarment of a lawyer who included the following statements in correspondence with judges, court administrators and prosecutors: "Judge Siracusa is called "Frank the Fixer" or "Frank the Crook"."; "Like [Judge Robert] Byrne, Frank the Crook is too busy filling the pockets of his buddies to act judicially."; "Judge Lewis, another crook, started in about me"; "The crooks calling themselves judges and court employees"; "I believe and state that most of the cases in Illinois in my experience are fixed, not with the passing of money, but on personal relations, social status and judicial preference."; "Chief Justice Peccarelli [sic], your response is

illustrative of the corruption in the 18th Judicial District.""; "When I stand outside the Court stating that Judge Peccarelli is a crooked judge who fills the pockets of his buddies, I trust Judge Peccarelli will understand this his conduct creates the improper appearance, not my publication of his improper conduct.""; "I believe [Justices Unverzagt, Inglis, and Dunn] are dishonest. . . . If the case has been assigned to any of these three, I would then petition the court for a change of venue. Everyone should be assured that the court is honest and not filing [sic] the pockets of those favored by the court.""; explaining that "[f]ederal courts, no less than state courts, forbid ex parte contacts and false accusations that bring the judicial system into disrepute. . . . Some judges are dishonest; their identification and removal is a matter of high priority in order to promote a justified public confidence in the judicial system. Indiscriminate accusations of dishonesty, by contrast, do not help cleanse the judicial system of miscreants yet do impair its functioning -- for judges do not take to the talk shows to defend themselves, and few litigants can separate accurate from spurious claims of judicial misconduct.""; holding that "[e]ven a statement cast in the form of an opinion ('I think that Judge X is dishonest') implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty.""; explaining that the court would have had to deal with the criticism if the lawyer had "furnished some factual basis for his assertions," but noting that he had not; "Palmisano lacked support for his slurs, however. Illinois concluded that he made them with actual knowledge of falsity, or with reckless disregard for their truth or falsity. So even if Palmisano were a journalist making these statements about a public official, the Constitution would permit a sanction.").

- In re Atanga, 636 N.E.2d 1253, 1256, 1257 (Ind. 1994) (addressing statements made by lawyer Jacob Atanga, a self-made immigrant from Ghana, who graduated from law school when he was 36 and became president-elect of his local bar association; explaining that Atanga told a local court that he could not attend a hearing in a criminal matter because he had a previously scheduled a hearing in another city; noting that the judge had changed the hearing date, but later reset the hearing for the original date after the prosecutor's ex parte application to reschedule; noting further that the day before the hearing, Atanga sought a continuance because of the conflicting hearing that had been scheduled in the other city; explaining that the local judge refused, and warned Atanga that he would be held in contempt if he did not attend the hearing; noting that Atanga did not attend, and was arrested, fingerprinted, photographed and even given a prisoner's uniform -- which Atanga wore even though the judge eventually accepted Atanga's apology and removed the contempt; noting that Atanga later told the local newspaper that he thought the judge was ""ignorant, insecure, and a racist. He is motivated by political ambition.""; eventually upholding a thirty-day suspension, although acknowledging that the local court's procedures were "unusual"; "Ex parte communication between the prosecution and the court,

without notice to opposing counsel of record, should not be done as matter or course. Jailing an attorney for failure to appear due to a conflict of schedule is also a questionable practice, albeit within the sound discretion of the trial court. And having an attorney appear in jail attire with his client creates a definite suggestion of partiality.").

- United States Dist. Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (upholding a six-month suspension of a lawyer who accused a judge of altering a transcript; "In the defamation context, we have stated that actual malice is a subjective standard testing the publisher's good faith in the truth of his or her statements. . . . The Supreme Courts of Missouri and Minnesota have determined that, in light of the compelling state interests served by RPC 8.2(a), the standard to be applied is not the subjective one of New York Times, but is objective. . . . We agree. While the language of WSRPC 8.2(a) is consistent with the constitutional limitations placed on defamation actions by New York Times, 'because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate. . . . Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.").
- Kunstler v. Galligan, 571 N.Y.S.2d 930, 931 (N.Y. App. Div.) (holding in criminal contempt the well-known civil rights lawyer William Kunstler who made the following statement to a judge in court: "'You have exhibited what you partisanship is. You shouldn't be sitting in court. You are a disgrace to the bench. . . . You are violating every stand of fair play.'"), aff'd, 79 N.Y.2d 775 (N.Y. 1991).

Some lawyers' criticism of judges goes unsanctioned. For instance, lawyers representing alleged terrorists imprisoned at Guantanamo Bay apparently faced no sanctions for harsh language they included in a Supreme Court pleading.

