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November 4, 1996

Letter to the Editor
The New York Law Journal
345 Park Avenue South
New York, New York 10010

ATT: Ruth Hochberger, Editor-in-Chief

Dear Ms. Hochberger:

Since last Wednesday, when The New York Law Journal published a Letter to the Editor responding to an item that had appeared in The Law Journal on October 18th, I have left telephone messages for you on your voice mail, as well as with Edward Adams.

I have been endeavoring to ascertain the status of our Letter to the Editor, "Concerted Call for Action", faxed on October 23rd in response to Richard Kuh's October 17th Perspective column, "The Importance of Being Critical". A hard copy was hand-delivered to The Law Journal on October 25th, together with CJA's informational brochure.

In view of the extremely serious matters described by our Letter -- profoundly affecting the public interest and the legal community -- it would be irresponsible for us to let it fall into a "black hole" -- never to be known or seen.

We, therefore, request confirmation that The Law Journal will be publishing our Letter to the Editor and, if not, why not. For your convenience, another copy is faxed herewith, together with Mr. Kuh's Perspective column.

In the event you are unaware, when we faxed our Letter to The Law Journal on October 23rd we offered full documentary support. We then stated and now reiterate:

> "Should you wish to see our correspondence with the bar leaders, politicians, and others referred to in our Letter, we will readily-- and gladly -- provide it to you."

One of the exhibits in our correspondence was The Law Journal's publication, on February 29th, of an ethics opinion of the City Bar answering the query of a "highly experienced trial lawyer", whose complaint of judicial misconduct had been summarily dismissed by the New York State Commission on Judicial Conduct. However, the experience of that lawyer, exemplifying the dysfunction and lack of accountability of the Commission on Judicial Conduct, was of no interest to the Committee to Preserve the Independence of the Judiciary, whose Statement lauding the Commission was published in The Law Journal on March 8th. Nor was it of any interest to the politicians the Committee purported to challenge. A copy of The Law Journal's February 29th publication of that opinion is enclosed.

We ask that you be good enough to respond by the end of the day so that we may make timely alternate arrangements -- in the event the Law Journal is not planning to publish our Letter.

Your consideration is greatly appreciated.

Yours for a quality judiciary,

Elena Ruth Sassower

ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

Enclosures:
(a) proposed Letter to the Editor from CJA, 10/23/96
(b) 10/17/96 NYLJ, Perspective column by Richard Kuh
(c) 2/29/96 NYLJ, "Ethics Opinion Allows Criticism of Trial Judge"

10/17/96

NEW YORK LAW JOURNAL

PERSPECTIVE

The Importance of Being Critical

BY RICHARD H. KUH

BAR ASSOCIATION presidents, law school deans and appellate judges now vie with each other to view with maximum alarm the "chilling effect on an independent judiciary" inherent in criticism of judges. I — out of sync with these leaders — view, with at least an equal measure of alarm, the chilling effect on legitimate criticism of judges (and of the judiciary generally), the activity of the six-month old Joint Committee to Preserve the Independence of the Judiciary (*NYLJ*, Oct. 3).

No one in our American democracy has less cause to fear chilling of independence than have our judges. After all, our federal judges have lifetime appointments, and New York State's judges virtually — unless they are caught red-handed in criminal activity — have the same: lengthy terms with renomination or reappointment (at least through age 70) all but assured. When criticized, howsoever harshly, their independence rationally should experience no chill. Their right to mount their benches daily remains unendangered. Other public servants, elected or appointed officials, must periodically stand for re-election or reappointment, subject to the variable whims of the electorate or of those with the appointive power. The rest of us hold our private jobs at the mercy of bosses, or of the economy, or both. *Our* independence is always vulnerable.

Freedom to criticize has been part of America's frontier tradition. The Declaration of Independence levied a lengthy critical bill of particulars against King George III, noting — attacking both King and judiciary — that "He has made Judges dependent on his Will alone." We have had no national Chief Executive since George Washington blessed with the ease of running, uncriticized and unopposed, for the highest role this nation can bestow. Our democracy has three separate but coequal branches of government, and nothing in our Constitution, or in America's traditions, suggests that one is to remain free of criticism.

