

The Importance of Defending Judges

It is a lawyer's duty to speak out in defense of the justice system and protect the integrity of the process.

One of the things I was told by more experienced mentors when I started practicing is that I needed to “learn how to lose.” Having grown up in a family where my father was a coach, losing was anathema. “Show me a good loser and I’ll show you a loser” was a common refrain in our household. But in my practice of litigation, I quickly learned that winning was relative and losing was inevitable. After all, in any trial, the cards you have to play are largely outside

of your control. Our client’s action (or inaction) will dictate how a judge or jury sees our case. And it can sting when you spend weeks in trial, giving up sleep while you maintain that singular focus on your client’s case, pouring your sweat and emotion into the appeal to the jury — only to have them reject what you have been arguing. As one crusty trial warrior told me after a particularly hard result in trial, “They weren’t buying what I was selling.”

But beyond our pride being on the line, all advocates recognize that we are essential participants in the functioning of our system of justice. Judges, jurors, lawyers and litigants all play a part in facilitating a guarantee of justice for our citizens.

But while we recognize that losing is inevitable in our system, our clients, or interested citizens, may not see or appreciate that a judge or jury didn’t see things their way. Especially in the case of a hotly contested matter, it’s not uncommon to see litigants react in anger at an adverse decision. In my more than three decades of handling civil litigation matters at trial and on appeal, I’ve had that difficult post-verdict encounter with an adverse party who was not pleased with the result of their case. Inevitably, the comment from the aggrieved litigant is something along the lines of “I don’t know how you sleep at night.” I try to diffuse the situation by responding politely without saying anything that could amplify the anger. After all, I know that emotions are running hot at that point and time will usually let things cool.

But what about the situation where



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a litigant or another interested party (or heaven forbid, a lawyer) takes offense at the decision of the judge or jury and strikes out with public statements alleging corruption or threats against the judge? What happens then? Who comes to the judge's defense?

You may think that this predicament is so rare as to not be a realistic possibility, but consider the following situations that have taken place in West Virginia this year:

1. A criminal defendant made repeated public threats that he was going to kill the judge who sentenced him, including graphic details on how he would go about the judge's murder.
2. In a hotly contested political lawsuit, several legislative leaders accused the judge who ruled that a candidate was not eligible to run for office of being an "activist liberal judge" of a "corrupt court."
3. An out-of-state lawyer who was admitted *pro hac vice* failed in getting a presiding judge to recuse himself in a case and accused the judge and the Chief Justice of the Supreme Court of Appeals who upheld the recusal decision of "corruption within the judiciary."

In the first example, threats of harm and acts of violence against judges are becoming commonplace. In New Jersey, a litigant

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searched online for the home address of a federal judge and showed up with a gun to confront the judge, killing her son and wounding her husband in the process. This tragedy has resulted in an effort to provide additional security to federal judges and to limit internet access to personal information regarding judges.

In the case in our state, the criminal defendant was prosecuted over the threats, pleaded guilty and was sentenced to additional time to run after the time for the underlying offense. The judge, a former prosecutor, noted that threats from criminal defendants against her had occurred over the years, but that her major concern was the attempt to impact the judicial system.

In the political case noted above, the comments about "activist judges" came from legislative leaders and political observers. Not surprisingly, in today's polarized political environment, any decision is likely to result in harsh push-back from the other party. But such comments degrade the system when they occur in a political echo chamber, repeated on social media without a balancing viewpoint. After all, judges are not supposed to comment about their decisions or speak publicly in response to criticism. So where does the balance come from?

In the last example, the criticism from the out-of-state lawyer evidenced a lack of understanding about the procedure under our rules for recusal of judges. Under the Trial Court Rules, the judge who is the subject of the recusal motion must first review and decide the motion. If the judge denies the motion, the decision is automatically reviewed by the Chief Justice of the Supreme Court of Appeals, who can grant the recusal request and appoint a new judge, affirm the denial of the request, or ask that the trial court judge conduct

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a hearing on the matter. Thus, when the out-of-state lawyer took issue with the trial judge "presiding over his own disqualification hearing," that was because the procedure embedded in our rules provides for that hearing to be conducted that way. The accusation from the lawyer of judicial corruption was unjustified, unprofessional and inconsistent with an advocate's responsibilities to show respect for the court and the justice system.

In all three of these examples, we can safely assume that the criticisms of the judiciary are inappropriate, whether they be threats of violence or allegations of corruption. While examples of true corruption by judges are fortunately rare, lawyers would have a responsibility to speak out about the corruption. Likewise, if the criticism of the judiciary is unjust, uncalled for or untrue, a lawyer's duty is the same. In that case it is imperative that lawyers come to the defense of the judiciary and object to the unsubstantiated allegations of corruption.

In thinking about this column, I struggled with the interplay of a lawyer's obligation to speak out about unjust criticism of the judiciary and our preservation of free speech under the First Amendment. But keep in mind that we are not seeking to ban such unjust criticism, but only to condemn it. Free speech is a bedrock principle of our republican form of government, but free speech only limits the ability of the government to prevent speech. It does not mean that all speech is free from condemnation by free people who find the speech offensive, unjustified or immoral.

The preamble of the West Virginia Rules of Professional Conduct contains a list of Lawyers' Responsibilities. I recommend it to you for review. One of the requirements is:

A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

This requirement imposes dual duties on lawyers. A lawyer is required not only to challenge illegal or unjust official action, but also to defend the legal system when it is subject to unjust attack. Ultimately, a lawyer's guidepost should be to act and speak in ways that preserve and uphold the integrity of the justice system. Any time that a judge is attacked unjustly, especially in situations where the judge cannot respond to the criticism, it is our responsibility to speak out in defense of the system.

In 1986, the American Bar Association empaneled a committee to examine the unjust criticism of the judiciary. The report of that committee's findings included this warning:

The effectiveness of the administration of justice depends in a large measure on public confidence. The reporting of inaccurate or unjust criticism of judges, courts, or our system of justice by the news media erodes public confidence and weakens the administration of justice. It is vital that nonlitigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial. ...

Therefore, cooperation of lawyers and bar associations is necessary to successfully meet inaccurate or unjust criticism of judges and courts.

Keep in mind that the ABA committee made this observation before the advent of social media, before the presence of the 24-hour news cycle, before bloggers and before the internet was ubiquitous. Yet the threats to our system are just as valid. In our polarized country, where it is difficult to list the things where we all agree, it is my hope that as lawyers, we can agree that we all have a responsibility to the system where we ply our trade to protect the integrity of the process. After all, if lawyers don't come to the defense of judges, who will? **WVL**

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