- Reply Brief of Appellant-Petitioner at 3-4, 3 n.5, 6, Al-Adahi v. Obama, No. 10-487, 2010 U.S. Briefs 487 (U.S. Dec. 29, 2010) (in a pleading filed by lawyers from King & Spalding and Sutherland Asbill & Brennan, criticizing a District of Columbia circuit court decision; "To avoid [purported precedent], the Court of Appeals created a new 'conditional probability' rule permitting it to substitute its judgment for that of the district court. The fallacious basis for the rule and its use to transform a disagreement about the facts into legal error are discussed in Al-Adahi's petition. The circuit created a standard, contrary to [the precedent], permitting it to substitute its own fact-finding for the district court's, even in cases involving live testimony." (footnotes omitted); "'Conditional probability' is rightly described by the dissent as 'a bizarre

theory' and 'gobbledy-gook' -- strong words -- in the probable cause decision that gave rise to it. Prandy-Binett, 995 F.2d at 1074, 1077 (dissenting opinion)."; "The author of Al-Adahi in the Court of Appeals also wrote [other decisions]. . . . As a senior judge, the author of Al-Adahi is added to randomly assigned two-judge panels and often hears Guantánamo cases. He has all but announced a public agenda. In his lecture entitled 'The Guantanamo Mess', he stated publicly that this Court erred in Boumediene. Judge A. Raymond Randolph, The Guantanamo Mess, The Center for Legal and Judicial Studies -- Joseph Story Distinguished Lecture (Oct. 10, 2010), <http://www.heritage.org/Events/2010/10/Guantanamos-Mess>. No prevailing petitioner has survived a trip to that court, and multiple petitions for certiorari now pending -- and more are coming -- in Guantánamo cases seeking this Court's attention. The court of appeals radically departed from this Court's dispositive precedent in [the earlier case], creating a new standard of review applicable to all civil non-jury cases. It is one thing to argue about detention standards and this Court's decision in Boumediene, but to announce a wholesale departure from a settled rule of appellate review just to ensure the continued detention of a single Guantánamo detainee is difficult to explain, except as flowing from the circuit court's passionate animosity to the Guantánamo cases and, perhaps, this Court's repeated reversals of its decisions." (footnote omitted)).

Geoffrey Fieger's Dispute with the Michigan Judicial System

The long-running battle between well-known Michigan lawyer Geoffrey Fieger and Michigan state court judges (as well as the federal government) provides a case study in lawyers' public communications about judges.

Fieger had been very critical of Judge Clifford Taylor, then serving on the Michigan Court of Appeals. A dissenting Michigan Supreme Court judge (in the case discussed below) recounted some of Fieger's statements about Judge Taylor.

In 1994, complaining about two then-recent Court of Appeals cases, Mr. Fieger publicly insulted Chief Justice (then-Court of Appeals Judge) Clifford Taylor, calling him "amazingly stupid" and saying:

Cliff Taylor and [Court of Appeals Judge E. Thomas] Fitzgerald, you know, I don't think they ever practiced law, I really don't. I think they got a law degree and said it will be easy to get a - they get paid \$ 120,000 a

year, you know, and people vote on them, you know, when they come up for election and the only reason they keep getting elected [is] because they're the only elected officials in the state who get to have an incumbent designation, so when you go into the voting booth and it says "Cliff Taylor", it doesn't say failed Republican nominee for Attorney General who never had a job in his life, whose wife is Governor Engler's lawyer, who got appointed when he lost, it says "Cliff Taylor incumbent judge of the Court of Appeals," and they vote for him even though they don't know him. The guy could be Adolf Hitler and it says "incumbent judge" and he gets elected.

Mr. Fieger said more about Chief Justice (then Court of Appeals Judge) Taylor:

[T]his guy has a political agenda I knew in advance what he was going to do We know his wife is Governor Engler's Chief Counsel. We know his wife advises him on the law. We know-we knew-what he was going to do in advance, and guess what, he went right ahead and did it. Now you can know somebody's political agenda affects their judicial thinking so much that you can predict in advance exactly what he's going to do[,] . . . his political agenda translating into his judicial decisions.

Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006), cert. denied, 549 U.S. 1205 (2007) (emphases added).

Unfortunately for Fieger, Judge Taylor was later elected Michigan's Chief Justice. Judge Taylor was later defeated in a reelection effort, and replaced with a Democrat-supported judge. That judge later resigned days before being indicted for felony fraud charges -- to which she later plead guilty.

- Jacob Gersham, Michigan Ex-Justice Admits Guilt in Fraud, Associated Press, Jan. 29, 2013 ("Former Michigan Supreme Court Justice Diane Hathaway pleaded guilty Tuesday to a felony fraud charge in connection with a real-estate scheme that allegedly helped her avoid a debt payment of up to \$90,000. The case is the latest setback for Michigan Democrats, who waged

a bruising, high-profile election battle last fall for three of the court's seven seats, but failed to tip the balance of power in the court, occupied by four Republicans. Governor Rick Snyder is expected to fill Ms. Hathaway's seat with a member of his party, widening the slim Republican majority. On Tuesday, Ms. Hathaway admitted to making fraudulent claims in a debt-forgiveness application to ING Direct, now a subsidiary of Capital One Financial Corporation. She pleaded guilty to a single felony charge of bank fraud in federal court in Ann Arbor. Ms. Hathaway couldn't be reached for comment. Federal prosecutors on January 18 accused Ms. Hathaway of lying about a Florida home she owned in order to dodge a payment of as much as \$90,000 as she sought ING's approval for a short sale on a Michigan property. In a short sale, a home is sold for less than the mortgage owed. Ms. Hathaway, 58 years old, had abruptly announced her retirement from the court days before the prosecutors filed criminal charges. Earlier, the state's judicial watchdog had called for her suspension, describing the allegations as 'unprecedented in Michigan judicial disciplinary history.' . . . Ms. Hathaway was on a trial court for 16 years before she was elected to an eight-year term on Michigan's high court in 2008.").

