June, 2007

Speak No Evil: Legal Ethics v. First Amendment

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Available at: https://works.bepress.com/terri_day/1/
We can speak about the institution, but ultimately the bar is the group that both is in touch with the public on the one hand and understands the judicial institution on the other.¹

Debate about the role of judges in American governance has sparked hostilities so poisonous as to create concern that “the nation could slide into dictatorship if harsh critiques of the judiciary go unanswered.”² To what extent attorneys enter into this debate is controversial. The First Amendment, ethical rules of professional responsibility and considerations of professionalism dictate the rights and responsibilities of lawyers as participants in this great debate.

The judiciary is being attacked from those in the highest positions of power and influence. From the President,³ members of Congress,⁴ state legislators,⁵ and influential

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religious leaders,⁶ the attack on the judiciary is vitriolic. These attacks have fueled a mobilization of efforts that threaten the very existence of a core American democratic principle, the independence of the judiciary. These efforts have emerged as the politicization of the judiciary in concrete efforts to influence judicial outcomes and seize control of the judicial branch. Congress is considering the creation of an Inspector General to oversee federal courts.⁷ A grassroots political organization had successfully introduced, through voter referendum, a South Dakota Constitutional Amendment that would strip away judicial immunity,⁸ and special interest groups have transformed judicial elections to the realm of highly contested political campaigns.⁹ Pundits suggest that these attacks on the judiciary are unique in American history¹⁰ and tear at the fabric of American democracy.

In the face of these threats to the judicial branch, what is the proper role of lawyers in this alarming scenario? Ethical rules and professionalism considerations demand that lawyers act and speak in ways that do not “unfairly undermine public confidence in the administration of

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⁶ Pat Robertson, televangelist, made the following statement: Judges “are destroying the fabric that holds our nation together. Over 100 years, I think the gradual erosion of the consensus that’s held our country together is probably more serious than a few bearded terrorists who fly into buildings.” Andrew Cohen, Anti-Judicial Rhetoric Scary Senate Merely Forestalled an Inevitable Showdown, DENVER POST, May 29, 2005, at E04, available at 2005 WLNR 8629753.


¹⁰ Jeffrey Rosen, It’s the Law, Not the Judge; But these Days the Bench is the Hot Seat, THE WASHINGTON POST, Mar. 27, 2005, at B1 (discussing periods in American history when Congress has tried to encroach on judicial
When a lawyer’s statements impugn the integrity and qualifications of a judge, disciplinary actions with the possibility of severe sanctions often follow. It is well-settled law that, in some areas, lawyers’ First Amendment rights are not coexistent with nonlawyers. Often there are important state interests that compete with attorneys’ First Amendment rights which justify greater restrictions on lawyers’ rights to speak than on the speech rights of nonlawyers.

This article explores the contours of attorneys’ First Amendment rights. There is little controversy about the power of a judge to control and restrict lawyers’ speech in the courtroom. In furtherance of the proper administration of justice and a fair process to litigants, judges’ ability to conduct a non-disruptive court proceeding trumps attorneys’ First Amendment rights to speak in the courtroom. However, a lawyer should never be “muzzled” even in the courtroom. The lawyer must be able to protect her client from arbitrary proceedings. Outside of the courtroom raises different issues. Considering out of court statements by lawyers involved in pending cases, the U.S. Supreme Court has said that attorneys’ First Amendment rights must be balanced against the right of litigants to get a fair and impartial adjudication. However, when a case is no longer pending, can a lawyer’s out of court statements that are critical of the judge or the judge’s ruling subject the speaker to disciplinary actions consistent with the First Amendment?

Ethical rules and professionalism considerations that restrict attorneys’ out of court

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13 Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991); Bridges v. California, 314 U.S. 252, 266 (1941) (discussing historical use of contempt to protect against disorder in the courtroom: “[i]n both state and federal courts, this power has been universally recognized”).
14 Gentile, 501 U.S. at 1075.
statements or opinions that are critical of judges and their rulings have been justified by the concern that lawyers may unfairly undermine the public perception of the judiciary and the administration of justice. While protecting the public perception of the judiciary is certainly an important, perhaps even compelling, interest, this article suggests that this interest is insufficient to justify restrictions on attorneys’ out of court statements in cases that are no longer pending. Given the state of the judiciary, impacting public perception is crucial to halting the alarming erosion of confidence in the judiciary and inculcating loyalty to the principle of an independent judiciary. Nevertheless, restricting core First Amendment rights further erodes American democratic principles and is not the proper path for repairing the public’s perception of the judiciary.

This article concludes that lawyers should have First Amendment rights, coexistent with nonlawyers, to make out of court statements critical of the judiciary in non-pending cases. An open, transparent judicial system, under the eye of public scrutiny, is crucial to American democracy. Speech about the judiciary and its functioning is core political speech entitled to the highest degree of protection under the First Amendment. Concern that statements critical of the judiciary will negatively influence the public is not a compelling state interest to justify restrictions on core First Amendment speech. First Amendment principles do not permit suppression of protected speech on the mere grounds that the audience will be overly persuaded.

The ethical rules that proscribe criticism of the judiciary also encourage lawyers to “defend judges and courts unjustly criticized.”¹⁵ A rule that potentiallypunishes negative statements and encourages positive statements strikes at the heart of First Amendment concerns.

¹⁵ ABA MODEL RULES of PROF’L CONDUCT R. 8.2, cmt. 3 (2007). (“To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.”).
When government, through disciplinary proceedings, punishes one point of view, government is acting as censor. The government is dictating permissible points of view that may be expressed, and also limiting the public’s right to hear a point of view the government disfavors. The overall effect of such a rule will “chill” attorneys from speaking at all.

Finally, the First Amendment protects not only the right of the speaker to speak, but also, the right of the audience to receive information. Lawyers are in the best position to inform the public on the workings of the judiciary, both good and bad. The remedy to information critical of government is more speech, not less. In a society that receives its information on the judicial system from talk radio, Internet blogs and sensationalized “gavel to gavel” media coverage of high profile court cases, it is time for the judiciary to come into the 21st century and engage in some public relations of its own. This article suggests ways to counter the negative portrayal of judges and the judicial system by employing public information officers and “partnering” with community groups to promote civic education that teaches the importance of an independent judiciary and the proper role of judicial decision-making.

Part I of this article will present a factual example of the chilling effect on First Amendment rights when an attorney’s critical statements about a judge collided with threatened disciplinary action under ethical rules. Part II of the article will discuss the judicial decisions that have addressed the legal standards to be applied when attorneys’ statements have resulted in disciplinary actions. Part III will analyze these decisions within a First Amendment framework. Part IV will discuss the efficacy of restricting attorneys’ speech critical of the judiciary in light of the appalling public ignorance about government institutions and how they function. The ethical rule restrictions may have unintended consequences of chilling speech critical to public education. Part V will suggest practical ways to positively impact public perception of the
judicial system through partnerships with community groups to promote and implement civic education. In conclusion, Part VI will summarize why combating the problem of public perception must involve more speech, not less. Ethical rule restrictions that target attorneys’ criticism of the judiciary violate the First Amendment because they silence attorneys, they reduce the overall amount of information, and they interfere with the public’s right to receive information on matters of public concern from those most informed.

I. Lawyer Beware: Speak at Your Own Peril

City politics can be some of the most intensely followed news in a community. There was no exception to the media’s scrutiny when Orlando Mayor Buddy Dyer was arrested on March 11, 2005, after a grand jury indicted him on violation of a state election law. Governor Bush suspended Mayor Dyer from office, and the city scheduled a special election to find a temporary replacement until the suspended mayor’s case would be resolved. There was disagreement on whether the Florida Constitution, state law and the City Charter required a special election. Local Democratic officials filed suit in state court contesting the legality of a special election to replace suspended Mayor Dyer while his case was still pending. A circuit court judge ruled that the law required a special election when a mayor is suspended.

16 Scott Powers, Dan Tracy and Jim Leusner, Legal Strategy Is Full of Nuances, ORLANDO SENTINEL, Mar. 12, 2005, at A15, available at 2005 WLNR 23724111. Although no fraudulent intent was alleged, Mayor Dyer and others were charged with violating a state law that prohibits paying someone to collect absentee ballots. See also Orlando Mayor Suspended After Indictment, http://www.local6.com/print/4277222/detail.html (updated Mar. 14, 2005) (last visited May 19, 2006).
20 Id.
Ultimately, the special election never transpired. The special prosecutor dropped all charges against Mayor Dyer on April 21, 2005. Governor Bush immediately lifted the suspension, and Mayor Dyer returned to City Hall. State legislators reviewed the state absentee-ballot law, under which Mayor Dyer had been indicted and charged, suggesting an amendment that “would make it unlawful to hire someone to collect absentee ballots only if there is an ‘intent’ to commit [voter] fraud.”

