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Feature

BEWARE THE WITCH'S BREW OF RHETORICAL HYPERBOLE

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When online, people will often write, tweet, or blog in the heat of the moment, fall victim to Godwin's Law, and make regrettable statements. Sometimes, instead of venting, it is better to just take a time-out, especially if you are a lawyer who is upset at a judge. The story of Florida attorney Sean Conway presents a cautionary tale that lawyers, as officers of the court, are not exempt from the norms of civility when posting on social media.

On October 30, 2006, Mr. Conway was in the Florida courtroom of Broward Circuit Judge Cheryl Alemán who had been scheduling criminal cases to be tried within two weeks after arraignment. Mr. Conway believed the judge wanted to force the defendants to move for a continuance, which would waive their right to a speedy trial.

Mr. Conway previously had filed a written plea of "Not Guilty" for his client at an arraignment on October 18, 2006. The court later set trial for October 30, 2006. But Mr. Conway asserted the notice setting this trial date had not been mailed until October 24, based on the envelope containing the notice, and that he only received the late notice on October 25, which gave him just three business days to prepare for trial because it had not been timely mailed. Mr. Conway argued that the defense had not been given a reasonable amount of time to prepare for trial as required by the Florida Rules of Criminal Procedure. Mr. Conway requested a continuance, asking that the trial date be reset without the necessity of waiving his client's right to a speedy trial. Judge Alemán did not adopt Mr. Conway's suggestion, and instead sought to have his client waive the right to a speedy trial. [1]

Later that day, Mr. Conway wrote about his experience with Judge Alemán on JAABlog, an unmoderated social media website where people can blog about local Broward County judges. In addition to recounting the aforementioned late notice and speedy trial waiver, Mr. Conway peppered his posting with hyperbole-- calling Judge Alemán an "EVIL, UNFAIR WITCH" (emphasis in original) who was ""seemingly mentally ill" with an "ugly, condescending attitude." [2] He also said, "She is clearly unfit for her position and knows not what it means to be a neutral arbiter." [3]

Afterward, the Florida Bar opened an investigation as to whether Mr. Conway violated several ethical rules, including Florida Rules of Professional Conduct rule 4-8.2(a) which states, "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." [4] This Florida rule is similar to Model Rule 8.2(a), and California courts enforce a similar standard of conduct under California Business and Professions Code section 6068(b). [5] Citing Mr. Conway's statements that Judge Alemán was an ""evil, unfair witch," "clearly unfit for her position," and "seemingly mentally ill," the Florida Bar alleged that they "were made with reckless disregard for their truth or falsity" and that Mr. Conway "impugns the integrity of Judge Alemán and the judiciary as a whole." [6]

Mr. Conway argued that lawyers have a First Amendment right to criticize the judiciary. He further asserted that Judge Alemán "was giving people one week to prepare for trial and as soon as the blog exposed it through powerful words, she stopped it .... Sometimes the language the bar approves of doesn't get the job done." [7] He later reiterated that "sometimes you have to

use the strongest words in order to be heard." [8] Mr. Conway, however, eventually consented to accept a reprimand from the Florida Bar and pay a $1,250 fine. [9]

But the Florida Supreme Court later issued an order to show cause regarding this disciplinary plea agreement, and requested briefs on the First Amendment issue. Mr. Conway argued that he had made no false statements, and that attorney criticism of judges, including "rhetorical hyperbole," is protected by the First Amendment. [10] The American Civil Liberties Union of Florida also filed an amicus brief arguing that Mr. Conway's statements were protected speech that raised issues of legitimate public concern. [11] The Florida Bar, on the other hand, argued that Mr. Conway's online "personal attack" was "not uttered in an effort to expose a valid problem" with the judicial system, so the statements "fail[ed] as protected free speech under the First Amendment." [12] In a Report of Referee submitted to the Florida Supreme Court, Judge Stephen Rapp found the statements "were false or posted with reckless disregard as to their truth or falsity," and recommended that Mr. Conway "be found guilty of misconduct justifying bar discipline." [13] The Florida Supreme Court approved the Report of Referee and the original plea agreement ("the Conditional Guilty Plea for Consent Judgment") without discussing the merits of the case, and directed the Florida Bar to administer the agreed- ***21** upon reprimand against Mr. Conway. [14]

