# Recent Rulings Show Lawyer Criticism Of Judges Is Perilous

By **John Harris** (February 16, 2022)

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There are times in most lawyers' careers when they encounter judges who outrage them.

They may believe the judge's rulings are profoundly wrong. They may believe the judge's political or personal views have infected the process. Or they may believe the judge is so partial to an opposing party or counsel, or so hostile to the lawyer or the lawyer's client, as to create the proverbial kangaroo court.

In each case, the lawyer is confronted with the question of what — if anything — they can or should do about it.

This article considers the professional consequences that may befall lawyers who speak out against judges they perceive to be incompetent, biased or even corrupt.

Although many lawyers may instinctively believe that the First Amendment broadly protects their opinions and good faith criticism of judges, it is clear that, as 2022 unfolds, lawyers are being sanctioned all over the U.S. for direct or implied criticism of judges both inside and outside the courtroom based on violation of a variety of ethical rules.

Most notable of these rules is the American Bar Association's Model Rule of Professional Conduct 8.2(a), which refers specifically to criticism of 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."

This standard echoes the actual malice test for defamation of a public figure established in 1964 by the U.S. Supreme Court's New York Times Co. v. Sullivan ruling.

Where lawyer criticism occurs in the courtroom, discipline has been imposed for conduct "intended to disrupt a tribunal," barred by Model Rule 3.5(d), or conduct that is "undignified or discourteous," which is prohibited under New York Rule 3.3(f). More broadly, New York Rule 8.4(d) has been invoked where lawyer criticism of judges "is prejudicial to the administration of justice."

For lawyers, enforcement of these rules sends an inescapable message. Publicly opining on the character, integrity, competence or motivation of a judge is perilous, and all the more so when a lawyer accuses a judge of bias, corruption or playing politics.

Although most states hinge discipline on a finding that a lawyer's comments about a judge are knowingly false or made with reckless disregard for the truth, many recent decisions seem to focus more on lack of decorum than knowing falsity, and many appear to place the burden on lawyers to prove the truth of their statements.[1]

Regrettably, because the line is blurred between when a lawyer can safely criticize a judge and when that criticism exposes the speaker to professional discipline, lawyers may choose to remain silent even in the face of actual judicial malfeasance or conflict of interest.[2]

Here is a sampler of what is happening today:

**John Morton in Ohio**

In November 2021, a divided Ohio Supreme Court in Cleveland Metropolitan Bar Association v. Morton suspended attorney John Morton for up to a year.

In representing a client in a series of agency and court proceedings, Morton claimed judges in Ohio regularly favor the government in tax valuation cases "no matter how unreasonable the government's view" of a property's value. In so doing, judges applied "politics, not law."

Morton further alleged that: (1) "only politicians committed to maximizing the revenue of their political cronies" could issue such decisions; and (2) delays in rendering decisions were improperly motivated.

The Cleveland Bar Association filed a complaint against Morton. Rejecting claims that Morton's statements were mere hyperbole, a hearing panel found that Morton had no reasonable factual basis for making the allegations, and found he engaged in undignified and discourteous conduct in violation of Ohio Rule 3.5(a)(6).

On appeal, a majority of the Ohio Supreme Court held that a reasonable attorney would have viewed Morton's comments as improper because he relied "solely upon his own interpretation of the facts" and — with respect to his claims of calculated delay — "ignored the possibility" that the delays resulted from high volume.

A concurring judge added that Morton took an oath when entering the practice to conduct himself with "dignity and civility" in compliance with ethical rules, and "there are professional consequences for failing to fulfill these duties."

The dissenting judges asserted that Morton should not be disciplined for multiple reasons:

1. Rule 8.2 required analysis of the attorney's subjective state of mind at the time of making the alleged false statement;

2. The need to protect the appearance of judicial integrity was not a compelling interest sufficient to abridge an attorney's right to criticize a judicial officer;

3. Enforcement of an objective-attorney test runs the risk that true statements could be disciplined if reasonable attorneys assume they are false, and false statements permitted if reasonable attorneys assume they are true; and

4. None of what Morton said was demonstrably untrue, and all of his opinions were based on fully disclosed facts.[3]

**Benjamin Pavone in California**

California lawyer Benjamin Pavone filed an appeal in a client's case in which he described a judicial hearing officer as "disgraceful," referencing her ruling as a "succubustic adoption of the defense position," and claiming the judge was determined to evade appellate review.

In 2019, the California Bar charged Pavone with "impugning the honesty, motivation, integrity or competence" of the judge by accusing her of intentionally refusing to follow the law. He was also accused of gender bias because the dictionary defines "succubus" to mean

"a demon assuming female form to have sexual intercourse with men in their sleep" and a "strumpet."

These allegations allegedly violated California Business and Professions Code Section 6068(b), which states that it is an attorney's duty to "maintain the respect due to the courts of justice and judicial officers."