Although the “election-law-violation” ordeal ended for Mayor Dyer and the City of Orlando, Attorney Steven G. Mason’s troubles were just beginning. Mason, who represented the Local Democratic Party in the special election litigation, was quoted in an Orlando Sentinel article about the judicial decision to go forward with the special election. He stated the following: “It’s an illegal election. We’ll find some judges on the appellate court who aren’t afraid of the political heat, and we’re going to win this thing.” Shortly after these comments appeared in the Orlando Sentinel, The Florida Bar initiated an attorney disciplinary investigation against Mr. Mason based on his published comments. Specifically, The Florida Bar’s inquiry would determine if Attorney Mason violated a Florida Rule of Professional Conduct that prohibits an attorney from making statements impugning the qualifications and integrity of a judge.

22 Id.
24 See Schlueb, Special Election, supra note 18, at B3.
26 Id. The Florida Bar’s inquiry focused on two comments by Attorney Mason published in the Orlando Sentinel. In a February 12, 2005 article, responding to a large civil jury award against his client, Mr. Mason said the following: “Unfortunately, this jury got absolutely buffalooed. They got snookered beyond snookered.” Id. The Florida Bar’s inquiry was to determine if this statement violated Florida Rule of Professional Conduct 4-8.4 (d) which says that “A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against [ ] jurors . . . .” available at http://www.floridabar.org. The other statement is quoted above. The Florida Bar’s inquiry
Attorney Mason filed a federal lawsuit claiming that any disciplinary action based on his published comments violated his First Amendment rights. After a ten-month flurry of motions and counter motions, the federal district court granted The Florida Bar’s motion for abstention. The Florida Bar’s grievance process continued. Mr. Mason received a Notice of No Probable Cause and Letter of Advice to Accused, dated February 8, 2006. The letter from The Florida Bar admonished Mr. Mason to improve his professional activity. He was “advised to be careful that he does not stray over the line . . . and reminded that overly criticizing the judiciary . . . undermine[s] the public’s perception of the judiciary.” Mr. Mason viewed the impact of the letter from The Florida Bar as intending and, in fact, causing a chilling effect on his First Amendment rights.

in regards to the April 2, 2005 statement focused on whether Mr. Mason’s statement violated Florida Rule of Professional Conduct 4-8.2 which says that “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 . . . .” available at http://www.floridabar.org. This paper will not discuss the statement made in the February 12, 2005 article about jurors.


29 Telephone Interview with Attorney Steven G. Mason, May 9, 2006. Mr. Mason’s office sent the author an electronic copy of the Notice of No Probable Cause and Letter of Advice to Accused, dated February 8, 2006, from The Florida Bar to Mr. Jerome Hennigan, Counsel for Respondent, Mr. Steven G. Mason.

30 Notice of No Probable Cause and Letter of Advice to Accused, dated February 8, 2006, from The Florida Bar to Jerome Hennigan, Counsel for Respondent Mason, sent by electronic transmission by Mr. Mason on May 9, 2006.

The Respondent is advised that although he has certain First Amendment Rights, he also has certain obligations and duties as a member of the Bar.

He is also advised that his speech in certain circumstances is governed by the Rules Regulating The Florida Bar. Under similar circumstances, as that which brought him before the grievance committee, the Respondent is advised to be careful that he does not stray over the line to unethical conduct.

Respondent is also reminded that overly criticizing the judiciary in anger for a ruling not in his favor, instead of taking the appropriate legal steps to overturn the ruling, undermine[s] the public’s perception of the judiciary. Further it undermines the public’s perception of our legal system and attorneys in general. (original in all caps)

31 Telephone Interview with Attorney Steven G. Mason, May 9, 2006.
Mr. Mason is not alone in facing Bar disciplinary proceedings based on statements critical of the judge or judicial process.\textsuperscript{32} Virtually, every jurisdiction has an ethical rule prohibiting attorneys from impugning the qualifications and integrity of a judge or engaging in conduct prejudicial to the administration of justice. Michigan’s rules of professional conduct include prohibitions against “undignified or discourteous conduct toward the tribunal.”\textsuperscript{33} Another Michigan rule provides that a lawyer “shall treat with courtesy and respect all persons involved in the legal process.”\textsuperscript{34} These two rules are colloquially referred to as “courtesy rules;” recently, the Michigan Supreme Court held that these rules are constitutional and enforceable.\textsuperscript{35}

Notwithstanding the Michigan “courtesy” rules, most state rules are patterned after the ABA Model Rules of Professional Responsibility (“Model Rules”) or its predecessor, the ABA Model Code of Professional Responsibility (“Model Code”). Model Rule 8.2(b) prohibits statements “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…”\textsuperscript{36} The comments to Rule 8.2 include the following:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office… Expressing honest and candid opinions on such matters

\textsuperscript{32} See infra Part II and accompanying notes.
\textsuperscript{33} Michigan RULES of PROF’L CONDUCT R. 3.5(c) (2006). This rule tracts the language found in Rule DR 7-106 of the Model Code (1983).
\textsuperscript{34} Michigan RULES of PROF’L CONDUCT R. 6.5(a) (2006).
\textsuperscript{36} ABA MODEL RULES of PROF’L CONDUCT R. 8.2 (2007).
Comparative Jurisdiction List; MODEL RULES of PROF’L CONDUCT R. 8.2(a), (False or Reckless Statements Concerning Qualifications or Integrity of Judicial and Legal Officials);
Jurisdictions with Rules Based on Model Rules:
AR, AZ, CO, CT, DC, FL, IL, KY, LA, MD, MI, NJ, NM, OH, PA, RI, SC, TX
Jurisdictions with Rules Based on Model Code:
OH, OR, NY
Other: CA (Several California cases address the situation in which a lawyer makes a false or disparaging statement regarding a judge. In general, these cases involve statements made in a filed pleading, and the decision generally is grounded in B&PC § 6068(b) which requires a lawyer "[t]o maintain the respect due to the courts of justice and judicial officers."
contributes to improving the administration of justice. 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 continue the traditional efforts to defend judges and courts unjustly criticized. 37

In 1983, the ABA Model Rules replaced the former ABA Model Code. 38 Although structured differently than the ABA Model Rules, the ABA Model Code restricted attorneys’ conduct that “is prejudicial to the administration of justice,” 39 and statements, that were made knowingly, involving “false accusations against a judge.” 40 The prohibitions in the ABA Model Code were premised on a lawyer’s obligation to “promote public confidence in our system and in the legal profession.” 41

Ethical rules proscribing attorneys’ conduct that reflect poorly on the administration of justice or the qualifications and integrity of a judge date back over a century ago. In Bradley v. Fisher, defense counsel for the assailant of Abraham Lincoln petitioned the United States Supreme Court for damages against the presiding judge who barred him from the practice of law due to alleged critical statements made during the trial. 42 The U.S. Supreme Court denied Bradley’s claim for damages. 43 In addition to announcing a broad rule of immunity for judges in their official capacity, the U.S. Supreme Court issued a strong statement describing the

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40 Id. at DR 8-102(B) (1983).
41 Id. at EC 9-1 (1983).
43 Id.
obligation that lawyers take when admitted to the bar. “The obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts.”


The ethical rules that subject attorneys’ speech to disciplinary sanctions are justified by the state interests in preserving public confidence in the judiciary and in ensuring fair and impartial adjudications. The ethical rules are enforced through disciplinary proceedings, which are viewed as the means “to protect the public, the administration of justice, and the profession [from attorneys] who do not possess the ‘qualities of character and the professional competence requisite to the practice of law.’” The Supreme Court has not given guidance to state courts on the standards to apply when such disciplinary actions collide with free speech rights. However, state courts have addressed the issue, and various tests have emerged.

Many of these state cases sanction attorney speech made inside the courtroom under a former version of Model Rule 3.5 and Model Code DR 7-106. Therefore, it is difficult to extrapolate whether these standards are applicable to “suspect” attorney speech made outside the courtroom in a non-pending case.

