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What Lawyers Can Do to Protect and Promote Judicial Independence

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ABSTRACT

Judicial independence is a foundational principle of our constitutional democracy that allows judges to decide legal disputes impartially, based upon law and evidence, without fear or favor. Although it became and remains a defining feature of our national and state governments, the uniquely American form of judicial independence originated in Pennsylvania.

As lawyers in the birthplace of American judicial independence, we have a special obligation to protect and promote that cherished constitutional value.

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Lawyers have a special obligation and opportunity to safeguard judicial independence through advocacy and by avoiding and condemning attacks on courts and jurists.

I. THE ORIGINS OF AMERICAN JUDICIAL INDEPENDENCE

Almost immediately after his arrival in his namesake colony, William Penn published his 1682 *Frame of Government of Pennsylvania*, which was deeply influenced by his persecution and imprisonment by an unjust English legal system. At the outset, the *Frame* declares that fair application of the law is the defining feature of a just government, whatever its form:

I know what is said by the several admirers of monarchy, aristocracy and democracy, which are the rule of one, a few, and many, and are the three common ideas of government, when men discourse on the subject. But I choose to solve the controversy with this small distinction, and it belongs to all three: Any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, or confusion.²

To ensure that “the laws rule” in Penn’s new government, the *Frame* required independent judicial officers and famously declared that “all courts shall be open, and justice shall neither be sold, denied nor delayed.”³ Iterations of this decree, which was the first effort in what would become the United States to integrate an independent judiciary into the structure of government, appear in all five of Pennsylvania’s subsequent Constitutions.⁴ Penn is better known as an advocate for religious freedom, but his role in developing the equally revered constitutional value of judicial independence was no less important.⁵

Nearly a century after Penn published his *Frame*, on March 5, 1770, a group of British soldiers stationed in Boston shot into a crowd of unruly colonists, killing five. The “Boston Massacre” quickly became a rallying cry against British tyranny and helped to spur the American Revolution, and it also played an important role in advancing the cause of judicial independence.

² *Frame of Government of Pennsylvania May 5, 1683*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. (2008), https://avalon.law.yale.edu/17th_century/pa04.asp.

³ *Id.*, *Frame of Government, Laws Agreed upon in England*, Art. V.

⁴ Pennsylvania Constitution of 1776, Sec. 26, https://avalon.law.yale.edu/18th_century/pa08.asp; Constitution of 1790, Art. IX, Sec. XI, available at <https://www.paconstitution.org/texts-of-the-constitution/1790-2/>; Constitution of 1838, Art. IX, Sec. XI, available at <https://www.paconstitution.org/texts-of-the-constitution/1838-2/>; Constitution of 1874, Art. I, Sec. 11, available at <https://www.paconstitution.org/texts-of-the-constitution/1874-2/>; and Constitution of 1968, Art. I, Sec. 11, available at <https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/00/00.htm>.

⁵ See Scott D. Gerber, “William Penn and the Origins of Judicial Tenure during Good Behavior,” *The Pennsylvania Magazine of History and Biography*, Vol. CXXXVI, No. 3 (July 2012).

The day after the Boston Massacre, a loyalist merchant walked into John Adams's law office and asked Adams to defend the soldiers against charges of murder. Although a leading patriot, Adams agreed to the representation. Despite the public clamor against his cause, Adams secured the soldiers' acquittal on murder charges, based in part on a closing argument that concluded as follows:

The law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations, and wanton tempers of men. . . . The law no passion can disturb. Tis void of desire and fear, lust and anger [and] commands that which is good, and punishes evil in all, whether rich, or poor, high or low. . . . On the one hand it is inexorable to the cries and lamentations of the prisoners; on the other it is deaf, deaf as an adder to the clamours of the populace.⁶

Adams was especially impressed by the several presiding judges' ability to remain impartial in the face of intense public pressure, and his reinforced belief in an independent judicial system, remaining neutral amid the passions of the day, would profoundly influence the judiciary we recognize today.

