

# Attorneys Have An Ethical Duty To Protect The Judiciary

By **Deborah Winokur** (November 21, 2023)

Upon joining the bench, our judges take an oath to protect and defend the Constitution of the U.S.

Sadly, these efforts can come at a steep cost to personal safety. Tragically, on Oct. 19, Maryland Circuit Court Judge Andrew Wilkinson, 52 and a father of four, was assassinated in the driveway of his home.[1]

Law enforcement believes the gunman was a disgruntled litigant in a child custody case. Judge Wilkinson's death also brings to mind the 2020 tragic murder of U.S. District Judge Esther Salas' son, Daniel Anderl, after the judge was targeted by a misogynist, racist extremist.[2]



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In December 2022, Congress passed a bill named in Daniel's honor — the Daniel Anderl Judicial Security and Privacy Act — prohibiting data collectors from selling or purchasing judges' personally identifiable information and prohibiting the publication of such information on the internet.[3]

In June 2022, the Supreme Court Police Parity Act was authorized, which provides for police protection, when deemed necessary, for immediate family members of Supreme Court justices or their staff. Various states, including New Jersey, have enacted or are considering similar measures to protect their judiciary.

According to New York City Bar Association President Susan J. Kohlmann, attacks and threats against judges have increased in the last several years.[4]

In a 2020 National Judicial College poll, three-quarters of the 572 judge-respondents said they are "not satisfied with the security measures taken by their court." [5] The legislative branch has been trying to ameliorate this safety gap, but lawyers themselves also must be part of the solution. It is not only our moral imperative, but also a requirement of our profession.

## Turning Down the Heat

The tenor of public disagreement and debate has become increasingly hostile and volatile. Attorneys who publicly excoriate judges throw gasoline on the fire. But attorneys who participate in these types of scorched earth tactics do so at both their own professional peril and potentially risk harm to judges.

Attorneys should be aware that most jurisdictions hold that attorneys' right to free speech can be restricted by the American Bar Association Model Rules of Professional Conduct when attorneys make incredulous statements or statements with reckless disregard for the truth about members of the judiciary.

This was true in the case of California lawyer Ben Pavone, who referred to a judicial hearing officer's ruling as a "succubustic adoption of the defense position" and was charged by the State Bar of California with impugning the integrity of a judge and violating California Business and Professions Code, Section 6068(b).[6]

New Mexico lawyer Victor Marshall faced a similar fate when he was suspended after implying that a judge ruled in favor of his opponent due to his own financial interests.[7]

In this context, lawyers should be mindful of the Model Rules of Professional Conduct's Rule 3.5, which prohibits lawyers from engaging in conduct that is intended to disrupt a tribunal; Rule 8.2 regarding false or reckless statements about the qualifications or integrity of a judge or adjudicatory officer; and Rule 8.4 prohibiting conduct that is prejudicial to the administration of justice.

Taken together, these rules create a minimum standard of decorous and truthful behavior for lawyers in their actions and public statements that, when properly followed, would serve as a release valve for public tensions and sentiments against judges.

### **Managing Clients**

Lawyers also have a role to play with regard to creating an expectation that clients will proceed in a respectful tone before judges and also managing their clients' own expectations about the legal process. While it may be human nature, and thus common, for lawyers to engage with their clients in informal criticism of judges and their orders, lawyers need to be careful to clarify that an adverse judgment does not mean that the judge has a bias, lacks qualifications or is otherwise acting improperly.

Again, Rule 8.2 comes into play mandating that lawyers not recklessly disregard the truth and needlessly incite their clients over disagreements regarding judicial rulings.

In addition, lawyers may find that they do not need to press for every possible advantage in the legal process on behalf of their clients. Unnecessary motion practice is the type of obstreperous conduct that violates Rule 8.4 when it becomes prejudicial to the administration of justice.

For example, during the COVID-19 pandemic era, Michael Hierl, an Illinois attorney representing a licensing company selling "fantasy art," sought reconsideration after his initial temporary restraining order was delayed due to an emergency COVID-19 order.

U.S. District Judge Steven Seeger denied the motion and was incredulous in his order that an attorney would push for a hearing to "immediately put a stop to the infringing unicorns and the knock-off elves" during an international pandemic. He referred to "the sage words of Elihu Root: 'About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop,'" quoting the U.S. Court of Appeals for the Seventh Circuit in *Hill v. Norfolk and Western Railway Co.* from 1987.[8]

### **Educating the Public**

The ethical canons of the code of conduct for U.S. judges include a number of restrictions on the ability of judges to comment on matters of public interest. Canon 3A(6) contains an admonition against commenting about cases pending before any court and particular vigilance is required for matters pending in the judge's own court.

Canon 2 requires that judges avoid the appearance of impropriety. The commentary specifically recognizes that a "judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen."

With these limitations on judicial speech in mind, Comment 3 to Rule 8.2 of the Model Rules of Professional Conduct recognizes that lawyers should defend judges when they are unjustly criticized. Lawyers must be the ones to educate the public about limitations on judicial speech and not seek to use judicial silence on political issues as a means to attack judges and their legal positions.

Lawyers should publicly reject efforts of special interest groups that demand commentary from judicial candidates about how they would rule on various issues of political interest. Bar associations and lawyer interest groups should follow the lead of the American Board of Trial Advocates, which created a protocol for responding to unfair criticism of judges. The protocol recognizes that judges' hands are tied with respect to responding to criticism of their actions in a case — and therefore calls upon lawyers within the group to set the record straight with regard to public attacks.[9]

Judges make a number of trade-offs when they join the bar — they know that certain of their free speech rights will be curtailed, and they know that they will be subject to public criticism — which could ultimately threaten their safety. Judges should also know that lawyers will stand with them in diffusing attacks against them and their rulings.

The Rules of Professional Conduct contain a number of provisions mandating or recommending that lawyers comport themselves in a manner to support the judicial function, train their clients to do so, and take proactive steps to publicly correct unwarranted or inaccurate criticisms.

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[1] <https://apnews.com/article/maryland-judge-killed-andrew-wilkinson-pedro-argote-f5547d8c74b74421fdb2f153f85c0d61>.

[2] <https://www.bostonglobe.com/2022/06/20/opinion/i-know-firsthand-threats-judges-face-my-son-was-killed-my-husband-was-shot/>.

[3] <https://www.uscourts.gov/news/2022/12/16/congress-passes-daniel-anderl-judicial-security-and-privacy-act>.

[4] <https://www.nycbar.org/media-listing/media/detail/the-disturbing-trend-of-threats-and-violence-against-judges-and-the-vital-importance-of-judicial-security>.

[5] <https://www.judges.org/news-and-info/the-verdict-is-in-on-judicial-security-judges-dont-feel-protected/>.

[6] Pavone v. Cardona, 3:2021 cv 01743 (S.D. Cal. Nov. 19, 2021).

[7] In Re: Marshall, 528 P.3d 653(N.M. 2023).

[8] Order in Art Ask Agency v. The Individuals Identified on Schedule A., No. 20-cv-1666, dated March 18, 2020.

[9] American Board of Trial Advocates, Protocol for Responding to Unfair Criticism of Judges.