44 Id. at 354–55.
45 Id. at 355.
46 In re Graham, 453 N.W.2d 313, 320 (Minn. 1990) (quoting Baird v. State Bar of Arizona, 401 U.S. 1, 7 (1971)).
47 Cf., In re Sawyer, 360 U.S. 622 (1959) and Gentile, 501 U.S. 1030 (attorneys speech during pending cases may be regulated to a greater extent than speech of ordinary citizens or the media).
48 ABA Model Rule 3.5 governs an attorney’s decorum in the courtroom. Among other prohibitions, Model Rule 3.5(c) provides that “a lawyer shall not engage in conduct intended to disrupt a tribunal.” ABA MODEL RULES OF PROF’L CONDUCT R. 3.5 (2007).
49 ABA MODEL CODE OF PROF’L RESPONSIBILITY DR 7-106(C)(6) (1983) states the following: “In appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal.”
Nevertheless, without United States Supreme Court precedent to follow, the highest courts of many states have addressed “the restraint on free speech inherent in disciplining a lawyer for comments criticizing a judge.” 50 In recognizing that disciplinary actions against lawyers who criticize the judiciary implicate First Amendment rights, Tennessee is one jurisdiction that distinguishes between in court statements made during a pending case and out of court statements made after the conclusion of a case.

A Tennessee attorney, Mr. Slavin, received a two-year suspension from the practice of law for disparaging comments made about several judges in pleadings to the court. 51 In the pleading requesting an appeal in one of his cases, the attorney referred to an administrative law judge as “petty, barbarous and cruel.” 52 Mr. Slavin called the decision from which he was appealing “a stench in the nostrils of the Nation.” 53 The disciplinary Hearing Committee found that some of the statements Mr. Slavin made were “undignified and discourteous,” but since the Disciplinary Board did not prove the attorney’s statements were false, his “expressions were protected by the First Amendment.” 54

In finding that Attorney Slavin’s statements were protected speech, the Hearing Committee relied on Ramsey v. Bd. of Prof’l Responsibility. 55 In Ramsey, the Court held that an attorney’s out of court statements, although “crude and unbecoming of any licensed lawyer” were protected by the right of free speech. 56 The Slavin court held that Ramsey is distinguishable because Mr. Slavin’s objectionable statements were made during in-court judicial proceedings. 57

50 In re Green, 11 P.3d 1078, 1083 (Col. 2000).
51 Bd. of Prof’l Responsibility v. Slavin, 145 S.W.3d 538, 551 (Tenn. 2004). Three judicial officers made complaints against attorney Slavin to Board of Professional Responsibility. Id. at 541.
52 Id. at 543.
53 Id.
54 Id. at 544.
55 Ramsey v. Bd. of Prof’l Responsibility, 771 S.W.2d 116 (Tenn. 1989)
56 Id. at 122.
57 Slavin, 145 S.W.3d at 549.
“The First Amendment does not preclude sanctioning a lawyer for intemperate speech during a courtroom proceeding.”\(^{58}\) Thus, the Tennessee Court recognized that for purposes of applying First Amendment principles to disciplinary actions based on undignified and discourteous conduct, there is a difference between in-court and out of court speech.\(^{59}\) In-court speech may be sanctioned, without offending First Amendment principles, “it if is highly likely to obstruct or prejudice the administration of justice.”\(^{60}\)

In line with the *Slavin* decision, many other courts have found no First Amendment protection for attorney speech made in court when such speech obstructs the administration of justice. Such unprotected speech may include “engaging in undignified or discourteous conduct degrading to a tribunal”\(^{61}\) or “knowingly mak[ing] a false accusation against a judge.”\(^{62}\) The Ohio Supreme Court addressed this issue in *Gardner* under the Free Speech Clause of its State Constitution, which provides greater speech protection than the federal Constitution.\(^{63}\) The Ohio Constitution protects attorneys’ false statements of opinion, but not false statements grounded on factual assertions.\(^{64}\)

In a motion to the court, Attorney Gardner accused a panel of appellate judges of being

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\(^{58}\) *Id.* (quoting *Jacobson v. Garaas*, 652 N.W.2d 918, 925 (N.D. 2002)).

\(^{59}\) See also *In re Graham*, 453 N.W.2d at 321 (“Constitutional first amendment rights have long protected Minnesota attorneys from disciplinary action when those rights were exercised either to criticize rulings of the court once litigation was complete or to criticize the judicial conduct or even integrity.”) (citing *State Board of Law Examiners v. Hart*, 116 N.W. 212 (1908)), cert. denied, 498 U.S. 820 (1990).

\(^{60}\) *Id.* The attorney’s in-court statements were not protected by the First Amendment. This “narrow restriction [is] justified by the integral role that attorneys play in the judicial system, which requires them to refrain from speech or conduct that may obstruct the fair administration of justice.” *Id.* at 550 (quoting *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 428–89 (Ohio 2003)).

\(^{61}\) ABA MODEL CODE of PROF’L RESPONSIBILITY DR 7-106(c) (1983)

\(^{62}\) ABA MODEL CODE of PROF’L RESPONSIBILITY DR 8-102(B) (1983).


\(^{64}\) *Id.* at 429–30.
dishonest, corrupt, and possessing prosecutorial bias. Further, he criticized the appellate opinion as being so “‘result driven’ that ‘any fair-minded judge’ would have been ‘ashamed to attach his/her name’ to it.” Through the disciplinary process, Attorney Gardner received a six-month suspension. Gardner argued that his statements about the judges were opinions protected under the Ohio Constitution.

The court applied an objective test based on a totality of the circumstances for deciding whether a statement is fact or opinion. According to the Ohio Supreme Court, accusing judges of dishonesty and corruption goes beyond “rhetorical hyperbole” and are charges grounded in factual assertions that offend the integrity and impartiality of the judges and the judicial system. Consequently, Gardner’s statements could be subject to disciplinary sanctions without violating the Ohio Constitution.

Since the ethical rule at issue provided that a lawyer “shall not knowingly make false accusations against a judge,” the court addressed whether the test to be applied for “knowingly” should be a subjective or an objective standard. The court applied an objective test, despite the fact that other courts have applied the “actual malice” subjective standard applicable in defamation cases under New York Times v. Sullivan. The court reasoned that the significantly different interests served by defamation law from those served by rules of professional ethics warranted an objective test for determining whether Gardner’s unfavorable

\[65\text{Id. at 427.}
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\[66\text{Id.}
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\[67\text{Id. at 433.}
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\[68\text{Id. at 427. Gardner also claimed the sanction violated his First Amendment rights under the federal Constitution. Id. at 428–29. The Court held that “the First Amendment does not insulate an attorney from professional discipline even for expressing an opinion, during court proceedings.” Id.}
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\[69\text{Gardner, 793 N.E.2d at 430.}
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\[70\text{Id.}
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\[71\text{ABA MODEL CODE of PROF’L RESPONSIBILITY DR 8-102(B).}
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\[72\text{Gardner, 793 N.E.2d at 431 (discussing the application of the actual malice standard under New York Times v. Sullivan, 376 U.S. 254 (1964), for disciplining attorneys who knowingly make false accusations against a judge).}
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comments about the judge were made “knowingly.”73 Unlike defamation law that compensates for private wrongs caused by injury to reputation, the court stated that ethical rules prohibiting false accusations against a judge are aimed at “preserv[ing] public confidence in the fairness and impartiality of our system of justice.”74 The court reasoned that an objective standard for determining whether attorneys’ false accusations are knowingly made “strikes a constitutionally permissible balance between an attorney’s right to criticize the judiciary and the public’s interest in preserving confidence in the judicial system.”75

This balancing of an attorney’s right to speak and the state’s interest in preserving the public confidence in the judicial system has been followed by other courts. The Florida Supreme Court, in The Florida Bar v. Ray, sustained a public reprimand against an attorney who questioned the veracity and integrity of an immigration court judge in three letters to the Chief Immigration Judge.76 The court determined that the attorney’s disparaging remarks about the judge violated the Florida ethical rule that prohibits a lawyer from making statements “that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications and integrity of a judge.”77

Although the language of the Florida ethical rule tracks the “actual malice” language used in New York Times v. Sullivan, the court declined to apply the subjective standard of actual malice as required under Sullivan.78 The Florida attorney argued that he had a subjectively reasonable basis in fact for making the statements about the immigration judge.79 However, the

73 Gardner, 793 N.E.2d at 432.
74 Id.
75 Id.
76 The Florida Bar v. Ray, 797 So.2d 556 (Fla. 2001).
77 Id. (quoting Florida RULE of PROF’L CONDUCT 4-8.2(a) which tracks the language of the ABA MODEL RULES of PROF’L CONDUCT R. 8.2(a)).
78 Id. at 558.
79 Id.
court held that the proper test is an objectively reasonable standard, and it was the attorney’s burden to substantiate his statements under this objective standard. According to the Florida Supreme Court, this objective standard is necessary because “members of the Bar are viewed by the public as having unique insights into the judicial system,” so attorneys’ critical statements would have undue weight in undermining the public confidence in the judiciary.

