ANTI-SOCIAL COURTS:

SILENCING ONLINE CRITICS

BY IRWIN R. KRAMER

Practicing law isn't easy. Beyond the stress of deadlines and the endless demands of clients, some lawyers have grumbled about "weak," "corrupt," and "lawless" judges "acting under improper and political influence" to make their lives even more difficult.[1]

As "Officers of the Court," beleaguered lawyers cannot confront these judges within the solemn domain of their courtrooms. But there are other domains where they may vent their frustration.

Social media sites like Facebook and Twitter provide easy platforms to denigrate an "ignorant buffoon" for being "drunk on the bench," to describe the "ugly, condescending attitude" of an "evil, unfair witch," or to tweet bizarre tales from the courtroom of "Judge Clueless."[2]

At the click of a mouse, aggrieved attorneys may instantly expose the flaws of our judicial system and the shortcomings of those within it. It's cathartic. Empowering. And free of charge.

But lawyers may face other types of charges for their impulsive posts.

Contesting misconduct charges before judges who may punish them for disparaging their colleagues, these online critics may pay for their derogatory remarks with the loss of their careers.

The Freedom to Disparage?

Affirming "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the U.S. Supreme Court has long observed that criticism of public officials "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[3] Since "erroneous statement[s are] inevitable" in heated debates, "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct."[4]

To provide the "breathing space" needed for uninhibited

[1] *Attorney Grievance Comm'n v. Frost*, 437 Md. 245, 85 A.3d 264 (2014).

[2] *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995); *In re Conway*, Fla. Bar File No. 2007-51,308(17B); *In the Matter of Peshek*, M.R. 23794 (Ill. 2010).

[3] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[4] *Id.* at 273.

debate, the landmark libel case of *New York Times v. Sullivan* refused to compel "the critic of official conduct to guarantee the truth of all his factual assertions."[5] Protecting First Amendment freedoms, *Sullivan* shields critics from legal action unless they deliberately lied or recklessly disregarded the falsity of their attacks.[6]

Although *Sullivan* did not involve criticism of judges, the justices applied this "actual malice" standard in *Garrison v. Louisiana* to exonerate an outspoken district attorney accused of "criminal defamation" for berating local judges.[7] Attributing a large backlog of criminal cases to their "laziness" and "inefficiency," this angry prosecutor accused them of hampering his efforts to enforce the vice laws and "raise[d] interesting questions about the racketeer influences on our eight vacation-minded judges."[8]

Wishing to punish him for "an attack upon the personal integrity of the judges,"[9] the state questioned whether the DA had a "reasonable belief" in the truth of his seemingly outlandish claims.[10] Rather than apply an "objective" test to require a reasonable investigation, the majority stuck with *Sullivan*'s subjective test, which "is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth."[11] To ensure a robust debate over public affairs, "only those false statements made with the high degree of awareness of their probable falsity demanded by [*Sullivan*] may be the subject of either civil or criminal sanctions."[12]

Ethical Restrictions

The American Bar Association expressly incorporated this subjective standard into what has been adopted as Rule 8.2(a) of the Maryland Rules of Professional Conduct. Using *Sullivan*'s language, the rule forbids an attorney from making "a statement that the attorney *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."

This has not stopped courts from rejecting *Sullivan*'s subjective test, stripping their critics of First Amendment rights, and punishing them for negligent misstatements. Distinguishing libel cases from disciplinary proceedings designed "to preserve public confidence in the fairness and impartiality of our system of justice," most courts use an "objective test" to "determine 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.'"[13]

The Fourth Circuit took this approach in affirming a federal court's disbarment of a Maryland lawyer who accused a magistrate of bias and incompetence. Finding the attorney's comments "unquestionably undignified, discourteous, and degrading," it complained that the lawyer "never made any attempt to investigate the magistrate's actions in other proceedings or otherwise establish a reasoned basis for the charges of incompetence or bias."[14] Because his "failure to substantiate charges as grave as the ones leveled here certainly constitute the making of accusations which he knew or *reasonably should have known* to be false," the court used this objective test to deny his claim to First Amendment protection.[15]