Perhaps the most notorious Fieger issue that reached the Michigan Supreme Court involved Fieger's criticism of several Michigan appellate court judges during his daily radio program -- condemning those judges for reversing a trial court verdict for one of his clients.

The Michigan Supreme Court recited Fieger's statements.

Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, "Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." Mr. Fieger, referring to his client, then said, "He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses." Two days later, on the same radio show, Mr. Fieger called these same judges "three jackass Court of Appeals judges." When another person involved in the broadcast used the word "innuendo," Mr. Fieger stated, "I know the only thing that's in their endo should be a large, you know, plunger about the

size of, you know, my fist." Finally, Mr. Fieger said, "They say under their name, 'Court of Appeals Judge,' so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."

Fieger, 719 N.Y.2d at 129 (emphasis added).

According to newspaper accounts, Fieger's lawyer said "the comments were made in [Fieger's] role as a radio show host, not as a lawyer, and enjoyed absolute protection under the First Amendment." Dawson Bell, Fieger's case at center of free speech debate, Detroit Free Press, Mar. 9, 2006.

The Michigan Supreme Court ultimately found that the ethics rules applied to Fieger. The Court's opinion is remarkable for several reasons, including the majority's accusation that a dissenting justice was pursuing a "personal agenda" driven by "personal resentment," and had "gratuitously" and "falsely" impugned other Supreme Court justices.²

² Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146, 153 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan Attorney Disciplinary Board's holding that the Michigan ethics rules governing lawyer criticism of judges violated the Constitution; addressing statements made by lawyer and radio talk show host Geoffrey Fieger after a 3-judge panel reversed a \$15 million personal injury verdict for Fieger's client and criticized Fieger's behavior during the trial; describing Fieger's criticism of the judges as follows: "Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, 'Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too.' Mr. Fieger, referring to his client, then said, 'He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.' Two days later, on the same radio show, Mr. Fieger called these same judges 'three jackass Court of Appeals judges.' When another person involved in the broadcast used the word 'innuendo,' Mr. Fieger stated, 'I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist.' Finally, Mr. Fieger said, 'They say under their name, "Court of Appeals Judge," so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals.'"; concluding that Fieger's "vulgar and crude attacks" were not Constitutionally protected; also condemning the three dissenting judges' approach, which the majority indicated "would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive

The saga then continued in federal court. Fieger sued the Michigan Supreme Court in federal court, challenging the constitutionality of the ethics rules under which the Supreme Court sanctioned him. The Eastern District of Michigan agreed with Fieger, and overturned Michigan Rule 3.5(c) (which prohibits "undignified or discourteous conduct toward the tribunal") and Rule 6.5(a) (which requires lawyers to treat all persons involved in the legal process with "courtesy" and "respect"; and which includes a comment explaining that "[a] lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality" (emphasis added)).³

However, the Sixth Circuit reversed -- finding that the district court had abused its discretion in granting Fieger the declaratory relief he sought.⁴

conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove."; especially criticizing the dissent by Justice Weaver, which the majority attributed to "personal resentment" and her "personal agenda" that "would lead to nonsensical results, affecting every judge in Michigan and throwing the Justice system into chaos"; noting that "[i]t is deeply troubling that a member of this Court would undertake so gratuitously, and so falsely, to impugn her colleagues. This is a sad day in this Court's history, for Justice Weaver inflicts damage not only on her colleagues, but also on this Court as an institution."; "The people of Michigan deserve better than they have gotten from Justice Weaver today, and so do we, her colleagues."; in dissenting from the majority, Justice Weaver argued that the Justices in the majority should have recused themselves, because they had made public statements critical of Fieger, and Fieger had made public statements critical of them), cert. denied, 549 U.S. 1205 (2007).

³ Fieger v. Mich., Civ. A. No. 06-11684, 2007 U.S. Dist. LEXIS 64973, at *19 & *22 (E.D. Mich. Sept. 4, 2007), vacated and remanded, 553 F.3d 955 (6th Cir. May 1, 2009), cert. denied, 558 U.S. 1110 (2010).

