BY DAVID D. DODGE

Judgmental Criticism Not Recommended

ER 8.2(a) of the Arizona Rules of Professional Conduct[1] prohibits a lawyer from making a statement concerning the qualifications or integrity of a judge that the lawyer 1) knows to be false or 2) makes with a reckless disregard concerning its "truth or falsity."

But how about when a lawyer makes a critical statement about a court that can be interpreted as an opinion just as easily as it can a statement of fact? Two recent cases demonstrate that there are limits to what lawyers can say about judges that have ruled against them.

In *In re Wilkins,*[2] a lawyer, by way of a footnote in an appellate brief, stated that the Indiana Court of Appeals opinion from which he was appealing was so "factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for [the lawyer's opponent] and then said whatever was necessary to reach that conclusion (regardless of whether the facts of the law supported its decision)."

The Indiana Supreme Court ordered the brief stricken as a "scurrilous and intemperate attack on the integrity of the Court of Appeals" and referred the matter to the Indiana disciplinary authorities. In its opinion regarding the disciplinary case, the Indiana Supreme Court held that the lawyer's conduct violated ER 8.2(a) and suspended the lawyer for 30 days. The court stated that the interest in preserving public confidence in the judicial system far outweighed any right that the lawyer had for making the statements in the controversial footnote, especially because no evidence was offered to support those statements. The court stated further that if the lawyer had any cause for complaint against a judge, it should be made to Indiana's equivalent of Arizona's Judicial Ethics Advisory Committee. The lawyer's sanction was reduced to a public reprimand after he apologized for being "overly-aggressive and inappropriate."[3]

> The interest in preserving public confidence in the judicial system far outweighed any right that the lawyer had for making the statements.

In re Arnold[4] concerned a lawyer who had been disqualified by a trial judge from appearing in a case when it was discovered that the lawyer was not an active member of the Kansas bar. After the disqualification, the lawyer returned to his office and faxed the judge a letter, with a copy to opposing counsel, complaining about the judge's attitude at the hearing and suggesting that the judge "seriously consider retiring from the bench." He also complained about the judge's "absurdly fastidious insistence on the decorum and demeanor" that the

Ethics Opinions are available at www.myazbar.org/Ethics

David D. Dodge is a partner in the Phoenix law firm Lieberman, Dodge, Gerding & Anderson, Ltd. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court.

lawyer said masked "an underlying incompetence." The lawyer closed by stating, "You act like a robot. Do yourself and Johnson County litigants a great favor and get off the bench now."

Not surprisingly, the lawyer received a public censure. At the subsequent disciplinary proceeding, the Kansas authorities found that the lawyer, among other things, had violated Rule 8.2 forbidding false statements about the qualifications or integrity of a judge. The Kansas Supreme Court upheld the determination, holding that when exercising a citizen's right to criticize a judge, a lawyer must be certain of the merit of the complaint, use appropriate language and avoid petty criticisms. Pointing out that the lawyer's style was "sarcastic, insulting, and threatening," the Kansas Supreme Court held that the remedy for an allegedly erroneous ruling was to appeal, not to write intemperate letters to the court.

Though we are all allowed to grumble to our client and our partners about a judge's ruling about which we disagree, these cases point out that the ethical line gets crossed when we write insulting letters to the court or accuse a court of misfeasance without having firm factual support for the allegation.[5]

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. 777 N.E.2d 714 (Ind. 2002).
3. 782 N.E.2d 985 (Ind. 2003).
4. 56 P.3d 259 (Kan. 2002).
5. For more discussion on this subject, see Douglas R. Richmond, *Appellate Ethics: Truth, Criticism and Consequences*, 23 REV. LITIG. 301, 327 et seq. (Spring 2004).