NO AMERICANS, as far as I know, have ever had their arms twisted, compelling them to don the black robe. Any, already so gowned, who may find the criticism of their judicial actions just too, too uncomfortable to continue, are free to step down. "If you can't stand the heat," President Harry Truman remarked years ago, "get out of the kitchen." Judges, who appropriately carry on their functions by frequently cooking the geese of others, should be sufficiently mature to recognize that their own culinary skills are, pursuant to our democratic traditions, appropriate subjects of public criticism.

In the common law's mother country — England — appellate tribunals, relatively speaking, are reluctant to criticize and to overturn actions taken at the trial level. Here such reluctance appears more honored in the breach than in the observance: appellate judges criticize, often stringently and — not unknown — injudiciously, actions taken at nisi prius. Are appellate judges alone to be permitted to criticize trial judges, as well as lesser appellate judges? Are the robed critics themselves to remain immune from unrobed criticism? Why should public officials, private citizens and the bar be relegated to malcontent private gossip critical of judges? Would not the bench and the bar, indeed our entire judicial system, be far healthier were lawyers, and all in position to observe the judiciary, *not* intimidated, *not* "chilled" such that their critical observations remained bottled up inside, or simply gossiped covertly in discussions with their comrades?

None of this is to suggest that our benches, both federal and state, are bad. Indeed, our judiciary is probably as good, possibly even better, than it has ever been. Most judges, both federal and state, take their robes seriously, ably performing difficult chores. Indeed, we have at least a sprinkling of true Olympians on our benches. But people, and judges are people (males, and — some females — continuing to put on their pants one leg at a time, just like the rest of us), are rarely perfect. We are told that even the great Homer nodded. Why, when judges nod, is criticism to be inhibited?

WE, IN THE WORLD'S greatest democracy, coddle our judges sufficiently by addressing them, over and over and over again, as "Your Honor." We stand respectfully on their coming in and on their going out. Our true feelings are irrelevant; memoranda are invariably signed "Respectfully." We look up to them whether we will or not; their benches being elevated. How far is this coddling to go? Our judges are accorded actions and words of respect formerly, traditionally, reserved for kings and nobility, customs blatantly inconsistent with our democratic mores, customs so heady for the objects of such beneficence, that — understandably — some appear conditioned to believe that they are above all criticism.

Criticism of judges, and indeed of the judiciary, can be a welcome means of improving judicial performance, whether springing from lawyers, from the common man, or from mayors or governors. Let's face it. Not only are judges, as human beings, fallible, but as good as are most of our judges, our judicial system is horribly adrift. Despite a plethora of court administrators and their staffs, often burdensome supervisory actions and statistical reporting systems, our courts as structured are obviously ill-equipped to manage today's litigation flood. The growing acceptance of alternate dispute resolution is in part a result of the failure of our courts to handle effectively the business that should be theirs. This itself justifies criticism of the judiciary and of judges.

Possibly, to offset the impact of the 22 bar groups and five law deans who recently scored personal attacks on judges as having "a chilling effect on an independent judiciary," some rival acronymic organization should be formed. A Society to Attack Bench Shortcomings (otherwise known as STABS) — not stabs in the back — an up-front, outspoken, courageous, group might soundly encourage public officials, and private citizens as well, to publicly attack bench shortcomings (including judicial loss of touch with reality). Judges likely to have their independence chilled by such attacks, are the weak and undeserving members of the judiciary. Courageous judges, with their virtual lifetime terms, will not find their independence compromised by criticism. Strong judges should have, and in fact do have, such confidence in themselves that they are able to flourish despite sometimes unjustified criticism. A good and just judge can convert — as was ventured (then, unsuccessfully) by the alchemists of old, dross into gold — criticism into improved judicial performance.