In Kentucky Bar Association v. Waller, a particularly egregious case of attorney speech made in court pleadings resulted in a six-month suspension in addition to criminal contempt charges. The attorney made unfounded statements that the court described as “scandalous and bizarre” concerning the qualifications and integrity of a judge. The attorney argued that his statements were true or, alternatively, that he should have the opportunity to prove truth. The court stated the following:

Respondent appears to believe that truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him. In this respect he has totally missed the point. There can never be a justification for a lawyer to use such scurrilous language with respect to a judge in pleadings or in open court. The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system. Officers of the court are obligated to uphold the dignity of the Court of Justice and, at a minimum, this requires them to refrain from conduct of the type at issue here.

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80 Id.
81 Id. See also In re Abbott, 2007 Del. LEXIS 199 (Del. 2007) (“the necessity for civility is relevant to lawyers because they are the living exemplars--and thus teachers--everyday in every case and in every court; and their worst conduct will be emulated . . . more readily than their best”) (internal citation omitted). Note also that the Abbot decision did not discuss the First Amendment at all.
82 Kentucky Bar Ass’n v. Waller, 929 S.W.2d 181 (Ky. 1996), cert. denied, 529 U.S. 1111 (1997).
83 Id. at 182. In a memorandum to the court, the attorney referred to a previous judge as a “lying incompetent ass-hole” and a liar. Id. In other pleadings, the attorney included incoherent ramblings that had nothing to do with the particular motion before the court. Id.
84 Id.
85 Id. at 183; accord Slavin, 145 S.W.3d 538 (unprofessional conduct and statements critical of the judiciary made in pleadings were “undignified and discourteous,” “degrading to the tribunal” and “prejudicial to the administration of justice”); the disciplinary board did not have to show that the statements were false); see also, Florida Bar v. Ray, 797 So.2d 556 (Fla. 2001) (burden on the attorney subject to discipline to show factual basis of statements); In re Pulmisano, 70 F.3d 483 (7th Cir. 1995) (the lack of support for an opinion implying false accusations of a judge may be sanctioned).
This Kentucky case represents an outer-limit where no test of truth or knowledge need be applied. In upholding the attorney’s sanction, the court suggested that the attorney seek professional counseling.\(^{86}\)

Whether statements critical of the judiciary are made in court or out of court, other courts, like the Ohio Supreme Court in *Gardner*,\(^{87}\) distinguish between statements that appear as factual assertions or as statements of opinion. In *Standing Committee v. Yagman*, the United States Ninth Circuit Court of Appeals found that an attorney’s statement to the media calling a judge anti-Semitic was in the form of opinion and, thus, protected by the First Amendment.\(^{88}\) Similarly, in *Green*, when an attorney called a judge racist, the attorney’s statements of opinion were not sanctionable according to the Colorado Supreme Court.\(^{89}\) Attorney Green accused a judge of being a “racist and bigot” based on the fact that the judge made the assumption that Mr. Green, an African American man, was not an attorney.\(^{90}\) When seeing the African American attorney, Mr. Green, in the clerk’s office, the judge asked the clerk on whose behalf Mr. Green was reviewing a file.\(^{91}\) The court stated “we may not, consistent with the First Amendment [ ] discipline Green for his subjective opinions, irrespective of our disagreement with them.”\(^{92}\)

\(^{86}\) *Waller*, 929 S.W.2d at 183. Among other things, Waller accused the judge of corruption and referred to the judge as a “lying incompetent ass-hole.” Id. at 181–82.

\(^{87}\) *Gardner*, 793 N.E.2d at 430

\(^{88}\) *Standing Committee v. Yagman*, 55 F.3d 1430, 1438–39 (9th Cir. 1995) (an accusation that a judge is anti-Semitic is actionable “only if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false.”)

\(^{89}\) *In re Green*, 11 P.3d 1078, 1086 (Col. 2000).

\(^{90}\) Id. at 1082.

\(^{91}\) Id.

\(^{92}\) Id. at 1086 (discussing the fact that the attorney’s statements did not involve facts or were not statements of opinion implying undisclosed assertions of fact and, therefore, protected by the First Amendment).
When the critical statements are factual or opinions implying some factual basis, other states\(^{93}\) and a United States Circuit Court of Appeals\(^{94}\) join Tennessee, Ohio and Florida in applying an objective test to determine whether such attorney speech is made with knowledge of falsity or reckless disregard for the truth. The courts that apply the objective test emphasize the compelling state interest in preserving the public confidence in the judiciary.\(^{95}\) A corollary to this interest is a recognition that critical statements by members of the Bar may have “more impact on the judgment of the citizen than similar remarks by a layman” because the public perceives lawyers as having special knowledge about judges and the judicial system.\(^{96}\) Finally, these courts emphasize that the purpose of enforcing the ethical rules is to protect the public from lawyers whose conduct adversely reflects upon their fitness to practice law.\(^{97}\) For these courts, the subjective actual malice standard would be too forgiving of attorneys whose fitness to practice law is questioned based on improper speech.\(^{98}\)

A minority of states provide more First Amendment protection to attorneys who make statements critical of the judiciary. In giving greater weight to free speech rights, these courts have deferred to the law of defamation in determining the proper balance between protecting First Amendment rights and enforcing ethical rules prohibiting attorneys’ critical statements.

\(^{93}\) Waller, 929 S.W.2d at 183 (holding that the reason disrespectful language directed at a judge is sanctioned is “not because the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system”), cert. denied, 519 U.S. 1111 (1997); In re Holtzman, 577 N.E.2d 30, 34 (N.Y.1991) (the subjective actual malice standard under \textit{New York Times v. Sullivan} “would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth”), cert. denied, 502 U.S. 1009 (1991); In re Graham, 453 N.W.2d 313, 322 (Minn.) (“in the interest of protecting the public, the administration of justice and the profession . . . the standard must be an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances”), cert. denied, 498 U.S. 820 (1990).

\(^{94}\) United States Dist. Court v. Sandlin, 12 F.3d 861 (9th Cir. 1993) (rejecting the subjective standard to test the good faith belief in the truth of attorney’s statements for a test that considers what a reasonable attorney would do under the same or similar circumstances).

\(^{95}\) See, e.g., Ray, 797 So.2d at 559.

\(^{96}\) Id. at 560.


\(^{98}\) Id.
against the judiciary. These courts recognize the similarities between judges and other public officials for purposes of First Amendment considerations. The rationale is that discussion about the performance of judges, like that of other public officials, is core First Amendment speech implicating matters of public concern and deserving the highest protection from any chilling effect caused by the fear of civil liability or attorney discipline.

Some courts have applied the *New York Times v. Sullivan* subjective test in determining whether an attorney knowingly or with reckless disregard made false statements impugning the integrity of the judge. Other decisions have recognized that opinions which do not imply a false assertion of fact are protected by the First Amendment and may not subject an attorney to disciplinary proceedings by a state bar. Still other courts make a distinction between out of court statements in non-pending cases (as opposed to statements by attorneys in on-going cases or in-court speech that interferes with the administration of justice) for purposes of balancing free speech interests with the state interest in disciplining attorneys for derogatory statements about judges.

In *Ramsey*, a Tennessee district attorney challenged disciplinary proceedings brought against him for out of court, public statements about a judge that were characterized as “crude and unbecoming of any licensed lawyer.” Finding that the attorney’s statements were protected, the court recognized the need to balance First Amendment considerations of both the

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102 *Yagman*, 55 F.3d at 1438–39, see also *Green*, 11 P.3d at 1086.
103 *See In re Sawyer*, 260 F.2d 189, 225 (9th Cir. 1958) (Pope, J., dissenting), rev’d on other grounds, 360 U.S. 622 (U.S. 1959); see also *State Bar v. Semaan*, 508 S.W.2d 429, 433 (Tex. App. 1974) (“any bridle upon a free flow of information to people concerning the performance and qualifications of public officials will have little chance of gaining constitutional approval”).
104 *Ramsey*, 771 S.W.2d at 120 (“The judge is mucking up my cases and I can’t stand for that,” and “I don’t have time for this horse manure.” (quoting examples of the district attorney’s comments referencing the judge)).
speaker and the listener with the public interests served through enforcing ethical rules.\textsuperscript{105} The court reasoned that disciplinary proceedings serve the public interest in punishing and deterring attorney conduct “that is prejudicial to the administration of justice or degrading to a tribunal and thereby diminishes the confidence of the public in our courts.”\textsuperscript{106}

In order to avoid a chilling effect on First Amendment rights, the Ramsey court concluded that judges, like public officials, should be held to the “stringent requirements” of \textit{New York Times v. Sullivan}.\textsuperscript{107} Applying a \textit{New York Times v. Sullivan} analysis, the court stated that false statements and other statements made by lawyers “willfully, purposely and maliciously [to] misrepresent [ ] judges and courts” are not protected under the First Amendment.\textsuperscript{108} The Ramsey court did not articulate the \textit{New York Times} actual malice test in the traditional sense: a subjective standard of “knowingly false or with reckless disregard for the truth or falsity.”\textsuperscript{109} However, the standard of “willfully, purposely and maliciously” is an equally stringent standard. This standard protects the right of the public to receive information about the character and efficiency of judges from attorneys, who are “that portion of the public most perfectly situated to advance knowledgeable criticism.”\textsuperscript{110} At the same time, the court thought that judges, bound by Cannons of Judicial Conduct, are unable to fully defend themselves and need the support of the Bar against unjust criticism.\textsuperscript{111} Thus, Ramsey recognized First Amendment rights to give and receive information on vital matters of public concern and, also, respected the need to protect the administration of justice.