Three years later, in a celebrated series of essays published in the *Boston Gazette* and entitled "On the Independence of the Judges," Adams expounded on views that had been reinforced by the Boston Massacre trial. The occasion was a British effort to change the manner in which colonial judges were paid, in order to bring them more directly under Crown control. Opposing the measure, Adams drew heavily on English legal traditions, but — like William Penn nearly a century earlier — he envisioned a judiciary that was completely unknown to the common law, whose judges were subject to the will of kings and parliaments. "Liberty can no more exist without an independent judiciary," Adams wrote, "than the body can live and move without a soul."⁷

Adams followed publication of the essays with his even more famous pamphlet, *Thoughts on Government*, published on the eve of revolution in 1776, in which he elaborated:

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both

⁶ Quoted at <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016>.

⁷ Robert J. Taylor et al (ed.), *Papers of John Adams*, 15 vols. (Cambridge, MA, 1977), 1:252–309, <https://www.masshist.org/publications/adams-papers/index.php/view/PJA02dg5>.

the legislative and executive, and independent upon both, that so it may be a check upon both[.]⁸

Adams codified his philosophy as law when he drafted the 1780 Massachusetts Constitution, which established a separate and co-equal judiciary and declared that “[it] is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.”⁹ Such independence is necessary, the constitution famously continues, “to the end it may be a government of laws, and not of men.”¹⁰

When the framers of the United States Constitution looked for models among the existing state constitutions, they rejected the majority that created extremely powerful legislatures and instead favored the Pennsylvania and Massachusetts models in which the branches of government were distinct and the judiciary was structurally independent. The framers thus memorialized in the US Constitution the judicial model we recognize today, with secure tenure, stable compensation, and separate institutional status to ensure that federal judges remain independent of political pressure.¹¹

The origins of judicial independence are an essential part of American history, but they are especially relevant for our purposes because William Penn and John Adams established themselves as founding fathers of American judicial independence while they were a citizen and practicing lawyer, respectively. Neither was an eminent jurist or law professor and neither was yet the great statesman he would become. This is a lesson to us all.

While it may not seem obvious that citizens and lawyers can or should be leading voices in support of judicial independence, the experiences of Penn and Adams show that exactly such people have the most to lose — like Penn himself — when the judiciary is not independent and the most to gain — like Adams and his clients in the Boston Massacre trial — when it is. Given our Commonwealth’s foundational role in developing judicial independence, it is especially appropriate for us as Pennsylvania lawyers to advance its cause.

II. WHAT CAN LAWYERS DO?

The threats to judicial independence are many. Judges sometimes face sharp criticism from politicians or the public after controversial rulings, and such criticism can caricature or misrepresent the decisions in order to demean the court or judges that rendered them. Judicial funding and budgets, or proposals to fundamentally restructure courts, can become venues in which politicians express their displeasure.

8 John Adams, *Thoughts on Government* (1776), THE WORKS OF JOHN ADAMS, ed. Charles Francis Adams, 10 vols. (Boston, 1850–56), 4:193, 198–99

9 Massachusetts Constitution, Part the First, Art. XXIX, <https://malegislature.gov/Laws/Constitution>.

10 *Id.*, Part the First, Art. XXX.

11 US Const., Art. III, Sec. 1.

In states like Pennsylvania that initially elect judges in partisan elections, highly-charged political rhetoric is not uncommon, and such rhetoric surfaces even in nonpartisan retention elections, especially when the elections occur in an already polarized political environment. Courts and judges also may face attacks on social media, through disinformation campaigns and otherwise, and public officials and litigants can threaten to defy lawful rulings. In the most extreme circumstances, judges and their families have been threatened and even physically attacked.

Each of these examples is an attack on judicial independence itself — not merely the court or judge that is most directly targeted. In particular, while criticism of judicial decisions is expected and entirely proper, personalized and misleading attacks on courts and judges themselves, to say nothing of violence, pose a serious threat to the public confidence on which judicial legitimacy and thus independence depend.

Lawyers have a unique ability to respond to such threats, and this ability is especially important because the judiciary’s capacity to defend itself is limited. Ethical rules generally prevent sitting judges from responding to criticisms of their decisions or political attacks¹² and, equally important, the judiciary lacks traditional instruments of power that are available to the other branches of government. In *Federalist* 78, Alexander Hamilton described the judiciary as the “least dangerous” branch of government because it lacks a “sword” and a “purse.”¹³ Without those levers of power, the judiciary relies on public trust for its legitimacy.