⁴ Fieger v. Mich. Supreme Court, 553 F.3d 955, 960, 957 (6th Cir. 2009) (holding that well-known lawyer Geoffrey Fieger did not have standing to challenge the constitutionality of the Michigan ethics rules prohibiting critical statements about judges; noting that "plaintiffs [Fieger and another lawyer] neither challenged the Michigan Supreme Court's determination that the courtesy and civility rules were constitutional as applied to Fieger's conduct and speech, nor sought to vacate the reprimand imposed on Fieger; rather, plaintiffs raised facial challenges to the courtesy and civility provisions. Specifically, plaintiffs asserted that the rules violate the First and Fourteenth Amendments of the United States Constitution."; noting that the district court had held certain provisions of the Michigan ethics rules unconstitutionally vague, but reversing that decision, and remanding for dismissal; "We vacate the judgment of the district court and remand with instructions to dismiss the complaint for lack of jurisdiction.

Perhaps not coincidentally, Fieger played a prominent role in a later case involving limits on lawyers' advertisements that might be seen as tainting a jury pool. The federal government prosecuted Fieger for campaign contribution violations involving his support for Democratic primary candidate John Edwards (the jury ultimately acquitted Fieger). Just before his trial, Fieger ran several advertisements implying that the Bush Administration was attempting to silence him. The district court handling the criminal prosecution prohibited Fieger from running the advertisements.

The Court finds these two commercials are unequivocally directed at polluting the potential jury venire in the instant case in favor of Defendant Fieger and against the Government. As Magistrate Judge Majzoub correctly found, the issue of selective prosecution is one of law not fact, and therefore, arguing such a theory to the potential jury pool through commercials, creates the danger of those jurors coming to the courthouse with prejudice against the Government.

United States v. Fieger, Case No. 07-CR-20414, 2008 U.S. Dist. LEXIS 18473, at *10-11 (E.D. Mich. Mar. 11, 2008).

Judges' Criticism of Other Judges

Interestingly, judges can be extremely critical of their colleagues, usually without any consequence.

Some majority opinions severely criticize dissenting judges.

- Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146, 153 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan

We hold that Fieger and Steinberg lack standing because they have failed to demonstrate actual present harm or a significant possibility of future harm based on a single, stipulated reprimand; they have not articulated, with any degree of specificity, their intended speech and conduct; and they have not sufficiently established a threat of future sanction under the narrow construction of the challenged provisions applied by the Michigan Supreme Court. For these same reasons, we also hold that the district court abused its discretion in entering declaratory relief."), cert. denied, 558 U.S. 1110 (2010).

**INTRUSIVE
SURVEILLANCE
VIDEOTAPES**

Intrusive Surveillance Videotapes

Hypothetical 2

As a defense lawyer, you receive numerous proposals from private investigators about how to catch plaintiffs exaggerating or even lying about the extent of their personal injuries.

May you direct a private investigator to engage in the following activities from a van parked on a public street outside a plaintiff's home:

- (a) Use a telephoto lens to videotape plaintiff's activities?

YES (PROBABLY)

- (b) Use a camera mounted on top of the van to look over a hedge on the plaintiff's property line?

MAYBE

- (c) Use a camera to look through a window into the plaintiff's home to record plaintiff's activity in her home?

NO (PROBABLY)

- (d) Use a special infrared camera focusing on the plaintiff's bedroom to determine the validity of his "loss of consortium" claim.

NO

Analysis

(a)–(d) While every court seems to explicitly allow litigants to conduct secret surveillance videotape of an adversary conducting activities in plain view, more intrusive types of surveillance eventually implicate other common law and even statutory limitations.

None of these surveillance techniques intercepts communications, and therefore do not trigger what generally are more specific and narrow regulations. Still, state law at some point restricts intrusive surveillance.

Many states recognize an "invasion of privacy" tort. Although the contours of this tort vary from state to state, especially intrusive surveillance techniques presumably would run afoul of these common law torts. For example, Illinois apparently follows the Prosser and Restatement (Second) of Torts invasion of privacy approach -- which includes "unreasonable intrusion upon the seclusion of another." Huskey v. National Broadcasting Co., 632 F. Supp. 1282, 1286 (N.D. Ill. 1986); Midwest Glass Co. v. Stanford Dev. Co., 339 N.E.2d 274, 277 (Ill. App. Ct. 1975).

However, not every state recognizes such a tort. For instance, Virginia has repeatedly rejected the concept of an "invasion of privacy" tort. Instead, Virginia law simply prohibits one from using a person's "name, portrait, or picture" for commercial purposes. Va. Code § 8.01-40.

At least one state has enacted a specific law restricting certain types of intrusive surveillance. California Civil Code § 1708.8(b) limits the type of activity that "paparazzi" commonly use.

A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

Cal. [Civ.] Code § 1708.8(b). The law also makes a violator subject to disgorgement to the plaintiff of any proceeds gained as a result of such improper surveillance. Cal. [Civ.] Code § 1708.8(d).

Interestingly, the California law has a specific exemption for (1) law enforcement personnel; and (2) private entities with a reasonable suspicion that the subject of the surveillance has engaged in "suspected fraudulent conduct." Cal. [Civ.] Code §1708.8(g).