Challenging the complaint before the U.S. District Court for the Central District of California in Pavone v. State Bar of California, Pavone claimed he "used a colorful (or caustic, depending on one's viewpoint) metaphor to criticize a court ruling," and asserted his First Amendment rights of advocacy and freedom of thought and speech.

He described the "succubus" charge as "textbook hyperbole" and "lusty and imaginative criticism" protected by the First Amendment that could not conceivably have been viewed as a statement of fact. Pavone also argued that Section 6068(b) is unconstitutional as applied to rhetorical criticism of judges.

On Nov. 19, 2021, the California court declined to enjoin the bar proceeding against Pavone.[4]

**Freshub v. Amazon in Texas**

On Dec. 17, 2021, U.S. District Judge Alan Albright in the U.S. District Court Western District of Texas sanctioned three lawyers from Kramer Levin Naftalis & Frankel LLP who represented an Israeli company, Freshub Inc., in an action against Amazon.com Inc.

After losing at trial, the lawyers filed a motion for judgment notwithstanding the verdict asserting that Amazon "played on the stereotype of greedy Jewish executives of an Israeli company allegedly taking advantage of U.S. companies, to trigger religious biases and deepen the 'us vs. them' nationalistic divide in the minds of the jurors." They further claimed that Amazon used a "Jewish stereotype dog whistle" to win the case.

Although the attacks were directed against Amazon, the judge took them as implicit criticism that he had willfully ignored prejudicial statements.

"The Court did not turn a blind eye to any racist or anti-Semitic conduct, because indeed there was none," Judge Albright wrote.

The judge added that, in the absence of concrete evidence that Amazon intentionally played up its adversary's Israeli ties or any witness' race, heritage or religion, "Freshub's inflammatory allegations are nothing but baseless attacks on the integrity of this Court and the reputation of defendants' counsel."

The judge ordered the lawyers to complete 30 hours of ethics-related continuing legal education.[5]

**Victor Marshall in New Mexico**

Victor Marshall is a New Mexico lawyer who represents landowners litigating water rights against the Navajo Nation. In court papers, Marshall suggested that the judge hearing the case failed to disclose a previous relationship with the Navajo Nation before ruling in its favor.

As a result, Marshall reportedly stated that "the public might reasonably wonder whether the judge fixed this case for his former client."

The judge denied that he had ever represented the tribe, though he acknowledged working for individual members decades earlier on matters unrelated to water rights. Marshall was brought up on disciplinary charges, and the panel recommended a public censure because no "objectively reasonable person" would truly have "wondered" whether the judge fixed the case based on his earlier representation.

On Jan. 14, in Matter of Marshall, the New Mexico Supreme Court imposed a harsher sentence, indefinitely suspending Marshall based on his perceived lack of remorse. It stated that "our concern is not so much" that Marshall claimed an undisclosed conflict of interest, "but the way that he made it" — implying that the judge had intentionally concealed his relationship, ignored the law and "fixed" the case.[6]

**Steven Donziger and Chevron**

Steven Donziger had won a huge tort judgment in Ecuador against Chevron Corp. on behalf of Indigenous peoples.

In extensive proceedings before two U.S. district judges — Lewis Kaplan and Loretta Preska of the U.S. District Court for the Southern District of New York — over allegations of willful failure to comply with court orders, the courts consistently ruled against Donziger and his clients, ultimately holding him in contempt and subjecting him to home detention and sentencing him, in October 2021, to six months in prison.[7]

Donziger's legal battle drew substantial support from prominent lawyers who waged a public campaign to expose what they view as unfair and corrupt treatment of him. In a 2013 court memo, Donziger's former lawyer John Keker described the case as having "degenerated into a Dickensian farce" because of the court's "implacable hostility" toward Donziger.[8]

In a 2020 press release from Frente de Defensa de la Amazonia, a group associated with Donziger, lawyer Martin Garbus was quoted as saying the sentencing decision by Judge Preska was part of "a cesspool of improper judicial conduct and corruption."[9]

Also in 2020, the National Lawyers Guild, in conjunction with the International Association of Democratic Lawyers, publicly filed a complaint with the U.S. Court of Appeals for the Second Circuit. The complaint stated that Judge Kaplan tried "to destroy Steven Donziger both personally and professionally" and engaged in "persecution," while IADL President Jeanne Mirer said in a statement that the judge "has been acting as a de facto lawyer for Chevron in this litigation."[10]

Even a casual reader of this article might well fear that the lawyers campaigning against the treatment of Donziger could run afoul of Rules 8.2 and 8.4(d).

**How We Got Here**

Protecting judges from criticism — and levying punishment against lawyers who make unwarranted, false or undignified comments — has been engrained in the legal profession for decades. Most courts in the U.S. hold that professional speech by attorneys regarding judges can be restricted and does not extend to the full limits of the First Amendment.