Richard H. Kuh, *a former New York County District Attorney, is a partner at Warshaw Burstein Cohen Schlesinger & Kuh, LLP.*

2/29/96 NYLJ

Ethics Opinion Allows Criticism Of Trial Judge

BY DANIEL WISE

A LAWYER MAY criticize a judge's handling of a trial, but only "in a temperate and dignified manner," the Association of the Bar of the City of New York has concluded in an advisory opinion.

The ruling was issued by the association's Committee on Professional and Judicial Ethics in response to an

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inquiry from a lawyer, not identified in the opinion.

The attorney asked if he could express his views in a professional publication that a judge, in overseeing a trial involving one of the lawyer's clients, had been "hostile, belligerent, aggressive, abusive, intimidating and generally intemperate."

The committee's advice comes in the midst of harsh attacks on several judges by two of the state's best known lawyers, Governor Pataki and Mayor Giuliani. Yesterday, for instance, Governor Pataki called for the impeachment of Brooklyn Criminal Court Judge Lorin Duckman if the State Commission on Judicial Conduct should not act to remove him within 60 days. Judge Duckman has been under fire for reducing the bail of a sus-

Continued on page 2, column 3

Ex "B"

Lawyer's Criticism of Judge Permitted

Continued from page 1, column 3

pect, who after being released, killed his girlfriend, and for remarks he made during the hearing that were said to suggest a cavalier attitude toward spousal abuse.

In its advisory opinion, the committee found no bar to a lawyer's making remarks critical of a judge, but cautioned that the lawyers be sure of their facts and proceed in a dignified manner.

The committee, for instance, urged that lawyers avoid "petty criticisms" and be guided by a desire "to improve the quality of the judiciary and the legal system in general."

Worthy of Attention

The lawyer asking for guidance had informed the committee that he had filed a complaint with the State Commission on Judicial Conduct, which had decided against proceeding with an investigation.

The Conduct Commission's decision not to act on the complaint did not preclude the lawyer from going public with his charges, the committee wrote, because some conduct, even though not violating the Code of Judicial Conduct, is "worthy of the legal community's attention."

Nonetheless, the committee cautioned the lawyer to consider whether his complaints are "well founded" in view of the Conduct Commission's refusal to take up the matter.

The committee noted that it was required to balance two competing considerations in the Judicial Conduct Code. On the one hand, the code exhorts lawyers to "encourage respect for the law and the courts and the judges thereof" [Ethical Consideration (EC) 9-6].

A countervailing consideration is set forth in EC 8-1, which encourages lawyers to work to improve the legal system, and recognizes that attorneys are uniquely poised to recognize the system's deficiencies.

Following is the text of the opinion:

FORMAL OPINION 1996-1

TOPIC: Statements Concerning Judges.

DIGEST: A lawyer may make public statements critical of the conduct of a particular sitting judge, provided the criticisms are well-founded, and notwithstanding the fact that the Commission on Judicial Conduct declined to pursue the lawyer's complaint of alleged judicial misconduct against the judge. Any such statements should be intended to improve the legal system, and made in a dignified, temperate manner.

CODE: DR 8-102(B); ECs 8-1, 8-6, 9-6.

Question

May a lawyer ethically write an article for a professional journal criticizing a particular judge for abusive and intemperate judicial conduct during a trial, notwithstanding the fact that the New York State Commission on Judicial Conduct did not find a basis for investigating the judge for that conduct?

Opinion

The inquirer is a highly experienced trial attorney. Recently, he represented the defendant in a personal injury case. The jury found the inquirer's client liable, but awarded no damages to the plaintiff. The case is now fully concluded and no appeals are pending. The inquirer believes that the judge committed serious acts of judicial misconduct during the trial, including hostile, belligerent, aggressive, abusive, intimidating and generally intemperate conduct directed at the inquirer and his co-counsel. The inquirer believes that the judge did so because of a combination of incompetence, animus and lack of judicial temperament, and has further reached the conclusion, upon speaking with other attorneys with experience before the judge, that his conduct in this case was typical of him.