This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity, or other misconduct,, the suspected violation of any administrative rule or regulation, a suspected fraudulent conduct, or any activity involving a violation of law or business practices or conduct of public officials adversely affecting the public welfare, health or safety.

Id.

Best Answer

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **MAYBE**; the best answer to (c) is **PROBABLY NO**; the best answer to (d) is **NO**.

Eavesdropping in a Public Place

Hypothetical 3

You are preparing for a large commercial litigation trial against Acme Company. You have been calling various hotels in a nearby city looking for a suitable spot to conduct a mock jury trial. The hotel event planner with whom you just spoke assured you that her hotel can handle such an event -- telling you that "we have a mock jury trial just like yours lined up this Saturday afternoon for Acme Company."

May you arrange for several of your law firm's secretaries and paralegals to "hang out" in that hotel's public lobby and hallways this Saturday afternoon (hoping to overhear conversations that might prove useful)?

YES (PROBABLY)

Analysis

This situation does not involve intrusive surveillance or any explicit deception. Instead, it involves eavesdropping in a semipublic place.

Courts seem not to have dealt with situations like this, meaning that they probably are acceptable.

One often-told incident involves a similar practice. Although perhaps apocryphal, the story relates that two large New York City law firms were battling each other in a high-stakes hostile takeover case. One law firm reportedly sent a number of its secretaries, staff and paralegals to ride up and down the elevators of the other law firm's building -- and later report back on any stray conversations they heard on the elevator.

Although a judge might find such tactics somehow "sleazy," no ethics rule seems to prohibit it.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

**CONFIDENTIAL
INFORMATION RECEIVED
BY UNAUTHORIZED
PERSON**

Evidence of an Adversary's Wrongdoing Transmitted Inadvertently or by an Unauthorized Person

Hypothetical 16

From the beginning of this important case, your client warned you that your adversary and its lawyers were "sleaze balls." Two recent incidents confirmed your client's characterization, and created dilemmas for you.

- (a) This morning you opened up a large brown envelope addressed to you in unfamiliar handwriting. The first page is a short note in the same handwriting saying simply "You need to see these. Don't tell anyone how you got them." The envelope contains three documents. From your very quick review, you can see that they are copies of e-mails from the adversary's lawyer to her CFO. In the first e-mail you quickly scan, the lawyer chastised the CFO for having destroyed several responsive documents after the litigation began, and advised her of the severe penalties for spoliation.

Must you refrain from reading the other e-mails and using them in the litigation?

NO (PROBABLY)

- (b) About an hour after you open the plain brown envelope, you received an e-mail from the adversary's lawyer. When you opened the e-mail, you saw that the lawyer intended it for her CFO. It is marked "privileged and confidential," and the first line reads: "I just learned that you destroyed more documents even though I told you never to do that again."

Must you refrain from reading the remainder of the e-mail and using it in the litigation?

MAYBE

Analysis

This hypothetical involves two related but distinct scenarios.

- (a) In ABA LEO 382 (7/5/94), the ABA indicated that lawyers who received unsolicited privileged or confidential materials from a third party should refrain from reviewing the documents, notify the adversary that the lawyer received them and either return them or ask a court to rule on their disposition. The ABA justified this approach

(which differed from the "return unread" approach applied to inadvertently transmitted privileged documents) because the documents described in this LEO were not inadvertently sent to the lawyer -- but rather were intentionally sent by a third party who might or might not have been authorized to deal with the documents. The ABA indicated that a court might have to examine this issue, because the intentional transmission of the documents could have been motivated by such varying intentions as a disloyal employee's attempt to hurt a corporation by purloining documents, or a well-intentioned whistleblower's attempt to stop corporate misconduct. Given this uncertainty, the ABA called for the court's involvement.

Unlike its "return unread" policy governing inadvertently transmitted privileged communications, the ABA has not explicitly rejected its approach to a third party's intentional transmission of privileged communications. If anything, the "keep the documents but notify the court" approach follows the new ABA attitude toward inadvertently transmitted privileged communications. ABA Model Rule 4.4(b).

Still, the ABA recently took the unusual step of withdrawing ABA LEO 382.¹ In the years between the ABA's promulgation and withdrawal of ABA LEO 382, several state bars endorsed the ABA approach.

- New York LEO 700 (5/7/98) ("A lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm may not seek information from that person if the communication would exploit the adversary's confidences or secrets. Where the information communicated involves alleged criminal or fraudulent conduct in which opposing counsel may be assisting, the receiving lawyer should communicate

¹ ABA LEO 440 (5/13/06) (withdrawing ABA LEO 382; reciting the standards under revised ABA Model Rule 4.4(b); noting that "if the providing of the materials is not the result of the sender's inadvertence," Model Rule 4.4(b) does not apply, and determining "[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope" of the ABA Model Rules).

with a tribunal or other appropriate authority to get further direction as to the use of the information.").

(b) This scenario involves an inadvertent transmission of privileged communications, but one which confirms clearly improper (if not illegal) conduct.