Other disciplinary cases have invoked this standard to hold "that free speech does not give a lawyer the right openly to denigrate the court in the eyes of the public."[16] Defending "the chastity of the goddess of justice," one court even proclaimed "that any conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties."[17]

Should the fear of reprisal deter such criticism, this chilling effect is just fine with courts seeking to silence those who may "impair the respect and authority of the court."[18] Forcing lawyers to justify their comments with "substantial competent evidence,"[19] these courts insist that lawyers "be certain of the merit of [each] complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements

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5 *Id.* at 279.

6 *Id.* at 280.

7 379 U.S. 64 (1964). Jim Garrison's subsequent investigation into the Kennedy assassination, criticism of the Warren Commission, and attacks on other public officials was depicted in the 1991 Oliver Stone film, *JFK*.

8 *Id.* at 66.

9 *Id.* at 76.

10 *Id.* at 78-79.

11 *Id.* at 79.

12 *Id.* at 74.

13 *Yagman*, 55 F.3d 1430.

14 *In re Evans*, 801 F.2d 703, 706 (4th Cir. 1986),

15 *Id.* (emphasis added).

16 *Matter of Westfall*, 808 S.W.2d 829, 833-34 (Mo. 1991).

17 *In re Shimek*, 284 So.2d 686, 690 (Fla. 1973).

18 *In the Matter of Greenfield*, 24 A.D.2d 651, 262 N.Y.S.2d 349, 351 (N.Y. App. Div.1965).

19 *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 168 (Ky. 1980)

tend to lessen public confidence in our legal system."[20]

So much for *Sullivan*'s "uninhibited, robust, and wide-open" debate. The Supreme Court may tolerate "vehement, caustic, and sometimes unpleasantly sharp attacks,"[21] but lesser courts would have us mind our manners when criticizing their colleagues.

If, by chance, rebellious lawyers could justify more caustic comments under Rule 8.2, they may still face sanctions for engaging "in conduct that is prejudicial to the administration of justice" under Rule 8.4(d) of the Rules of Professional Conduct. Though this nebulous prohibition would be void for vagueness in any other context, many courts, including the Court of Appeals of Maryland, use this rule to punish lawyers whenever their "conduct impacts negatively the public's perception or efficacy of the courts or legal profession."[22] As virtually any speech impugning the qualifications or integrity of a judge would have that effect, offended courts have ample authority to punish their critics.

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Maryland's Unsettled Law

The law is unsettled in Maryland, and that, itself, should be unsettling to lawyers who dare to blog about their least favorite judge.

Disbarring an attorney who "impugned" with impunity, the Court of Appeals had no need to set a standard for First Amendment protection in *Attorney Grievance Comm'n v. Frost*.[23] After attacking three judges, a State's Attorney and the Attorney General of Maryland as "lawless," "weak," "corrupt," "crooked," and "acting under improper and political influence to have [him] locked up,"[24] Mr. Frost refused to dignify "this unjustified, unjustifiable, and downright ridiculous attorney disciplinary case" by defending himself at trial. Ignoring Bar Counsel's discovery, he admitted by default the falsity and recklessness of his statements.[25]

Without any dispute on this key element of the case,[26] the Court never had to choose between subjective and objective tests for actual malice. But the majority seemed to favor the latter approach. Recalling a "substantially similar" case in which it disbarred a lawyer for using "conjecture and speculation" in "impugning the integrity of the Chief Judge of the Court of Special Appeals,"[27] the Court arguably applied the Fourth Circuit's objective test and found that his "*failure to investigate* ... convincingly demonstrates his lack of integrity and fitness to practice law."[28]

Placing their public image above the First Amendment rights of those who may tarnish it, the majority thought that "the limits on professional speech by attorneys are not coextensive with the limits of the First Amendment."[29] Though the Supreme Court extolled the virtues of vigorous debate on the shortcomings of the system, the Court of Appeals "has long held lawyers to a higher standard of conduct than the average citi-

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[20] *In re Simon*, 913 So.2d 816, 824 (La. 2005).