The inquirer submitted a letter of complaint to the Commission, which did not find a sufficient indication of judicial misconduct to warrant an investigation. A request by the inquirer for reconsideration of the dismissal of his complaint was denied. The inquirer now wishes to write a letter for publication in a periodical regularly read by the legal community, in which he would discuss the conduct of the judge and of the Commission in declining to take action against the judge. The inquirer's professed motivation is to educate others and allow them to benefit from his experience, as well as to put public pressure on the judge to improve his conduct or face defeat in an upcoming re-election bid.

As a threshold matter, we note that ethical restrictions on criticizing the judiciary have been the subject of a number of cases that have evaluated such restrictions under the First Amendment. See, e.g., *Standing Comm. on Discipline of the U.S. Dist. Court v. Yagman*, 55 F3d 1430 (9th Cir. 1995); *In re Holtzman*, 78 NY2d 184 (1991), *cert. denied*, 502 U.S. 1009 (1992); cf. *United States v. Cutler*, 58 F3d 825 (2d Cir. 1995) (contempt). See also Note, *Attorney Discipline and the First Amendment*, 49 NYU L. Rev. 922 (1974). Whether the letter the inquirer proposes to write would be protected under the First Amendment is a legal question this Committee cannot address.

The Code of Professional Responsibility requires a lawyer to balance two responsibilities. On the one hand, Canon 8 encourages lawyers to assist in improving the legal system. EC 8-1 specifically acknowledges that attorneys "are especially qualified to recognize deficiencies in the legal system." Thus, under the Code, attorneys are encouraged to assist in improving the legal system through initiating corrective measures in the selection of judges. EC 8-1, 8-6. This responsibility necessarily entails some independent analysis and criticism of the judiciary. At the same time, EC 9-6 exhorts attorneys "to uphold the integrity and honor of the profession; to encourage respect for the law and the courts and the judges thereof..." This duty may at times conflict with the role an attorney takes as a leader in the criticism, reform, and change of the legal system.

EC 8-6 attempts to balance these competing concerns in the context of judicial elections. It provides, in part:

> Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench ... 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 as a right to criticize such officials publicly, the lawyer should be certain of the merit of the 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.

Further, DR 8-102(B) admonishes lawyers not to "knowingly make false accusations against a judge or other adjudicatory officer."

Measured against these standards, we are of the view that an attorney may properly criticize a judge for conduct in an action that is no longer pending so long as the attorney is not knowingly making false accusations against the judge and strives to voice the criticisms in a temperate and dignified manner. The criticisms cannot, in any case, be part of a "general course of conduct ... degrading to ... the courts, and irrelevant or grossly excessive." *In re the Justices of the Appellate Division, First Dep't v. Erdmann*, 33 NY2d 559 (1973).

Assuming that the inquirer's criticisms are well-founded, he should be permitted to bring his criticisms to the attention of the legal community. The inquirer is not precluded from doing so solely because the Commission on Judicial Conduct determined not to pursue his complaint. There is judicial misconduct that does not warrant an investigation by the Commission, that is, conduct that does not rise to the level of a violation of the Code of Judicial Conduct, but that is nonetheless of sufficient magnitude — particularly when viewed in the aggregate — to be worthy of the legal community's attention. However, while the Commission's failure to act in this case is not, in and of itself, a sufficient basis to preclude a lawyer from publicly criticizing a sitting judge, the lawyer should take into account the fact that the Commission did not proceed with his complaint in assessing whether his criticisms are well-founded. In addition, we urge the inquirer to avoid petty criticisms, and to make critical statements only when motivated by a desire to improve the quality of the judiciary and the legal system in general, and then to present his views only in a temperate, dignified manner.

Conclusion

Subject to the limitations expressed in the foregoing opinion, the question presented is answered in the affirmative.

CALENDAR OF COMING EVENTS