It is unclear how most bars would react to this situation. As explained elsewhere, the ABA would now permit the receiving lawyer to use this inadvertently transmitted e-mail, although the lawyer would have to notify the other side of the inadvertent transmission.

States continuing to follow the old ABA "return unread" policy would have the most difficult time dealing with this scenario. Literal language of some states' legal ethics opinions would preclude the receiving lawyer's reading, retention or use of this e-mail -- but common sense and concern for the institutional integrity of the court system would weigh in favor of allowing use of this e-mail.

Best Answer

The best answer to (a) is **PROBABLY NO**; the best answer to (b) is **MAYBE**.

CONFLICT OF INTEREST

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by WILLIAMS
Commissioner

Jan. 9, 2015

JULIE FARR v. LINCOLN PROPERTY CO
TRAVELERS INDEMNITY CO OF AMERICA, Insurance Carrier
Jurisdiction Claim No. VA02000002128
Date of Injury: October 15, 2009

Philip J. Geib, Esquire
For the Claimant.

Chanda W. Stepney, Esquire
For the Defendants.

Gershon Pain Specialists
Medical provider.

REVIEW on the record by Commissioner Williams, Commissioner Marshall and Commissioner Newman at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's October 24, 2014 Order removing Philip J. Geib, Esquire, as counsel for medical provider Gershon Pain Specialists. We AFFIRM.

I. Material Proceedings

On October 15, 2009, the claimant sustained injuries to both legs which the defendants accepted as compensable. A Medical Only Award Order was entered on November 12, 2010. The claimant's injuries gave rise to a third party action, and she recovered a total of \$90,000 from the third party on November 20, 2012. On February 4, 2013, a Third Party Order was entered that included the following provisions:

Pursuant to §65.2-313, Code of Virginia, the employer/carrier is entitled to a credit in the amount of \$54,275.58 against its liability for additional compensation

payments and medical expenses, after which its responsibility to make such payments shall resume.

The injured Worker remains entitled to a reimbursement of attorney fees and expenses at the rate of 48% of any additional compensation and/or medical entitlements as they are incurred. Such reimbursements shall be paid by the carrier/employer directly to the Injured Worker on a quarterly basis from the date of this award. The Injured Worker must provide the carrier/employer with medical bills when a pro rata reimbursement is sought.

Attorney Philip J. Geib represented the claimant at the time the Third Party Order was entered and continues to do so at the present time. The Order was not appealed and became final on March 6, 2013.

On July 18, 2014, the claimant filed a request for a hearing seeking authorization and payment of medical treatment provided by Gershon Pain Specialists. On September 5, 2014, Mr. Geib filed a letter noting he also represented Gershon Pain Specialists and indicating he wished to address the issue of alleged unpaid medical expenses. The Deputy Commissioner subsequently scheduled a telephone conference to discuss "the Commission's concern over a possible conflict of interest between the claimant and the medical provider in regard to the parties' dispute over the effect of the Commission's February [4], 2013 Third Party Order." On October 16, 2014, counsel for the claimant also submitted a brief arguing the following:

I am obtaining the written consent from both clients to represent them in the matters before the Commission given the perceived conflict and in comport with the rules.

In the case at bar, I have previously noted to the Commission that the issue pending, with regard to the claimant, is the claimant is simply seeking, among other things, to have her current medical treatment bound to be the responsibility of the insurance carrier and/or employer. The employer and/or carrier has refused to authorize and pay for the need for ongoing medical treatment. The carrier and/or employer has taken the position that the claimant's current condition, and need for medical treatment, does not arise from the industrial accident. The

claimant's health care provider, Dr. Gershon, has indicated the claimant's treatment and need for medical treatment and does in fact continue to arise from the industrial accident.

The claimant further seeks that her medical expenses be paid, either by the carrier and/or employer. The claimant agrees that she may be subject to the Stipulated Order related to the third-party settlement. However, the language of the ORDER is clear. The claimant need only present her bills to the employer and/or carrier and the employer and/or carrier SHALL pay unto the claimant their portion of the expense. The employer and/or carrier though are taking the position that the claimant must expend or pay such bill and provide only receipts for the bill in order to receive any payment pursuant to the offset ORDER. The language of the Third-Party ORDER is absolutely clear. Again though, the employer is taking the position that the claimant's current condition, and need for medical treatment, resulting in the medical expense, does not arise from the industrial accident.

The health care provider's position, which I have argued previously, is that the health care provider is entitled to payment of the outstanding medical expenses in full. The health care provider has a separate right of recovery, as set forth in the Act, and is not directly subject to the third-party settlement. The health care provider is not a party to the third-party settlement nor did they necessarily agree or take the position that they were subject to the settlement ORDER. A health care provider cannot engage in collections outside the jurisdiction of the Virginia Workers' Compensation Commission. The health care provider is not making a claim against the claimant; they are only seeking that the outstanding medical expenses be paid by the carrier either in full or in part that the Deputy Commissioner may determine that they are entitled to payment via the third-party settlement and/or ORDER. The health care providers are not seeking any contribution from the claimant in the matter pending before the Commission. Therefore, per the Rules of Professional Responsibility, I am quite able to represent both the health care provider, as well as the claimant in this matter. The rights of both parties need to be joined together in litigation so that both parties are informed as to their individual rights of recovery vis a vis the carrier and/or employer. By the way, I am not acting, and am representing both parties as an advocate not against the claimant nor against the health care provider adverse to the others interests in the current claims before the Commission.