Lawyers play a crucial role in building and maintaining that trust because we serve as a key interface between the judiciary and the public — in representing clients as a primary example. But even beyond representing clients, lawyers have unique influence as officers of the court, community leaders, prominent citizens, learned advisors, and educators. Especially in times of political polarization, when public trust more easily erodes, lawyers must be proactive in supporting and defending the legitimacy of the judiciary and its judges.

What, then, can lawyers do to foster judicial independence? As suggested in the sections that follow, we can do a lot, both in how we fulfill our ethical obligations and, more broadly, in how we communicate about the judiciary when engaging with legal institutions, our clients and the public.

12 See, e.g., 207 Pa. Code Ch.33 Rule 2.9 (“(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter[.]”); *Id.*, Rule 2.10 (“(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court[.]”); *Id.*, Canon 4 (“A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”).

13 Hamilton, Alexander, et al., *THE FEDERALIST* NO. 78 (New York: Signet Classics, 2005), <https://constitutioncenter.org/the-constitution/historic-document-library/detail/alexander-hamilton-federalist-no-78-1788>.

A. ETHICAL ADVOCACY

In determining what lawyers can and should do in any context, including advocating for judicial independence, the appropriate starting point is the *Pennsylvania Rules of Professional Conduct*. Like the *Preamble* to the *Code of Judicial Conduct*, the *Preamble* to the *Rules of Professional Conduct* declares its policy goals in both practical and aspirational terms. As relevant here, the *Preamble* repeatedly emphasizes the duties that accompany lawyers' special status as officers of the court and "public citizens":

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice.

. . . 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.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, [and] the administration of justice. . . [A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.¹⁴

The *Rules* that follow the *Preamble* require "candor toward the tribunal" and caution that a lack of candor "undermines the integrity of the adjudicative process."¹⁵ Lawyers are likewise prohibited from making false or reckless statements about "the qualifications or integrity of a judge" because such statements "can unfairly undermine public confidence in the administration of justice."¹⁶ Lawyers are thus encouraged to defend judges and courts that are unjustly criticized in order to "maintain the fair and independent administration

¹⁴ Pa.R.Prof.Conduct, Preamble, Paras. 1, 5, 6, 13

¹⁵ *Id.*, § 3.3, and Comment 2.

¹⁶ *Id.*, § 8.2 and Comment 1.

of justice[.]”¹⁷ Finally, the Rules define “professional misconduct” to include “conduct that is prejudicial to the administration of justice.”¹⁸

These *Rules*, which are aptly described as “rules of reason,”¹⁹ define our obligations as lawyers in both negative terms — what we must not do — and in positive terms what we should and often must do. However, overall, the *Rules* encourage or require far more activities than they prohibit — we must “demonstrate respect” for courts and judges; “uphold legal process;” “seek improvement of the . . . administration of justice;” “further the public’s understanding of and confidence in the rule of law and the justice system;” and “maintain the fair and independent administration of justice” by, for example, defending courts and judges against unfair criticism.

Properly viewed in these terms, advocacy for judicial independence is completely consistent with our ethical obligations.

B. INSTITUTIONAL ADVOCACY

Pennsylvania has a number of organizations available to lawyers who are interested in supporting judicial independence.

For example, the Pennsylvania Commission on Judicial Independence (PACJI) was founded in 2005 to foster public understanding of the role of the judiciary and the value of judicial independence and to address unjust criticism of the judicial system. Under the leadership of Superior Court Judge Mary Jane Bowes, PACJI has planned and sponsored numerous seminars, symposia, publications, community events at which judges speak to the public, and other projects designed to educate the public about the judicial branch and its work. These efforts include monitoring and responding to threats to judicial independence with public statements and op-eds, continuing judicial and legal education programs, developing a website, podcasts, and television programming, and facilitating discussions about courthouse security. In furthering its mission, PACJI has also partnered with other leading organizations, including the National Constitution Center, the Rendell Center for Civics and Civic Engagement, the Administrative Office of Pennsylvania Courts, and law schools.

The Pennsylvania Bar Association (PBA) has a Judicial Independence Committee that actively educates the public and the media about the court system and judicial decisions. The committee is composed of PBA and local bar association leaders, PBA members, and former judges, and it advocates on behalf of judges “who cannot defend themselves against unfounded attacks[.]”²⁰

Lawyers have many additional options for joining and becoming actively involved in organizations that directly or indirectly support judicial indepen-

¹⁷ *Id.*, Comment 3.