For example, in 1993 in the case U.S. District Court for the Eastern District of Washington v.

Sandlin,[11] the U.S. Court of Appeals for the Ninth Circuit noted that, although upon admission to the bar lawyers do not surrender their right to speak freely, they "must temper [their] criticisms in accordance with professional standards of conduct."

The U.S. Supreme Court has not specifically considered the limits of lawyer criticism of judges in the context of imposing professional discipline. In 1964, it held in Garrison v. Louisiana that a lawyer could not be convicted of criminal libel for chastising judges as lazy or indifferent unless the comments satisfied the actual malice standard of Sullivan.[12]

Two decades later, in In re: Snyder, the Supreme Court held that a lawyer could not be disciplined for writing to the court to complain that he had been forced to engage in "extreme gymnastics" to receive the "puny amounts" authorized for indigent criminal defense. Although the court found the letter "exhibited an unlawyerlike rudeness," it nevertheless held that "a single incident of rudeness or lack of professional courtesy" did not merit sanction or discipline, at least in the context of a private letter.[13]

The high-water mark for tolerating lawyer criticism of judges is probably the Ninth Circuit's decision in Standing Committee v. Yagman.[14] Dissatisfied with his appearance before a federal judge, Washington attorney Stephen Yagman assailed the judge as "ignorant," "a buffoon," and a "right-wing fanatic," and added that the judge "has a penchant for sanctioning Jewish lawyers … I find this to be evidence of antisemitism."

Yagman was brought up on disciplinary charges for conduct that "degrades or impugns the integrity of the court" and interferes with the administration of justice. The lower court found that Yagman's statements to be knowingly false or made with reckless disregard for their truth.

The Ninth Circuit reversed. It stressed that statements impugning the integrity of a judge "may not be punished unless they are capable of being proved true or false." Statements of "rhetorical hyperbole" are not sanctionable, nor are statements that use language in a "loose, figurative sense." Yagman's references to ignorance, right-wing fanaticism and similar accusations "all speak to competence and temperament rather than corruption."

Together, they conveyed "nothing more substantive than Yagman's contempt" for the judge. As to the allegation of antisemitism, the court found the remark protected opinion under the First Amendment given that Yagman disclosed the factual basis for his views.[15]

The court also found that Yagman's allegations did not obstruct or prejudice the administration of justice because the statements did not pose a "clear and present danger" or a "substantial likelihood" of disruption.

While Yagman's criticism of the judge was "harsh and intemperate" and apparently intended to precipitate the judge's recusal, the court noted that a lawyer's personal attacks cannot force a judge's recusal — especially given that federal recusal statutes generally require a showing that the judge "is (or appears to be) biased or prejudiced against a party, not counsel."

The mere possibility that judges would remove themselves based on harsh criticism from attorneys did not rise to the high level required for obstruction of justice.

Yagman applied the Sullivan test based not on the lawyer's subjective knowledge and belief, but based instead on the viewpoint of a reasonable, objective lawyer. Virtually all the courts that have considered the issue have applied this more stringent "objective lawyer" analysis

to attorney criticism of judges, which in some cases appears to have been outcome-determinative.[16]

**Takeaways**

During and before his presidency, Donald Trump — who is not a lawyer — regularly castigated judges, accusing the jurists presiding over the Trump University and Roger Stone cases of overt bias and hostility; labeling judges whose decisions he didn't like as "Obama judges" or "political"; and describing the Ninth Circuit as "out of control."[17]

In the current climate, what would befall a lawyer in the U.S. who made the same comments? Plainly, allegations that judges render decisions based on politics or personal bias tend to diminish public confidence in the judiciary.

But should these comments be treated more harshly when made by an individual lawyer than when made by the president? And are these comments better treated as merely rude under Snyder or rhetorical hyperbole under Yagman? And should there be less tolerance for lawyer speech when a judge is falsely accused of corruption or bias than if a judge is accused of incompetence?[18]

All of this begs the further question of whether lawyers are at greater risk of discipline for criticizing judges than they have been in the past. The statistical answer is unclear, but the risk to lawyers is real.

A number of the recent decisions appear to be based largely on indecorous language — as in Marshall, the way things are said — rather than consideration of whether the remarks were false, matters of opinion or actually affected judicial independence.

Other cases, like Freshub, are notable because lawyers were sanctioned in part for implicit criticism of judges.

Finally, and counterintuitively, one may wonder whether individual lawyers who rail against judges are more vulnerable to discipline than a groundswell of critical lawyers, as with Donziger.

At the very least, the state of free speech in the legal profession in 2022 strongly counsels caution before a lawyer criticizes judges for their political leanings, integrity, intellect or motivation. Whether this chill is a good thing may depend on one's current view of the need to protect the judiciary.

