

ETHICS ADVISORY OPINION

FROM THE STATE BAR OF NEW MEXICO'S ETHICS ADVISORY COMMITTEE

ADVISORY OPINION: 2006-02

DATE: October 2, 2006

TOPIC: Commenting in a public forum regarding candidates for legal office, including judges.

DISCLAIMER: The Ethics Advisory Committee is constituted for the purpose of advising inquiring lawyers on the interpretation of the Rules of Professional Conduct as applied to the inquiring lawyer's duties. The committee's opinions are not binding and are intended only to assist lawyers in the course of their conduct.

**RULES IMPLICATED: 16-802 NMRA 2006;
16-106 NMRA 2006**

QUESTION PRESENTED

What are the implications of the Rules of Professional Conduct when a lawyer considers publication of statements of fact or opinion regarding persons seeking election, either through competitive election or retention election, or being considered for appointment to a judicial or other public legal office?

SHORT ANSWER

The Rules of Professional Conduct encourage lawyers to present honest and candid opinions regarding the judiciary and the administration of justice. However, in making statements and expressing opinions regarding prospective or current members of the judiciary, or of other public legal offices, the lawyer must not make a statement that the lawyer knows to be false or is made with reckless disregard as to its truth or falsity.

FACTUAL BACKGROUND

This issue was presented to the Ethics Advisory Committee (the "Committee") on the inquiry of a lawyer who was contemplating publication of information, through a letter to the editor, about a judge seeking reelection to the bench. Prior to submitting the statements for publication, the lawyer asked for "an advisory opinion as to the ethical issues involved." The lawyer attached a draft of the statements the lawyer intended to publish regarding the member of the judiciary. However, the Committee did not pass on the draft language because the issue of whether a lawyer has met the standards required by the Rules of Professional Conduct is not one that could be determined by a third-party without conducting fact-finding, which is beyond the scope of the Committee's work. Current concerns regarding the judiciary make the inquiry a timely subject for a formal opinion.

ANALYSIS

Rule 16-802(A) NMRA 2006 provides

A. Defamation. 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, adjudicatory officer, or of a candidate for election or appointment to judicial or legal office.

Despite this prohibition against making defamatory statements regarding candidates for judicial or public legal office, as lawyers, we have a unique opportunity to interact with, observe and form professional opinions about the performance of judges and other public legal officials involved in the administration of justice, as often with candidates for those positions as well. That opportunity to observe, along with our role in the administration of justice, brings with it responsibilities to inform those involved in the process of selecting or electing members of the judiciary or other public legal offices. The ABA Comment to Rule 16-802 NMRA 2006 (ABA Model Rule 8.2) articulates this role as follows:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. *Expressing honest and candid opinions on such matters contributes to improving the administration of justice.* (Emphasis added).¹

The ABA Comment recognizes that, as with all responsibilities, over-zealous or improper methods of meeting those responsibilities can be detrimental:

Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice. * * * To maintain the fair and independent administration of justice, lawyers are encouraged to defend judges and courts unjustly criticized.

Id. Thus, the Rules of Professional Conduct encourage lawyers to express candid opinions and truthful statements regarding not just judges, but any person who may be a public legal officer, as well as candidates for those positions.² Honest, candid opinions and true statements made by lawyers regarding persons within those categories contribute to the processes necessary to ensure the fair administration of justice. Conversely, the failure to engage in candid and truthful statements regarding the judiciary and other

¹Moreover, the Preamble to the Rules of Professional Conduct expresses similar considerations:

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

Preamble – A Lawyer's Responsibilities, New Mexico Rules of Professional Conduct.

²While participation in public debate regarding any public official or candidate is not prohibited by the Rules of Professional Conduct, particular emphasis is placed upon a lawyer's statements regarding prospective or current members of judicial and other public legal offices, due to our direct involvement with such officials in our capacities as lawyers.

legal officers, specifically regarding the selection or election of such persons, amounts to a failure on the part of lawyers to fulfill important obligations of our position in society.

However, when a lawyer engages in representations regarding judges or other public legal officers or candidates for such positions that the lawyer knows are false, or that are made with reckless disregard for the statement's truth or falsity, the lawyer causes serious harm to the administration of justice. Statements such as these also improperly injure the reputation of the official or candidate and tend to damage the public's perception of the legal profession and would violate the requirements of Rule 16-802.

When commenting on judges, other public legal officials, or candidates for such positions, the lynchpin for lawyers is whether the opinions expressed are honest and candid expressions and the statements are true—lawyers are encouraged if not obligated to provide such commentary in order to ensure the vitality of our legal system. Conversely, should a lawyer publish dishonest opinions or statements that are knowingly false or made with reckless disregard to their truth or falsity, the lawyer would violate the Rules of Professional Conduct and would improperly injure the reputation of the official or candidate, and thereby cause great damage to the institutions involved in the administration of justice and to our profession. Thus, the lawyer considering such commentary must consider both the responsibilities of keeping the public informed of the performance of public legal officials, including judges, and insuring that the opinions are honest and candid, and the statements made are neither known to be false, nor made with reckless disregard for their truth or falsity.

In addition to the requirements of Rule 16-802 NMRA 2006, the lawyer's other obligations under the Rules of Professional Conduct must also be considered. Perhaps most notably, but without

limitation, the lawyer must also consider if any of the information provided involves client confidences, in which case the lawyer must comply with Rule 16-106 NMRA 2006. This rule requires client consent before a lawyer reveals "information related to the representation of a client." Rule 16-106 NMRA 2006 would preclude any commentary regarding a candidate that includes the disclosure of confidential information without the prior consent of the client.

Finally, if a lawyer publishing the statements is also a candidate for a judicial office, the lawyer must also consider the Code of Judicial Conduct. Rule 16-802(B) NMRA 2006 provides:

A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

However, application and interpretation of the Code of Judicial Conduct is beyond the purview of the Committee.

CONCLUSION

Lawyers are encouraged to provide candid and honest opinions regarding public legal officials and candidates, including judges, as an aid to improving the administration of justice. Conversely, statements known to be false or made with reckless disregard to their truth or falsity do mischief to the administration of justice and are forbidden by the Rules of Professional Conduct. Moreover, the lawyer must keep in mind other obligations set out in the Rules of Professional Conduct (e.g., Rule 16-106 NMRA 2006 – Confidentiality of Information) when commenting on the performance of a public legal officer or candidate. A lawyer who is a candidate for judicial office must also consider applicable provisions of the Code of Judicial Conduct pursuant to Rule 16-802(B) NMRA 2006.