



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

Because I'm an extremely hip lawyer... and will do it for free, *StreamingCourtNews* called me to video comment on a long-running celebrity case for its site. Perhaps getting carried away in the moment, I expressed the view that the judge seems to enjoy the limelight and could be providing unconstitutionally disparate treatment of the criminal defendant based upon how many TV cameras the defendant's fame has attracted and the judge's well-known ambition to be nominated for the appellate court. I realize this means I probably won't find favor in this judge's court in the future, but now I'm wondering, is this something I could actually be disciplined for?

A: Well, you bring a full bucket of issues with your question: (a) do the Model Rules cover judicial criticism? (b) what if the judge is in another state—does that state have jurisdiction over you and/or can your state discipline you for criticism of a judge from another state? (c) what about First Amendment protection of your comments? Setting aside the interesting choice of law questions for another time, Model Rule 8.2 provides that a lawyer shall not make a statement about the qualifications or integrity of a judge that the lawyer knows to be false or makes with reckless disregard for the truth, essentially the "actual malice" standard of *Garrison v. Louisiana*, 379 U.S. 254 (1964). In general, discipline of the attorney under this standard of knowing falsity or reckless disregard passes First Amendment muster if the disciplining authority proves the lawyer's criticism was a false statement of fact, or if it was an opinion, that it necessarily implied an undisclosed assertion of fact that was false. See, e.g., *In re Green*, 11 P.3d 1078 (Colo. 2000). Here, at least with your use of "seems," "could be" and "may" you have stated your views as opinions or possibilities rather than fact. Do these opinions or suggestions necessarily imply facts about the judge's integrity? The Ethics Lawyer (who is not a "Constitutional lawyer") thinks not, but that is the issue. And yes, you've definitely burned a bridge with (at least) that judge—best of luck with your media career.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American

College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.