But, in reviewing the nature and extent of recent lawyer discipline in this area, there is good reason to question whether the disciplinary risks facing outspoken lawyers are fairly proportional to the harm their words would cause.

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[1] Raising concerns in formal motion papers or seeking a judge's recusal doesn't necessarily insulate the criticism, even though seeking recusal is the preferred route for raising challenges to judicial bias. See In re. Zalkind , 872 F.2d 1 (1st Cir. 1989) (reversing sanction for criticism in recusal motion that judge pre-determined the merits and showed animus toward movant). Lawyers who are found to have made false allegations in seeking recusal have been repeatedly disciplined. See, e.g., Matter of Mire , 2015-B-1453 (Sup. Ct. La. 2016) (divided Louisiana Supreme Court sanctions lawyer who filed motion claiming that judge improperly altered transcript; the dissent noted: "This court does justice no favor by punishing the whistleblower").

[2] Remaining silent about a judge's actions arguably can itself be unethical. The preamble to the ABA's Model Rules asserts that, as a public citizen, a lawyer should seek "improvement of the law" and "the administration of justice." Although that mandate does not invite unwarranted criticism of judges, the current atmosphere may chill criticism that is warranted.

[3] Cleveland Metropolitan Bar Ass'n v. Morton , Slip Op. No. 2021-Ohio-4095 (November 23, 2021)

[4] Pavone v. California , 3:2021 cv 01743 (S.D. Cal. Nov. 19, 2021)

[5] Freshub, Inc. v. Amazon, Inc .No. 6:21-CV-00511-ADA (W.D. Texas December 17, 2021)

[6] Matter of Marshall, No. S-1-SC-37698 (Sup. Ct. New Mexico, January 12, 2022); see "Noted Attorney's License Suspended By New Mexico Supreme Court,"Santa Fe New Mexican(January 14, 2022).

[7] See "Lawyer Who Won $9.5 Billion Judgment Against Chevron Reports to Prison," New York Times (October 27, 2021). Donziger was disbarred as an attorney in New York in August 2020. Matter of Donziger , 186 A.D.3d 27 (1st Dep't 2020) (referencing evidence of corruption of a court expert, obstruction of justice, witness tampering, and judicial coercion and bribery).

[8] See "How the Environmental Lawyer Who Won a Massive Judgment Against Chevron Lost Everything," The Intercept, (January 29, 2020).

[9] Martin Garbus, as quoted in a press release of Frente de Defensa de la Amazonia, available at https://www.makechevroncleanup.com/press-releases/2020/12/31/us-judge-preska-slammed-for-doing-chevrons-dirty-work-in-unprecedented-500-day-detention-of-human-rights-lawyer-steven-donziger.

[10] The National Law Guild's statement is available at https://nlginternational.org/2020/09/more-than-200-lawyers-file-judicial-complaint-against-judge-lewis-a-kaplan-over-abusive-targeting-of-human-rights-advocate-steven-donziger/.

[11] 55 F.3d 1439 (9th Cir. 1995).

[12] Yagman was also reported to have told others privately that the judge had been "drunk on the bench." The court found that the disciplinary authorities introduced no evidence that the statement was false, and the lower court therefore improperly presumed falsity.

[13] 12 F.3d 861, 866 (9th Cir.1993).

[14] 379 U.S. 64 (1964).

[15] 472 U.S. 634, 638 (1985).

[16] See In re. Mire, 2015-B-1453 (Sup. Ct. La. 2016) (attorney disciplined despite her subjective view that court transcript had been doctored; majority finds that a reasonable lawyer would have found "no evidentiary support" for the doctoring claim and would not have made the charge); Matter of Holtzman , 78 N.Y.2d 184 (1991)(District Attorney sanctioned for falsely alleging that judge demeaned rape victim; although the lawyer believed her statements to be true, court disciplined her for inadequate investigation: "[I]t seems only prudent to verify in some degree a belief that a judge has done something for which criticism is warranted").

[17] See, e.g.,"Trump Slams 'Out of Control Ninth Circuit Court," Fox News (November 23, 2018);" So-Called Judge Ridiculed by Trump is Known as a Mainstream Republican," The New York Times (February 4, 2017).

[18] Compare Matter of Reed , 716 N.E.2d 426, 427 (Ind. 1990) (attorney reprimanded for saying that judge's "arrogance is exceeded only by her ignorance") and Matter of Raggio , 87 Nev. 369, 371 (1971) (attorney reprimanded for calling decision "most shocking and outrageous," "judicial legislation at its very worst," and semantical gymnastics") with Matter of Oberlander , 177 A.D.3d 72 (N.Y.2d Dep't 2018) (suspension for attorney who accused federal judges of "active, collusive criminal conduct" and running a "star chamber").