[21] *Sullivan*, 376 U.S. at 270.

[22] *Attorney Grievance Comm'n v. Geesing*, 436 Md. 56, 65, 80 A.3d 718, 723 (2013), *quoting Attorney Grievance Comm'n v. Dore*, 433 Md. 685, 696, 73 A.3d 161, 167 (2013).

[23] 437 Md. 245, 85 A.3d 264 (2014).

[24] *Id.* at 267.

[25] *Id.* at 271.

[26] *Id.* at 273.

[27] *Id.* at 278, *quoting Attorney Grievance Comm'n v. DeMaio*, 379 Md. 571, 585, 842 A.2d 802, 810 (2004).

[28] *Id., quoting DeMaio*, 379 Md. at 584, 842 A.2d at 809-10, *quoting In re Evans*, 801 F.2d at 706.

[29] *Id.* at 276, *quoting In re Dixon*, 994 N.E.2d 1129, 1136 (Ind. 2013).

zen."[30] Unlike other members of the public, the Court "expect[s] those who have been granted the special privilege of admission to the bar to bring reasonable objectivity to their statements about judicial officers; to rise above the raw emotions and accusations that impede rather than enhance the judicial process."[31]

To the extent that lawyers display any passion at all, the Court would prefer that they serve as the Judiciary's cheerleaders rather than as its critics. In its opinion, "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[32] Reminding us of our "responsibility to refrain from engaging in conduct prejudicial to the administration of justice," the majority believed that "Rule 8.2(a) furthers this principle by requiring lawyers to refrain from impugning the qualifications or fitness of judicial and public legal officers."[33]

The lone dissenter thought otherwise. In Judge Robert N. McDonald's opinion, the "primary purpose in attorney discipline is to protect the public from inept or errant lawyers, not to protect public officials from criticism, even if unjustified."[34] Since "[l]awyers are specially situated to assess the official performance of judges and other judicial and legal officers," Judge McDonald would use the constitutional principles developed in libel cases to "require that lawyers have broad latitude in criticizing such officers" in disciplinary cases as well.[35]

The majority provided this latitude soon thereafter, but limited it to judicial elections. In *Attorney Grievance Comm'n v. Stanalonis*,[36] a rival candidate took the incumbent's views out of context in a flyer which accused the judge of opposing the registration of sex offenders.[37] Though the incumbent opposed the registration of his criminal defense clients before taking the bench, the judge had not "made a blanket statement opposing registration of sex offenders generally."[38]

Writing for a five-member majority, Judge McDonald observed that "[t]he speech at issue in this case—which purported to describe the views of a candidate for judicial office—is core political speech and has the highest level of First Amendment protection."[39] With "limited time to vet language" in "the heat of a political campaign," Judge McDonald wrote that "imprecise wording is not necessarily a violation of [Rule] 8.2(a)."[40]

"[E]ven if a court would normally favor an objective test in assessing … 'reckless disregard," Judge McDonald believed that "there is a significant argument that a subjective test should be applied in an election context, in light of the 'core' First Amendment values at stake."[41] But since there was a "demonstrable basis" to justify the flyer's content, the Court believed that the lawyer's statement would be protected under either test and, yet again, declined to choose between the two.[42]

Censoring Critical Criticism

In a democratic society, criticism of government officials is critical. While the Court of Appeals has saved its "highest level of First Amendment protection" for judicial elections, the "operations of the courts and the judicial conduct of judges are matters of utmost public concern" on election day and every day.[43]

"Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions."[44] But unlike other state officials, Maryland judges have long been shielded from public scrutiny. Ruling from courtrooms where cameras are banned, the work of judges, and of the Judiciary as a whole, is far from transparent.