Meanwhile, Judge Alemán was defending herself in an unrelated case against other allegations of judicial misconduct that were filed against her in February 2007. [15] After a three-day proceeding in December 2007, the Florida Judicial Qualifications Commission found, among other things, that Judge Alemán had, in another case, given defense counsel only fifteen minutes to write a motion to disqualify the judge from a first-degree murder case in which the death penalty was being sought, and improperly threatened contempt sanctions against defense counsel. [16] The Florida Supreme Court affirmed the commission's findings and conclusion that Judge Alemán had committed misconduct by imposing unreasonable time limits on counsel and then threatening counsel with contempt. [17] The court ordered that she be disciplined with a public reprimand and pay the costs of the disciplinary proceedings. [18]

Notwithstanding whether Mr. Conway's criticism of Judge Alemán's judicial conduct in his case had any merit, he blogged about it in the heat of the moment using injudicious and inflammatory language. [19] (Mr. Conway used more measured and temperate language when he wrote to the Florida Judicial Qualifications Commission to complain about Judge Alemán). "When you become an officer of the court, you lose the full ability to criticize ***22** the court," according to Michael Downey who teaches legal ethics at the Washington University law school. [20] Mr. Conway claimed that this "was not about being disrespectful, or just wanting to call someone a name .... [but] about being heard." [21] But the desire to be heard above the din of the many voices on social media is a poor justification for name-calling directed at a judicial officer.

Sanctioning a lawyer for rhetorical hyperbole, however, raises unsettling First Amendment issues. [22] Rhetorical hyperbole should not be equated with a reckless disregard of the truth. The Ninth Circuit has held that statements of "rhetorical hyperbole" are not sanctionable, and an attorney may criticize a judge if the criticism is supported by a reasonable factual basis. [23]

Rather than a formal disciplinary sanction, perhaps a letter of caution from the Florida Bar to Mr. Conway about civility and respect would have been more appropriate. [24] On the other hand, Mr. Conway's unrepentant attitude in defending his use of "the strongest words in order to be heard" suggests that a letter of caution would have fallen on deaf ears. But even if a state bar's disciplinary sanctions may be too blunt of an instrument to police rhetorical hyperbole and name-calling, that does not mean the norms of civility should be abandoned.

In the words of Supreme Court Justice Potter Stewart, "[a] lawyer belongs to a profession with inherited standards of propriety and honor ... [and] must conform to those standards." [25] A lack of civility could erode the public's respect for the legal system. [26]

While an attorney should not be precluded from criticizing the conduct of a jurist, the standards of civility nonetheless should be kept in mind when on social media or any other public forum.

Footnotes

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1 *See* Letter From Florida Bar to Sean Conway (April 3, 2007), http:// www.dmlp.org/sites/citmedialaw.org/files/2007-04-03-Letter %20Notifying%C20Conway%C20**o**f%C20Bar%Ïnvestigation.pdf.

2 Sean Conway, *Judge Aleman's New (Illegal) "One-Week to Prepare" Policy*, JAABlog (Oct. 30, 2006, 9:11 PM), http:// jaablog.jaablaw.com/2006/10/30/judge-alemans-new-illegal-oneweek-to-prepare-policy.aspx.

3 *Id.*

4 Letter From Florida Bar to Sean Conway, *supra* note 1; *cf. Florida Bar v. Ray*, 797 So. 2d 556, 560 (Fla. 2001) (prohibiting statements "impugning the integrity of a judge, when made with reckless disregard to their truth or falsity").

5 *See Ramirez v. State Bar*, 28 Cat. 3d 402 (1980).

6 Letter From Florida Bar to Sean Conway, *supra*.

7 *Bullsh*t*, JAABlog (Dec. 13, 2007, 8:16 AM), http:// jaablog.jaablaw.com/2007/12/13/bullsht.aspx.

8 Michael Mayo, *High Court's "Evil Witch" Speech Decision Should Spook Florida Attorneys*, Mayo on the Side (Oct. 31, 2008, 10:10 AM), http:// weblogs.sun-sentinel.com/news/columnists/mayo/blog/2008/10/no_free_speech_for_ lawyers_in.html.