¹⁸ *Id.*, § 8.4(d).

¹⁹ *Id.*, *Scope*, Para. 14.

²⁰ See *Judicial Independence*, <https://www.pabar.org/site/For-Lawyers/Committees-Commissions/Judicial-Independence>.

dence. Examples include Pennsylvanians for Modern Courts, which hosts an annual Judicial Independence Benefit,²¹ and the Public Interest Law Center, which works with community groups, advocacy organizations, other public interest and private law firms, and institutions of higher education to advance civil, social, and economic rights.²² Even when not focused specifically on judicial independence, these groups advance their cause by engaging with the legal system to benefit the public.

Finally, lawyers can organize and present our own judiciary-focused programming through local bar associations, inns of court, and pro bono groups. We can also write amicus curiae briefs on behalf of state and local bar associations, as well as frequent amici like the Pennsylvania Defense Institute, the Pennsylvania Coalition for Civil Justice Reform, the Pennsylvania Association for Justice, the Pennsylvania Association of Criminal Defense Lawyers, and others. The PACJI, The Supreme Court of Pennsylvania Historical Commission, and PBA have significant written materials and other resources to assist with such efforts.

Lawyers should be aware of and work with or alongside these organizations to support a free and fair judiciary.

C. PUBLIC ADVOCACY

Outside of law-related organizations, lawyers have many opportunities to directly communicate with the public about the role of the judiciary and the importance of its freedom from outside influence.

Once again, as prominent citizens, lawyers have authoritative voices and the ear of the community, whether speaking at a school on Career Day, an Elks Lodge, a church or synagogue, a local council meeting, or even a cocktail party. Especially given our special knowledge of the judiciary, our opinions about the necessity of judicial independence are outsized and influential and should be heard.

Many lawyers also have special access to venues for messaging, and some effectively have bullhorns as a result of close contacts with online, print, and broadcast media outlets. Even putting aside our ethical imperatives, these platforms can be utilized to quickly defend the judiciary against unfair attacks. Serving as legal analysts and commentators also gives lawyers unparalleled opportunities to educate the public and improve civic literacy about the judiciary. Timely and fact-based commentary is an especially effective way of countering misinformation.

This advocacy also can be accomplished through op-eds, letters to the editor, social media posts and comments, public forums, and encouraging edi-

²¹ See *Judicial Independence Benefit*, <https://www.pmconline.org/events/judicial-independence-benefit-2>.

²² See *About Us*, Pub. Interest L. Center, <https://pubintlaw.org/about-us/>.

torial boards and reporters to write about independence-related subjects. An excellent example is “Judicial independence is under threat. It’s essential to our republic’s survival,” published in a number of Pennsylvania newspapers operated under the *USA Today* umbrella by Judge Jordan Yeager of Bucks County. Although now a jurist, Judge Yeager was a longtime, prominent practitioner of public sector, environmental, and appellate law, and his diverse experience on and off the bench gives him particular authority to conclude:

Without an independent judiciary we would lose a stabilizing pillar of our constitutional order. We would descend from the rule of law to mob rule.²³

Judge Yeager’s insights are compelling and he is not alone. Lawyers from many backgrounds have seen the crucial importance of judicial independence from many perspectives. Our experiences and views should be shared.

Finally, like all citizens, we should offer our views to executive and legislative officials. These views may include advocating for measures that are essential to judicial independence — including adequate courthouse security and funding — and advocating against counterproductive measures like retaliatory structural changes to courts.

In all of these ways, lawyers as private citizens can effectively and publicly support judicial independence.

D. DECORUM AS ADVOCACY

Having considered *Rules*-based obligations and advocacy through legal institutions and communications with the public, it is useful to consider how lawyers can advocate for judicial independence in a lower-profile but equally effective way, namely by managing how we conduct our daily practices. Many best practices are obvious — maintaining candor, refraining from public, politicized, or personal attacks on the courts or judges, and the like.

But there are other, more subtle ways in which lawyers might undermine judicial independence. Equal vigilance is required in these circumstances.