In an Order dated October 24, 2014, the Deputy Commissioner made the following findings of fact and rulings of law:

Upon consideration of the arguments set forth by Mr. Geib, it is found that a concurrent conflict of interest exists between the claimant and the medical provider as a result of the medical provider's asserted claim against payments due the claimant via the Third Party Order. Because that Order compels the defendants to make pro rata reimbursement payments directly to the claimant, it is found that the medical provider's claim against those expected payments creates a conflict between the interests of the claimant and the medical provider. Therefore, we hold that Mr. Geib may not represent both the claimant and the medical provider in this matter. Accordingly, it is hereby ORDERED that Philip J. Geib, Esquire be REMOVED as counsel of record for Gershon Pain Specialists, the medical provider in this matter. (footnotes omitted.)

Mr. Geib filed a Request for Reconsideration on November 3, 2014, arguing that he had obtained written conflict of interest waivers from both the claimant and the medical provider and arguing, "[t]here is nothing before the Commission that provides for any claim with a medical provider seeking anything potentially against the interests of the claimant. Both the claimant and health care provider seek an OPINION vis-à-vis the employer/carrier which will define each parties responsibilities as to present and future medical expenses." In the event the request for reconsideration was denied, Mr. Geib sought review by the full Commission. The Deputy Commissioner denied the request and the matter was referred to the review docket.

On November 13, 2014, Mr. Geib submitted written waivers of potential conflict of interest from both the claimant and the medical provider.

II. Findings of Fact and Rulings of Law

The Rules of Supreme Court of Virginia provide, in pertinent part:

Part 6, Rule 1.7, Conflict of Interest: General Rule.

- (a) . . . A concurrent conflict of interest exists if: . . .
 - (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person . . .

- (b) Notwithstanding the existence of a concurrent conflict of interest . . . , a lawyer may represent a client if each affected client consents after consultation, and:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) the consent from the client is memorialized in writing.

Va. Sup. Ct. R. Pt. 6, § II, R. 1.7.

Mr. Geib is well-known and respected by this Commission, and he has obtained written consent from both the claimant and the medical provider and avers he may represent both in the present matter.

If the credit provided to the insurance carrier in the Third Party Order was exhausted, we could reasonably conclude there was a community of interest between the claimant and medical provider and Mr. Geib could represent both parties. However, since the settlement proceeds have not been exhausted, the provider's claim is a claim against the interests of the claimant, as a review of the history of Va. Code § 65.2-313 will demonstrate.

An employee's right to prosecute a personal injury claim against the third party responsible for the compensable accident is subject to the employee's obligation to reimburse the employer for compensation payments out of any recovery. See Va. Code § 65.2-309. Apportioned between the employer and employee "as their respective interests may appear" are

“reasonable expenses and reasonable attorney’s fees” incurred by the employee in the prosecution of the claim against the third party. Va. Code § 65.2-311(A).

The enactment of Va. Code § 65.2-313 resolved inequities inherent in the procedures employed for apportioning fees between employees and employers. Prior to the enactment of this section, the calculation of the employers’ pro rata share of attorney’s fees and costs was premised solely upon compensation benefits paid through the date of recovery. The employer was thereafter released from the obligation to pay compensation until the employee exhausted his or her net settlement proceeds in the payment of accident-related medical expenses and disability.

Compensation the employer would have paid but for the third party recovery was traditionally excluded from the calculation of the employer’s pro rata share of fees. This unfairly saddled the employee with all the attorney’s fees and expenses attributable to those post-settlement entitlements, an inequity addressed by the Virginia Supreme Court in Circuit City Stores v. Bower, 243 Va. 183, 413 S.E.2d 55 (1992). In Bower, the Court considered whether the apportionment of the employer’s share of fees should include future benefits the employer was relieved from paying by virtue of the recovery. The employer contested consideration of such benefits, arguing a trial court would rarely be able to accurately calculate future compensation benefits an employer would be obligated to pay over the life of a claim. Therefore, the employer argued, apportioning fees should be based upon those benefits actually paid, not prospective entitlements which would necessarily require the trial court to indulge in gross speculation. Id. at 186-87, 413 S.E.2d at 56-57.

The Court rejected the employer's argument reasoning that the third-party recovery benefited the employer by both the recovery of compensation previously paid and the release of the obligation to pay future benefits. The Court found "no rational distinction between the benefit an employer enjoys from being reimbursed for compensation payments already made and the benefit of being released from the obligation to make future compensation payments." *Id.* at 187, 413 S.E.2d at 57 (quoting Sheris v. Travelers Ins. Co., 491 F.2d 603, 606 (4th Cir. 1974)). The Court held that the calculation of the employer's pro rata share of fees should take into account the sum of pre-recovery payments actually made and post-recovery payments the employer would have made but for the recovery.