Ironically, those who are best equipped to critique the judicial system are the least likely to do so. Seeking the approval of judges to protect their clients' interests, lawyers are understandably reluctant to question their intellect, temperament or integrity. If anything, lawyers hoping to curry their favor are more likely to lavish them with undue praise than to alienate them with unfair criticism.

When lawyers overcome these inhibitions and share candid concerns, judges should listen. Lest they "forget their common human frailties" and abuse "the paraphernalia of power" to uphold their self-proclaimed "dignity," one legendary jurist counseled his brethren to stay "mindful of their limitations and of their

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30 *Id.* at 277 n.13, *quoting Attorney Grievance Comm'n v. Sheinbein*, 372 Md. 224, 253, 812 A.2d 981, 998 (2002).
31 *Id.* at 276, *quoting Dixon*, 994 N.E.2d at 1136.
32 *Id.* at 274, *quoting* Preamble to the Maryland Rules of Professional Conduct at [6].
33 *Id.*
34 *Id.* at 280.
35 *Id.* at 280-81.
36 445 Md. 129, 126 A.3d 6 (2015)
37 *Id.* at 136.
38 *Id.* at 137.
39 *Id.* at 140-41, *citing Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002).
40 *Id.* at 141-42.
41 *Id.* at 144.
42 *Id.*
43 *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).
44 *Bridges v. State*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting).

ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."[45]

Though the *Frost* Court encouraged us to "further the public's ... confidence in ... the justice system,"[46] lawyers should not serve as judicial cheerleaders who may only speak out when they have nice things to say. A healthy respect for the rule of law does not require that "Officers of the Court" gratify the "chain of command." As active participants in the system of justice, attorneys ought to have the latitude to expose its flaws.

When courts punish their most effective critics, or fail to set clear standards for protecting their speech, they impede the critical information needed to improve justice for all. This is particularly true in Maryland and other states where citizens must assess judicial qualifications at the ballot box.

Democracy cannot thrive in the dark. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion."[47] As Judge McDonald warned when dissenting in Frost, "discipline imposed by the judiciary that may appear designed to shield judges from general statements of adverse opinions can itself undermine confidence in the judiciary."[48]

Chilling Advice

If asked to identify the most important place for the exchange of views in modern society, the Supreme Court believes that "today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular. ... Social media offers 'relatively unlimited, low-cost capacity'" for "a wide array of protected First Amendment activity on topics 'as diverse as human thought.'"[49]

But when thoughts turn to judges, the price of First Amendment rights may be too high for the lawyers who exercise them. Yielding to the chilling effect resulting from numerous sanctions on outspoken lawyers, Maryland's first bar counsel advised attorneys "to undergo a *cooling off* period ... before 'lashing out' at the judiciary."[50]

Unless and until the Court of Appeals gives lawyers the latitude to engage in more heated debates, those who wish to remain in this profession should chill out before speaking out. Before posting, maintain a professional, respectful tone, remove hyperbole and *ad hominem* attacks, and avoid details that may compromise client confidentiality or be perceived as an effort to influence rulings in a pending case.

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The Supreme Court may tolerate sharper attacks. The court that issued you your license might not.

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[45] *Id.*

[46] *Frost*, 85 A.3d at 274, *quoting* Preamble to the Maryland Rules of Professional Conduct [6].

[47] *Bridges*, 314 U.S. at 270.

[48] *Frost*, 85 A.3d at 283.

[49] *Packingham v. North Carolina*, 582 U.S. ___, 137 S.Ct. 1730, 1735 (2017), *quoting Reno v. ACLU,* 521 U.S. 844, 868, 870 (1997).

[50] Melvin Hirshman, Did I Mean to Say That?, 42 Md. Bar Journ. 69, 70 (Vol. XLII No. 5 Sept./Oct. 2009) (emphasis added).