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\textsuperscript{105} \textit{Id.} at 121.
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} at 122–23.
\textsuperscript{109} \textit{New York Times}, 376 U.S. at 279–80; see \textit{e.g.}, St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (holding that recklessness in the \textit{New York Times} test requires a “high degree of awareness of probable falsity,” or that the publisher “in fact entertained serious doubts as to the truth of his publication”).
\textsuperscript{110} \textit{Ramsey}, 771 S.W.2d at 122.
\textsuperscript{111} \textit{Ramsey}, 771 S.W.2d at 122 (citing \textit{In re} Hickey, 258 S.W. 417, 430 (Tenn. 1923)).
\end{flushleft}
In *Slavin*, a Tennessee case discussed earlier, sanctions were sustained against a lawyer who made intemperate comments about a judge. For purposes of balancing First Amendment rights with the imposition of ethical sanctions, the *Slavin* court distinguished in-court statements from the out of court statements that were protected in the *Ramsey* case. In making this distinction, the Tennessee Supreme Court relied on Supreme Court authority for the proposition that free speech rights in a courtroom, during a judicial proceeding, are subordinated to the interest of maintaining the administration of justice.

A very different view of in-court versus out of court speech is articulated by the Colorado Supreme Court case *In re Green*, where the court set aside disciplinary sanctions against an attorney who criticized the judge in letters to the court during on-going proceedings. The court noted that since the attorney did not make his criticisms public, there was a less compelling government interest in disciplining this attorney. In comparing the government interest in attorney discipline to non-public versus public criticisms of the judge, the *Green* court cited cases in which disciplinary proceedings were brought against attorneys for “disparaging comments about judges made to a public audience.” However, the cases cited by the *Green* court actually support more protection for attorneys’ disparaging comments when made to a public audience.

In *Palmisano*, an Illinois lawyer argued that his disbarment by a federal district court as a reciprocal measure violated his First Amendment rights. Illinois disbarred the attorney based...
on numerous, baseless and publicly-made accusations of crime against some judges over an extended period of time.\textsuperscript{120} The Seventh Circuit Court of Appeals affirmed the disbarment noting that Illinois held a full evidentiary hearing and found that the attorney made the spurious accusations with “actual knowledge of falsity, or with reckless disregard for their truth or falsity.”\textsuperscript{121} The court commented that “even if Palmisano were a journalist making these statements about a public official, the Constitution would permit a sanction.”\textsuperscript{122}

In \textit{Standing Committee v. Yagman}, an attorney’s public statements that a judge was an anti-Semite or “drunk on the bench” were held protected by the First Amendment.\textsuperscript{123} While agreeing with earlier precedent that false statements of fact may be sanctioned under the \textit{New York Times} actual malice test, \textit{Yagman} held that opinions may not be restricted by ethical rules.\textsuperscript{124} In \textit{Yagman}, the Ninth Circuit Court of Appeals held that lawyers’ out of court, non-defamatory statements in non-pending cases “may be sanctioned only if they pose a clear and present danger to the administration of justice.”\textsuperscript{125}

The \textit{Green} court’s reliance on the \textit{Palmisano} and \textit{Yagman} cases for the proposition that publicly-made disparaging comments about a judge provide more compelling reasons for attorney discipline seems misplaced. In fact, both cases provide vigorous First Amendment protection for publicly-made statements that are critical of a judge. Those cases subordinate

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\item \textsuperscript{120} \textit{Id.} at 485. (the attorney sent letters to several government officials accusing one judge of being crooked and “fill[ing] the pockets of his buddies to act judicially.”)
\item \textsuperscript{121} \textit{Id.} at 487.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Yagman}, 55 F.3d at 1438, 1441.
\item \textsuperscript{124} \textit{Id.} at 1437–38 (citing \textit{Sandlin}, 12 F.3d at 864, 867).
\item \textsuperscript{125} See \textit{Id.} at 1443 (internal citation omitted).
\end{itemize}

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First Amendment rights to attorney discipline only under the very stringent tests of actual malice or clear and present danger to the administration of justice.\textsuperscript{126}

Although some courts\textsuperscript{127} cite the \textit{Green} case as applying a subjective test of the \textit{New York Times} standard, the \textit{Green} court did not address that issue. Following other jurisdictions, the \textit{Green} court did apply the \textit{New York Times} test to determine whether an attorney could be disciplined for calling the judge a racist and a bigot.\textsuperscript{128} Finding that the attorney’s statement was not a false statement of fact or an opinion that implies undisclosed false facts, the court did not proceed to the second part of the \textit{New York Times} test concerning proof of actual malice.\textsuperscript{129} The court stated, “We do not address this issue, and thus express no opinion on it.”\textsuperscript{130}

In a case factually similar to the \textit{Green} case, Mr. Porter, an Oklahoma attorney, accused a judge of being a racist.\textsuperscript{131} However, unlike attorney Green, Mr. Porter made his comments to the media at the conclusion of his client’s case.\textsuperscript{132} The Oklahoma Supreme Court held that Mr. Porter could not be disciplined because his public criticisms of the judge were protected by the First Amendment.\textsuperscript{133} Applying the stringent standards of \textit{New York Times}, the court placed the

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\item \textsuperscript{126} See \textit{Palmisano}, 70 F.3d 483 (upholding disbarment because Illinois disbarment proceedings found that attorney subjectively knew that the statements accusing judge of criminal activity were false); \textit{Yagman}, 55 F.3d 1430 (negative opinions expressed out of court in a non-pending matter may be sanctioned only if they are proved false, and otherwise protected statements may be sanctioned only if they pose a clear and present danger to the administration of justice); \textit{but see Sandlin}, 12 F.3d 861 (holding that a false statement of fact against a judge may be sanctioned under objective malice, an objective standard modification of the \textit{New York Times} actual malice test).
\item \textsuperscript{127} See \textit{e.g.}, \textit{Gardner}, 793 N.E.2d at 431 (Ohio 2003) (citing to \textit{In re Green} as one of the cases from three States that will not discipline lawyers for false accusations against a judge unless there is a finding of subjective knowledge or recklessness: Colorado, Oklahoma, and Tennessee).
\item \textsuperscript{128} \textit{Green}, 11 P.3d at 1085.
\item \textsuperscript{129} \textit{Id.} at 1085–86 (articulating the \textit{New York Times v. Sullivan} standard as requiring a two-part inquiry for attorney discipline: (1) whether the prosecutor of the disciplinary action proved the statement was false, and (2) whether the attorney made the statement with actual malice [knowingly or with reckless disregard]).
\item \textsuperscript{130} \textit{Green}, 11 P.3d at 1086. (The issue not addressed is whether proof of actual malice requires a subjective or objective test to determine if an attorney made the false statements knowingly or with reckless disregard).
\item \textsuperscript{131} \textit{Porter}, 766 P.2d at 958.
\item \textsuperscript{132} \textit{Id.} at 960–61.
\item \textsuperscript{133} \textit{Id.} at 968.
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burden on the Bar to prove that Mr. Porter’s statements were false statements of fact and that Mr. Porter did not have a sincere, subjective basis for making the statements.\(^{134}\)

In considering the imposition of ethical rules to discipline lawyers for criticizing the judiciary, the \textit{Porter} decision is most protective of free speech rights. The court stated that “the First Amendment is clearly offended by such a restriction [imposed by disciplinary rules] on the free exchange of information pertinent to the functioning of government embodied by this prohibition of attorney criticism.”\(^{135}\)

The \textit{Porter} court recognized that disciplinary rules restricting attorneys’ critical statements about the judiciary infringe on the right of the public to be informed “of the affairs of their government.”\(^{136}\) The court based its decision on the need to protect the First Amendment right of the public “to receive information from a class of persons most intimately familiar with the administration of the judiciary.”\(^{137}\) As such, the court concluded that the “First Amendment license to comment is broader than the traditional correct demeanor expected of an officer of the court.”\(^{138}\)

In considering whether disciplining attorneys for their criticisms of the judiciary is consistent with First Amendment principles, most courts do not make distinctions between in court and out of court statements and pending versus non-pending matters. The timing and venue of the attorneys’ suspect speech should matter when balancing free speech interests with

\(^{134}\) \textit{Id.}.

