

PODIUM

Lawyers' Attacks on Judges Risk Censure

By Michael A. Cardozo SPECIAL TO THE NATIONAL LAW JOURNAL

AS WE APPROACH the 1996 electoral season, it is likely that both incumbents and challengers will be tempted to engage in the kind of judge-bashing that has become so popular in recent months. It seems to make for great newspaper headlines and TV news coverage—exactly what ambitious candidates need to draw attention to their campaign—and the targeted judge is, in most cases, rightly prohibited by the Code of Judicial Conduct from responding to the attack in any meaningful fashion.

Many excellent statements have been made by bar associations, leading members of the legal profession—and others not associated with law practice—in response to the recent attacks upon the independence of the judiciary. There is one point that has been overlooked to date, however, and it is one that bears emphasis: a consideration of the ethical implications of reckless attacks on judges by public officeholders and candidates for public office who are lawyers.

The bar's rules of professional conduct govern conduct by all lawyers, not just conduct committed in the course of a

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particular litigation or transaction in which the lawyer is personally involved. Accordingly, attacks on judges by public officials who are members of the bar clearly are covered by the disciplinary rules. These officials, like the judges they criticize, are required to respect certain ethical limitations.

Reckless Attack

In 1991, New York's highest court affirmed the disciplining of Elizabeth Holtzman, then Kings County district attorney, because she had engaged in the very sort of reckless sniping that has so alarmed both bench and bar in recent months. Ms. Holtzman publicly called state Civil Court Judge Irving Levine "unfit for the bench" and demanded that "the most severe disciplinary measures" be applied against him, based upon the judge's alleged, "egregious" conduct in a specific case.

The court of appeals subsequently found that Ms. Holtzman had made the statement



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without waiting to review any of the most basic evidence that would have supported the allegation and had failed even to obtain a transcript of the proceedings. A review of the transcript revealed that it did not support the allegation, and a disciplinary committee subsequently found that the accusation was, in fact, false.

Under these circumstances, the court of appeals ruled that such behavior "reflected adversely on the lawyer's fitness to practice law. The lawyer knew or should have known that such attacks are unwarranted and unprofessional, serve to bring the bench and bar into disrepute, and tend to undermine public confidence in the judicial system."

Accordingly, Ms. Holtzman was reprimanded by the Grievance Committee for the 10th Judicial District for having violated a provision of New York's Disciplinary Rules that prohibited any member of the bar from engaging in conduct that "adversely reflects on the lawyer's fitness to practice law."

Approaching Consensus

Federal and state courts from around the country, including the 5th, 7th and 9th circuits, have reached the same conclusion: A lawyer may be disciplined if he or she makes false statements regarding a judicial officer, either with knowledge of their falsity or with reckless disregard for their truth.

Attorneys are fully aware that a judge can apply the law only as it pertains to the facts found by judge or jury. So an attorney who is a public official should recognize that our freedoms are at risk if judges come to believe that controversial decisions they reach will result in demeaning headlines and raucous demands for their removal. As the chief judge of the 2d Circuit, Jon O. Newman, and three senior 2d Circuit judges said in a public statement issued on March 29, 1996, "Attacks on a judge risk inhibition of all judges as they conscientiously endeavor to discharge their constitutional responsibilities."

Public officials, whether or not they are lawyers, have the right to criticize judicial decisions. Even harsh criticism of an individual judge does not present issues of ethics, as long as there is some factual or legal basis for the criticism. But criticism by a lawyer that is misleading or lacks a factual or legal basis should be subject to professional discipline.

We hope it will not be necessary for disciplinary committees to take action against any lawyer/public official for this reason, but they should not be deterred from doing so when the recklessness of an accusation brings the matter within well-established standards for disciplinary action. ■

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