We are of course advocates, and more challenging and contentious legal work understandably generates more strident advocacy. A difficult opponent, prolonged litigation, and high stakes add further pressure, and typical business concerns about developing business and financing law practices, to say nothing of supporting families, make lawyering among the most stressful careers. And stress naturally makes it more difficult to maintain decorum and act with moderation. Throw in an adverse judicial ruling, and a mix of stress, ego, and

²³ Jordan B. Yeager, *Judicial Independence is Under Threat. It’s Essential to Our Republic’s Survival*, PHILLYBURBS.COM, <https://www.phillyburbs.com/story/opinion/2025/03/27/judicial-independence-is-under-threat-it-is-essential-to-our-republics-survival-opinion/82677749007/>.

embarrassment can lead us to attack not only the ruling but the court and judge that issued it.

This risk becomes especially acute when reporting a loss to a client. In this fraught context, which is magnified by a resounding defeat for an important client in a contentious case, we may be inclined to blame the loss on judicial bias, ignorance, or a vendetta. While perhaps understandable in context, we must resist the urge to cast such blame. Instead, as mentioned, we should “demonstrate respect” for courts and judges, instill “the public’s . . . confidence in the rule of law and the justice system,” and avoid impugning the “integrity of a judge.”²⁴

Although private criticism conveyed to clients may seem more benign than a public attack, the fact remains that clients are members of the public who will form and broadcast opinions, based on what we tell them, to family, friends, and others. As a result, all comments impugning a judge’s integrity should be considered public comments, and all such comments “unfairly undermine public confidence in the administration of justice.”²⁵ Rather than making such ill-advised accusations, we should defend courts and judges, which is essential “[t]o maintain the fair and independent administration of justice[.]”²⁶

Even putting aside the *Rules*, common sense suggests that statements by a client’s trusted and authoritative guide to the legal system that a judge is essentially biased or ignorant undoubtedly diminishes the client’s — and thus the public’s — trust in the judiciary. This is equally true of a lawyer’s comments to colleagues, friends, and others, all or any of whom may form adverse views of the judiciary if the lawyer responds to an adverse decision or other disappointing outcome by unfairly impugning the court or judge. It is certainly appropriate to criticize, even vehemently, the reasoning or authorities on which a judicial decision relies, but the criticism must be legal, not political or personal. In other words, criticism grounded in the law is fine; criticism grounded in the judge’s alleged motive or character is not.

Judicial independence is bolstered (or weakened) by many ordinary aspects of practicing law, from the candor of arguments and citations, to the tone of oral or written advocacy, and by what we say to clients after difficult hearings or losses. In these regards, we do not take an oath to win every case or win at all costs. Rather, the oath requires our obedience to and defense of the federal and state constitutions, “fidelity” to courts, candor, and not prejudicing the administration of justice “for lucre or malice.”²⁷ In other words, we must practice in a way that upholds the essential conditions of fair and impartial adjudications. The manner in which we routinely practice has profound ramifications for judicial independence.

24 Pa.R.Prof.Conduct, *Preamble*, Paras. 5 and 6; and § 8.2.

25 *Id.*, § 8.2, Comment 1.

26 *Id.*, § 8.2, Comment 3.

27 42 Pa.C.S.A. § 2522.

III. CONCLUSION

Given the competing forces that have existed within and outside the models of government that nations have devised throughout history, it is not surprising that independent judiciaries have been the exception, not the norm. Pennsylvanians are thus very fortunate that such a judiciary became firmly rooted in our Commonwealth and country, through the genius and efforts of William Penn, John Adams, and many others. But that form of judiciary is not self-sustaining. It can be nourished and supported or it can be neglected, distorted, and even destroyed.

As officers of the court and public citizens, lawyers have unique obligations and opportunities to protect and strengthen judicial independence and legitimacy. As outlined above, by fulfilling our ethical obligations, teaming with like-minded institutions, nurturing public trust, and practicing in ways that support rather than undermine judges, we can ensure that courts remain strong, fair, and free to apply the law without fear or favor. That is the essence of judicial independence and, far from benefitting only courts, it protects all of us by allowing courts to safeguard our essential rights and liberties. Advocacy in support of judicial independence certainly takes effort, but preservation of that cherished value is worth it.