\(^{135}\) \textit{Id.} at 967.

\(^{136}\) \textit{Id.} at 968.

\(^{137}\) \textit{Id.} at 969.

\(^{138}\) \textit{Id.} at 970. However, other courts have held that attorney speech, as speech coming from officers of the court, may be restricted greater than nonlawyer speech because such officers are essential in the government function of administering justice and are already subject to strict state regulations. \textit{See} \textit{Ohralik} v. \textit{Ohio State Bar Ass'n}, 436 U.S. 447, 460 (1978) (“The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'”) (citing to \textit{Goldfarb} v. \textit{Virginia State Bar}, 421 U.S. 773, 792 (1975)).
the interest of protecting the integrity of the judiciary. A First Amendment balancing approach should weigh in favor of free speech rights when the criticism occurs out of court in matters that are no longer pending before the court. Concern about the public’s perception of the judiciary should be subordinated to the First Amendment right of the public to receive information on matters of public concern from those very people, attorneys, who are the most informed about the judiciary, especially when other fundamental rights are not at stake.139

III. United States Supreme Court Jurisprudence and Restrictions on Attorney Speech

Although there are Supreme Court precedents discussing the application of ethical rules to other speech rights of attorneys, a First Amendment challenge to the ethical rules that restrict critical statements about the judiciary has not been considered. Therefore, without clear guidance from the Supreme Court, many of the cases discussed above applied reasoning from inapposite precedents that focused on conduct prejudicial to the administration of justice or commercial speech.

“It is unquestionable that in the courtroom itself, during a judicial proceeding, [and in a pending case outside a courtroom]140 whatever right to ‘free speech’ an attorney has is extremely circumscribed.”141 The Supreme Court, in Gentile, determined that a state disciplinary rule prohibiting attorneys from making statements to the press in pending cases was void for vagueness and reversed the attorney’s reprimand.142 The Court did not define the Constitutional

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139 Once a case is over, there are no longer concerns that an attorney’s out of court statements will interfere with a defendant’s right to a fair and impartial trial.


141 Gentile, 501 U.S. at 1071 (internal citations omitted).

142 Gentile, 501 U.S. at 1048, 1058 (Kennedy, J., in Parts III, VI, plurality opinion).
limits of a court’s ability [through disciplinary rules] to regulate attorneys’ speech about non-pending cases. 143

Nevertheless, the Gentile case articulates various state interests that justify restrictions on attorney speech during pending cases. Recognizing that dissemination of information about criminal trials and the judicial system is vital in a democratic state, 144 the case discusses the many arguments for recognizing less First Amendment protection for attorneys to speak about pending cases than for the press or the general public.

Perhaps the strongest argument for restricting attorneys’ speech during a pending trial was articulated by Justice Brennan. “As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.” 145 It is a fundamental right that an accused receive a fair trial by impartial jurors. 146 Therefore, during a pending case, lawyers’ speech rights may be subordinated to the rights of an accused. However, the restraint on speech recognized in Gentile “merely postpones the attorneys’ comments until after the trial.” 147 The Gentile Court suggests that there is fuller protection of such speech after a case concludes. 148 In a non-pending matter, the First Amendment rights to speak and receive information about the judicial system do not compete with other fundamental rights.

Unlike Gentile, ethical rules that restrict attorney advertising do not implicate core First

143 Id.
144 Id. at 1035 (Kennedy, J., in Part I, plurality opinion) (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)).
147 Gentile, 501 U.S. at 1076 (Rehnquist, C.J., in Part II, plurality opinion).
148 Id. at 1034–1035, 1076.
Amendment speech or other fundamental rights. Attorney advertising is commercial speech which is distinguishable from “speech at the First Amendment’s core.”\(^{149}\) Restrictions on commercial speech are not entitled to the highest level of strict scrutiny reserved for core First Amendment speech; instead, an intermediate level of scrutiny is applied.\(^{150}\) As such, the Supreme Court cases addressing the First Amendment implications in restricting attorneys’ commercial speech rights through ethical rules are of little value in determining what protection should be given to attorneys’ critical statements about the judiciary.

A. The Law of Defamation

While recognizing the right of lawyers to criticize “the state of the law,”\(^{151}\) there is no Supreme Court decision that directly addresses whether ethical rules regulating attorneys’ criticisms of the judiciary are consistent with the First Amendment. For purposes of First Amendment analysis, many of the state court cases discussed above have looked to the law of defamation. This is logical, as the ethical rules prohibit false statements about the qualifications or integrity of a judge made knowingly or with reckless disregard. The performance of the judiciary, like that of other government officials, is a matter of public concern implicating core First Amendment speech.

There is no First Amendment protection for false statements of fact. Falsehoods fall into the category of speech that has “no essential part of any exposition of ideas” and is “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”\(^{152}\) However, where the statements are

\(^{150}\) Id. at 623–24. For more discussion of different levels of scrutiny analysis, see infra Part III, B and Part IV.
\(^{151}\) In re Sawyer, 360 U.S. 622, 633 (1959).
of public officials (and, by analogy, the judiciary) and “their conduct of public business,” only knowingly-made false statements are outside the protection of the First Amendment.

As the Supreme Court stated in *New York Times v. Sullivan*, “debate on public issues should be uninhibited, robust and wide-open . . . [and] freedom of expression needs ‘breathing space’” to survive. Recognizing that erroneous statements are likely in free debate, the actual malice standard protects some false communications. “[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.”

The *New York Times* actual malice standard provided the balance between private reputation and public interest required under the First Amendment. However, in balancing the interests served by enforcing ethical rules and in protecting speech on public issues, the courts have been less protective of First Amendment rights. Rejecting the subjective, actual malice test, most of the state courts applied an objective test for disciplining attorneys. The objective test weighs in favor of protecting the public confidence in the judiciary and the administration of justice over core First Amendment speech.

It is incongruous that judges should provide more protection from public scrutiny to themselves than to others. “[J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.” The very essence of free speech in a democratic society is offended when public

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155 Garrison, 379 U.S. at 73.

156 See Garrison, 379 U.S. at 77 (“The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant”).

157 Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting).
officials (judges) promulgate rules punishing criticism of them by the group of persons most informed.

B. Content-based Speech Restriction Requires Strict Scrutiny

Notwithstanding the analogy to defamation law, Model Rule 8.2 is a content based and viewpoint based restriction on core First Amendment speech. Judges are public officials;\(^\text{158}\) often, judges are elected or retained through the electoral process.\(^\text{159}\) The freedom to criticize government and public officials sustains a democratic society,\(^\text{160}\) protects the marketplace of ideas\(^\text{161}\) and protects the public from government corruption.\(^\text{162}\) Restrictions on core political speech must survive strict scrutiny.\(^\text{163}\)

Restrictions that regulate the content or viewpoint of the speech are also subject to strict scrutiny.\(^\text{164}\) Content based rules target the subject of the message or its communicative impact.\(^\text{165}\) The danger posed by content based rules is that government will act as a censor, determining permissible viewpoints and subjects.\(^\text{166}\) The restriction regarding judicial criticism


\(^{159}\) Hon. Daniel R. Deja, *Feature: Judicial Selection: How Judges Are Selected, A Survey of the Judicial Selection Process in the United States*, 75 MI BAR JNL. 904, 905, 907 (1996) (“The states generally have favored popular election of judges over the federal model, and if an appointment process is used, it is followed by a retention election. Thirty-nine states incorporate the electorate in the judicial selection process in some fashion.”); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977–2002*, 37 U. MICH. J.L. REFORM 791 (2004) (“In thirty-nine of our fifty states, judges must face the electorate in some form, either through competitive or retention elections.”) (internal citation omitted).


\(^{161}\) Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

\(^{162}\) *See generally* John H. Ely, *Democracy and Distrust* 106–07 (1980) (holding that courts must police restrictions on free speech and political activity because those who hold power want to keep others from gaining power); *see also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–879 (1963) (holding that the functions of protecting free speech in a democratic society are (1) to assure individual self-fulfillment, (2) to create a means of attaining truth, (3) to secure equal participation of individuals in political decision making, and (4) to maintain a balance of stability and change in the society).

\(^{163}\) Burson v. Freeman, 504 U.S. 191, 197-98 (1992); *see also* definition of *strict scrutiny* infra Part IV, para. 2 (stating strict scrutiny test from *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).