9 Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, ABA Journal (Feb. 1, 2011), http:// www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_sociaI_ media_is_obvious_dangerous/.

10 Respondent Sean Conway's Response to Show Cause Order (July 12, 2008), http://jaablog.jaablaw.com/files/34726-32374/ conway_response.pdf.

11 ACLU Amicus Brief in Support of Conway, *Florida Bar v. Conway*, No. 08-326 (July 11, 2008), http:// www.dmlp.org/sites/ cirmedialaw.org/files/2008-07-11-ACLU%20Brief%C20in%C20Support%C20**o**f%C#onway.pdf.

12 John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. Times -- (Sept. 12, 2009), http:// www.nytimes.com/2009/09/13/us/13**l**awyers.html.

13 Report of Referee, *Florida Bar v. Conway*, No. 08-326 (2008), http://www.floridasupremecourt.org/clerk/ briefs/2008/201-400/08-326_ROR.pdf.

14 *Florida Bar v. Conway*, No. 08-326, 2008 WL 4748577, at *1 (Fla. Oct. 29, 2008).

15 *Formal Charges Filed Against Judge Aleman*, JAABlog (February 6, 2007, 5:26 PM), http://jaablog.jaablaw.com//2007/02/06/ formal-charges-filed-against-judge-aleman.aspx.

16 *In re Aleman*, 995 So. 2d 395, 399-400 (Fla. 2008).

17 *Id.* at 400.

18 *Id.*

19 *Cf.* Sean Conway, *Additional JQC Complaint Filed Against Judge Aleman*, JAABlog (May 8, 2007), http://jaablog.jaablaw.com// 2007/05/08/additional-jqc-complaint-filed-against-judge-aleman.aspx.

20 Schwartz, *A Legal Battle*, *supra*; *see also* Benjamin Beezy, *An Alternative Approach to Evaluating Attorney Speech Critical of the Judiciary: A Balancing of Court, Attorney, and Public Interests*, 1 UC Irvine L. Rev. 1221, 1239 (2011) (attorney speech has historically been limited by the conception of attorneys as officers of the court).

21 JAABlog (Dec. 13, 2007), *supra*.

22 *See, e.g.*, *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 958 (6th Cir. 2009) (finding an attorney's reference to "three jackass court of appeals judges" was protected by the First Amendment and the Fourteenth Amendment); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (holding that describing a judge as "ignorant," "ill-tempered," ""buffoon," "substandard human," "right-wing fanatic," "a bully," and "one of the worst judges in the United States," was rhetorical hyperbole and a statement of opinion protected by the First Amendment, but the statement that the judge was "drunk on the bench" implied a statement of fact that could be sanctionable); *In re Green*, 11 P.3d 1078, 1086 (Colo. 2000) (finding an attorney's statement that a judge was a "racist and bigot" could not be a basis for disciplining the attorney consistent with the First Amendment); *State Bar v. Semaan*, 508 S.W.2d 429, 431-32 (Tex. Civ. App. 1974) (finding an attorney's comment that a judge was "a midget among giants" was not sanctionable because it could not be proven true or false); *In re Erdmann*, 301 N.E.2d 426, 427 (N.Y. 1973) (finding a lawyer's statement that judges were ""whores who became madams" was protected speech).

23 *Yagman*, 55 F.3d at 1438 ("statements of opinion are protected by the First Amendment unless they 'imply a false assertion of fact"') (citation omitted); *see also United States Dist. Court v. Sandlin*, 12 F.3d 861, 864 (9th Cir. 1993).

24 *See* Jonathan Turley, *Florida Supreme Court Upholds Sanction Against Lawyer Who Called Judge a "Witch" on a Blog*, Jonathan Turley Blog (Sept. 30, 2009), http://jonathanturley.org/2009/09/30/florida-supreme-court-upholds-sanction-against-lawyer-who-called-judge-a-witch-on-a-blog/.

25 *In re Sawyer*, 360 U.S. 622, 646 (1959) (Powell, J., concurring).

26 *Cf. Florida Bar v. Ray*, 797 So. 2d at 560 (noting that recklessly false statements impugning the integrity of a judge would "erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention").

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