Virginia Code § 65.2-313, enacted the year following Bower, balanced the interests of both employers and employees as to the payment of fees on post-recovery entitlements.¹ The prescribed formula serves dual purposes: addressing the inequity of pro rating fees solely on pre-recovery payments and relieving the trial court from the burden of divining future compensation payments the employer was released from paying.² While § 65.2-313 does not relieve employees of the obligation to pay post-recovery entitlements out of their net settlement proceeds, it obligates employers to pay employees the proportionate share of attorney's fees and costs attributable to each such entitlement. As a consequence, employees are not saddled with fees for a recovery which ultimately benefits the employer, and the employer is only obligated to pay fees on actual entitlements the employer is relieved from paying due to the settlement.

¹ Va. Code § 65.2-313 is entitled, "Method of determining employer's offset in event of recovery under § 65.2-309 or § 65.2-310."

² Va. Code § 65.2-313 references "further entitlement" defined as "compensation and expenses for medical, surgical and hospital attention and funeral expenses to which the claimant is entitled under the provisions of this title, which entitlements are related to the injury for which the third-party recovery was effected."

An employer's obligation to pay an employee is triggered by the employee incurring any specific "further entitlement" set out in Va. Code § 65.2-313. As to medical expenses, § 65.2-313 inexorably ties the employer's obligation to reimburse an employee to those injury-related bills the employee actually pays. For as long as an employee retains the settlement proceeds, his or her interests are aligned with those of the employer in minimizing medical payments, thus preserving settlement proceeds and reducing fee reimbursements. However, the employee's interests are in inherent conflict with the health care provider, whose interest is to receive payment in full.

Since Gershon Pain Specialists is asserting a claim against the interests of the claimant, we agree with the Deputy Commissioner that Mr. Geib cannot represent the medical provider.

III. Conclusion

The Deputy Commissioner's October 24, 2014 Order is AFFIRMED.

This matter is hereby removed from the review docket.

APPEAL

Because this is an interlocutory issue, there is no right of appeal to the Court of Appeals of Virginia until the Commission has issued a final decision in this case.

**Bio of
Charles F. Midkiff**

Charles F. Midkiff, (Director, President of Firm) born 1947; admitted to the bar, Virginia, 1970.

Education: Old Dominion University (B.S., *magna cum laude*, 1968); College of William and Mary (J.D., 1970); Editor-in-Chief, *William and Mary Law Review* (1969-1970); Associate Editor, *Virginia Bar Association Journal* (1975-1977); Chairman, Young Lawyers Section, Virginia Bar Association (1980-81); Chairman, Administrative Law Section, Board of Governors, Virginia State Bar (1977-81); Vice-Chairman, Natural Gas Transportation Committee, Natural Resources Section, American Bar Association (1986-1990); Member, Legal Section, American Public Power Association; President, Board of Trustees, Old Dominion University Research Foundation (2001-2003).

Publications: was engaged by the AICPA to write the manuscript "Surviving Litigation: How to Avoid or Defend a Malpractice Suit" published in July 1989; co-author: "Virginia Workers' Compensation," Virginia State Bar (1987, 1990, 1992, 1994 and 1998); co-author and speaker, "Americans with Disabilities Act: Impact on Employers," *Virginia Bar Association Journal* (1992).

Admitted: to the U.S. Supreme Court; all Virginia state and federal courts; all courts in the District of Columbia; U.S. District Court for the Western District of Pennsylvania. **Member:** Virginia State Bar; Defense Research Institute; American Judicature Society; U.S. Supreme Court Historical Society; Richmond Bar Association; Virginia Association of Defense Attorneys. **Practice Areas:** Energy Law; Professional Malpractice; Lobbying; Workers' Compensation Law; Civil Litigation.

Honors: AV Peer Review Rated in Martindale-Hubbell; Included in *The Best Lawyers in America*® for 20 years, as well as *Virginia Business Magazine's* listing of "Legal Elite Attorneys in Virginia" (employment law) and *Richmond Magazine's* "Super Lawyers in Virginia." **Other:** Co-defense counsel in the first randomly selected jury trial in military history (*Time Magazine*, 1971); defeated IRS tax lien in Virginia U.S. District Court (front page, *Wall Street Journal*, June 1974); has been a guest speaker at annual meetings of the Virginia Society of Certified Public Accountants in Bermuda, 1985; Roanoke, 1986; and Williamsburg, 1992; Virginia Society of Certified Public Accountants Auditing and Tax Conference 1989, 1991, 1994, 1996, 1998-2000; Commissioner, Governor's Advisory Commission on Workers' Compensation, (1992-1993); has been a guest speaker before the Federal Bar Association on regulatory issues as well as a guest speaker on the defense of attorneys, accountants, insurance agents, and workers' compensation claims; awarded Bronze Star during service in Vietnam; Certified Master Scuba Diver.