\(^{166}\) *See id.* at 642.
is not only content based, it is also viewpoint based. Model Rule 8.2 sanctions critical speech, but encourages attorneys to support the judiciary.\(^{167}\) When “the harm the regulation seeks to remedy necessarily flows from the communicative impact of the speech,” strict scrutiny applies.\(^ {168}\) Here the perceived harm is the public’s response to the speech; a concern that the criticism will undermine the public’s confidence in the judicial system. Furthermore, while criticism is subject to discipline, favorable comments about the judiciary are encouraged. Only speech promoting a positive view of the judiciary is permitted under the regulation. Strict scrutiny places the burden on the government to demonstrate that the speech restriction is necessary to serve a compelling state interest, and that the restriction is narrowly tailored to achieve the stated interest.\(^ {169}\) Part V, below, will discuss in further detail strict scrutiny analysis as applied to restrictions on attorney speech imposed by ethical rules.

Public confidence in the judicial system and the administration of justice are the stated interests which justify restrictions on attorneys’ critical statements about the judiciary. In addition, it is argued that attorneys’ speech rights are more limited than others because lawyers voluntarily give up First Amendment rights when entering the bar and attorneys’ comments have more impact on the public perception.\(^ {170}\)

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\(^{167}\) ABA Model Rules of Prof’l Conduct R. 8.2(a), cmt. (2007); see also discussion supra Part I, para. 6.


\(^{169}\) Buckley v. Valeo, 424 U.S. 1, 64–65, 94 (1976); see also definition of strict scrutiny infra Part IV, para. 2 (stating strict scrutiny test from Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).

\(^{170}\) Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 460, 464-66 (1978) (holding that attorneys are more schooled in the art of persuasion which justifies greater restrictions on attorney advertising than other professionals; also holding that attorney speech, as speech coming from officers of the court, may be restricted greater than nonlawyer speech because such officers are essential in the government function of administering justice and are already subject to strict state regulations: “The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ’officers of the courts.’”) (citing to Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)); Gentile v. State Bar of Nev., 501 U.S. 1030, 1074 (1991) (Rehnquist, C.J.) (suggesting that lawyers are not protected by the First Amendment to the extent of those engaged in other businesses; that lawyers are instruments of justice in a highly specialized and regulated profession, where public interest must be weighed against the First Amendment rights of the individual).
Many courts have stated that protecting the public perception of the judiciary and the administration of justice are compelling interests. Even if compelling, these interests do not outweigh the loss of protected rights. The First Amendment protects both the right to speak and the right to receive information.\textsuperscript{171} Interfering with the public’s right to receive information, good and bad, about the judiciary is government censorship, and it interferes with the ability of the public to make informed decisions on the election of judges.\textsuperscript{172} When balancing these interests, voting rights and government censorship implicate fundamental rights and public perception concerns do not.

In \textit{Gentile v. Nevada}, the Court upheld a Nevada rule prohibiting a criminal defense attorney speech in public dissemination where the speech has a substantial likelihood of causing a materially prejudicial effect on the judicial process.\textsuperscript{173} This rule derived from Rule 3.6 of the ABA Model Rules.\textsuperscript{174} The Court held that the "substantial likelihood " standard constituted a permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."\textsuperscript{175} The rationale for applying lower level scrutiny\textsuperscript{176} to Gentile’s speech was that lawyers’ First Amendment rights are circumscribed by the very nature of their

\textsuperscript{172} Republican Party v. White, 536 U.S. 765 (2002) (invalidating an ethical rule that restricted speech of candidates running for judicial office). In his concurring opinion, Justice Kennedy stated: "I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment. . . . The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose." \textit{Id.} at 793 (Kennedy, J., concurring).
\textsuperscript{174} \textit{Id.} at 1068.
\textsuperscript{175} \textit{Id.} at 1075.
\textsuperscript{176} Lower level scrutiny in this context means something less than strict scrutiny. It is unclear whether the substantial likelihood standard in \textit{Gentile} is akin to intermediate scrutiny.
highly regulated profession, where they are instruments of the law and of the court. 177

Notwithstanding, four of the justices suggested that the lower level of scrutiny should be limited to government restrictions that could only be justified under threat of actual prejudice or imminent harm to the public interest, suggesting that attorneys, such as Gentile, deserve full First Amendment protection.178 These four justices also held that a blanket prohibition of defense attorneys’ speech subject to lower level scrutiny would unfairly prejudice criminal defendants who cannot speak themselves without fear of self incrimination and cannot usually retain a public relations team to counter public remarks from the government.

The conclusion to be drawn from the Gentile case is that attorneys’ speech rights during the pendency of a trial may be subordinated to the defendant’s right to receive a fair and impartial trial. During a trial, there are fundamental rights that must weigh against the First Amendment right of attorneys to speak and the corollary right of the public to receive information. However, in non-pending cases, attorneys’ out of court statements should receive full First Amendment protection because the countervailing interest to protect the public perception of the judiciary does not implicate fundamental rights.

It is paternalistic to limit the public’s right to receive information about the judiciary just because attorneys’ speech is more persuasive and has greater impact than other speech. The First Amendment does not tolerate censorship just because the listener may be overly persuaded.179 “If the dangers of [attorneys’] speech arise from its persuasiveness, from [attorneys’] ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the

177 *Id.* at 1074.
178 *Id.* at 1039, 1055, 1058.
sort of dangers that validate restrictions. The First Amendment does not permit suppression of speech because of its power to assent." 180

Unless the bar meets its burden of proof under strict scrutiny analysis or can successfully demonstrate that the challenged speech falls into one of the categories outside the protective umbrella of the First Amendment, (defamation, fighting words, incitement), disciplinary sanctions for speech pertaining to non-pending matters should be unconstitutional. An application of First Amendment principles and Supreme Court precedents leads to the conclusion that attorneys should be free to speak about non-pending judicial matters, good or bad, without fear of discipline. Many of the state cases discussed above failed to give these statements the highest level of protection required by the First Amendment.

Those states that apply an objective test to the actual malice determination are providing more protection from public scrutiny to judges than to other public officials. While judges may not have the same latitude as other public officials to respond to false statements due to judicial canons, the public’s right to receive the information should be no less. In our tripartite system of government, information about the judicial branch is no less important to a self-governing people than information about any other branch of government. The need for access to information about the judiciary is even greater as judicial elections become more like other elections of public officials. Restricting the public’s access to information about the judiciary, both good and bad, makes it that much easier for special interest groups to "hijack" judicial elections. 181 This has a much greater potential to compromise the independence of the judiciary than any amount of negative criticism from attorneys.

180 Gentile, 501 U.S. at 1057.
181 See Jones, supra note 9, at CN1 (special interest groups spend record amounts in judicial raises, including $9.3 million for one seat on the Illinois Supreme Court).
Whether the Supreme Court would apply a defamation analysis or a strict scrutiny analysis to this type of case is unclear. Perhaps an analogy to the public employee speech cases provides a third avenue of analysis. Even under the reasoning of *Garcetti v. Ceballos*, attorneys’ out of court statements about matters not before the court should receive full First Amendment protection.

C. **Public Employee Analogy: *Garcetti v. Ceballos***

In determining the First Amendment rights of government employees, Supreme Court precedents have balanced the right of a public employee to speak as a private citizen addressing matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs. In *Garcetti v. Ceballos*, the Court held that a supervising district attorney’s official remarks in an internal memorandum were not protected by the First Amendment. The attorney was disciplined by his supervisor because he wrote an official memorandum alleging that police made serious misrepresentations in a search warrant affidavit.

Although all attorneys are not public employees, there are some similarities between attorneys as “officers of the court” and public employees. Like public employees, attorneys in pending cases have special obligations to the administration of justice because as “an officer of the court, [a lawyer,] like the court itself [is] an instrument of justice.”

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183 See *Bridges v. California*, 314 U.S. 252, 271 (1941) (“For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”).
185 *Garcetti*, 126 S.Ct. at 1955–57 (the case was remanded because the Court of Appeals did not consider attorney Ceballos’s remarks outside the ambit of his official duties).
denied the First Amendment rights of a private citizen, when he or she, as an officer of the court, speaks in the courtroom.\textsuperscript{187} Similar to public employers, courts need to exercise a significant degree of control over lawyers’ words and actions in the courtroom and during pending trials, not just to protect the rights of the accused, but, also, to promote the efficient operation of the court. In the judicial system, lawyers representing clients in on-going cases are “key participants” in the efficient administration of justice.

However, the First Amendment does not permit public employers to condition employment on the relinquishment of fundamental liberties. Public employers may not limit government employees’ opportunities “to contribute to public debate.”\textsuperscript{188} In the employment speech cases, the Supreme Court has recognized the public’s First Amendment right “in receiving the well-informed views of government employees.”\textsuperscript{189} The right of public employees to speak about the operations of their government employers encompasses the right of citizens to hear informed opinions about the operation of government.

The dissent in \textit{Garcetti v. Ceballos} questioned the majority’s line-drawing between speech that pertains to official duties and other speech for purposes of First Amendment challenges to employee discipline.\textsuperscript{190} It is a well-recognized principle that public employees enjoy a qualified speech protection that balances “the tension between individual and public interests in the speech [] and the government’s interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees.”\textsuperscript{191} However, the balancing of these interests does not change just because an employee speaks about matters

\textsuperscript{187} \textit{Id.} at 1074.
\textsuperscript{188} \textit{Pickering}, 391 U.S. at 573.
\textsuperscript{189} \textit{Garcetti}, 126 S.Ct. at 1958.
\textsuperscript{190} \textit{Garcetti}, 126 S.Ct. at 1963 (Souter, J., dissenting).
\textsuperscript{191} \textit{Id.}
within her job responsibilities. In fact, the individual and public interest in such speech may be
greater, since the information an employee knows best falls within her official duties. Thus, the
value of the public receiving information on matters pertaining to official duties is greater and
the disruption to the employer’s business is no less merely because the speaker is not speaking
about matters that fall within her official duties. Justice Souter criticizes a result that is more
restrictive of speech just because it comes from the source with the greatest knowledge.

The *Garcetti* case provides strong support for protection from attorney discipline for all
speech, except those categories of speech that fall outside the gambit of First Amendment
protection, about non-pending cases outside the courtroom. Once a case is over, the “officer of
the court” analogy to the public employee is no longer applicable. There is no need to balance
the tension between free speech interests and the interests in protecting the efficient operation of
the court or a fair and impartial trial, once a case is concluded.

As recognized in the employee speech cases, the right of an attorney to speak about
public matters, uninhibited by the fear of attorney discipline, is crucial to the public’s right to
receive information about a matter of vital public importance. Open and robust discussion about
the judiciary is essential to self-governance, reflecting on the public’s ability to have an informed
vote in judicial elections and knowledge about an essential branch of government.

To restrict the public’s flow of information from those who are most knowledgeable
about the subject is, in Justice Souter’s words, “counterintuitive.” The *Garcetti* decision
provides less protection to employees’ official communications, because “official
communications have official consequences” and because the employee who speaks out on

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192 Id. at 1965–70.
193 Id.
194 Id. at 1966.
matters within the scope of her job responsibilities potentially creates more “uproars.” While the need for civility in the workplace may justify greater restrictions on official communications in the government employment context, civility outside the courtroom involving non-pending matters is not a compelling interest to support restrictions on core First Amendment speech.

At the conclusion of a pending matter, the interests in promoting the administration of justice and a fair and impartial trial are no longer at issue. The remaining reason to support limited First Amendment protection for attorneys’ out of court criticisms in these situations is to protect the erosion of public confidence in the judicial system.

Concern about protecting the public perception of the legal profession is a sufficient government interest to support restrictions in the area of attorney advertising. Of course, attorney advertising is entitled to limited First Amendment protection, unlike speech about public officials and their performance of public service. However, even in the context of attorney advertising, the dissenting four Justices in Florida Bar v. Went for It, Inc. did not support suppressing attorneys’ commercial speech to promote public respect for the profession or to refrain from offending members of the public. Suppression of speech protected by the First Amendment is not permitted merely because the listener may be offended. “To the extent the bar seeks to protect lawyers’ reputations by preventing them from engaging in speech some

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195 Id. at 1967.
197 Florida Bar v. Went For It, Inc., 515 U.S. 618, 638 (1995) (because direct mail solicitation after an accident may offend some members of the population or be beneath the dignity of some lawyers is not sufficient to suppress the advertising) (Kennedy, J., joined by Stevens, J., Souter, J., and Ginsburg, J., dissenting).
198 Id. at 638 – 39 (citing Carey v. Population Services Int’l., 431 U.S. 678, 701 (1977)); see also Tex. v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”) (internal citations omitted).
deem offensive, the State is doing nothing more than manipulating the public’s opinion by suppressing speech that informs us how the legal system works.”

Even in the context of commercial speech, the dissent in *Florida Bar v. Went for It, Inc.* preferred more speech, not less, to counter eroding public respect for the profession. Censorship of offensive, but otherwise protected speech assumes that government knows what is best for the public to hear. “[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”

Accepting the fact that the protection of the public’s respect and confidence in the judiciary is an important government interest, there is doubt that attorneys’ criticism affects public confidence in the judiciary. Whether the present day attacks on the judiciary, including the corresponding erosion in public confidence and the declining respect for the independency of the judiciary, are unprecedented in history is a debate better left to legal historians. Nevertheless, that there is concern about the erosion of public perception and the declining respect for the independence of the judiciary is not debatable.

In regard to how the public actually forms its opinion about the judiciary, information is key. Perhaps, what is unique about the 21st century are the modes of communication and the amount of information available, much of which is unreliable. From Internet blogs to “Judge Judy” and “Boston Legal” TV shows, the information that impacts the public perception of the judicial system is vast. It is doubtful that the ethical restrictions on attorneys’ criticisms of the judiciary even make a “dent” in this multitude of information. With so much information bombarding the public, the line between reality and fiction may become opaque. Rather than

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199 *Id.* at 639 – 40.
200 *Id.* at 645.
201 *Id.* at 645 (citing Edenfield v. Fane, 507 U.S. 761, 767 (1993)).
limiting the pool of information from those members of the population who can best draw
distinctions between reality and fiction for the general public, lawyers’ input should be
couraged, not chilled by the fear of discipline.

IV. Public Confidence in the Judiciary and Restrictions on Attorney Criticism – Is
There a Connection?

The First Amendment guarantees of free speech are not absolute. It is a
fundamental principle of First Amendment jurisprudence that not all categories of speech are
equally worthy of protection from government restrictions. Furthermore, there is no debate
about where political speech ranks in the hierarchy of speech protection. Information about
government officials and their performance is at the core of protected speech. Without the
ability to speak freely about governmental matters, Americans could not be self-governing.
Judges, whether elected or appointed, are public officials and should be subject to the same
scrutiny as other public officials.

Because a restriction on the right to criticize judges involves core political speech, any
punishment for such speech must survive strict scrutiny analysis. As such, the ethical rules
which impose professional discipline for speech that erodes public confidence in the judiciary
must be “necessary to serve a compelling state interest and narrowly drawn to achieve that
end.” Even if protecting the public perception of the judiciary is a compelling interest, the

202 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (“There are certain well-defined and narrowly limited
classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional
problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words --
those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well
observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a
step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and
morality”).
editorializing by recipients of grants from the Corporation for Public Broadcasting, in part on ground that political
speech "is entitled to the most exacting degree of First Amendment protection"); see also Perry Educ. Ass'n v. Perry
Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (“For the State to enforce a content-based exclusion it must show
ethical rules that restrict attorney criticism of the judiciary are not narrowly tailored. In order to show that a speech restriction is narrowly tailored, there must be some nexus between the goal to be achieved, (promoting public confidence), and the speech restriction.

For courts that wrongly apply a lower level of scrutiny on the belief that attorneys have “limited” First Amendment rights, the analysis still requires that the restriction is narrowly tailored to meet an important state interest.\footnote{The lower level of scrutiny (articulated in \textit{Gentile} and in the state court cases that apply an objective test to the \textit{New York Times} actual malice standard) is akin to intermediate scrutiny which requires that the governmental restriction on speech must serve an important state interest, be narrowly tailored to achieve that interest and leave open ample alternative channels of communication); \textit{see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n}, 460 U.S. 37, 45 (1983) (“The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication”).} Bare assertions that overly critical statements of the judiciary erode public confidence are insufficient to support government restrictions on core political speech. Without some showing of a nexus between public confidence and the prohibited speech, ethical rules that discipline attorneys for expressing their negative views on judicial performance violate the First Amendment under either level of scrutiny.

In weighing First Amendment rights against a code of judicial canon, the Mississippi Supreme Court ruled in favor of the judge’s free speech rights.\footnote{Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 2004).} In a letter to a weekly newspaper, a county judge condemned California legislation that extended legal rights to gay and lesbian partners. In the letter, the judge expressed his view that “homosexuals belong in mental institutions.”\footnote{\textit{Id.}} A week later, the judge appeared on a local radio show and defended his letter to the newspaper. He justified the letter by calling himself a “red blooded Christian man” who
recognized homosexuality as an illness.  

Responding to the judge’s statements denigrating homosexuals, a civil rights organization filed a complaint with the Mississippi Commission on Judicial Performance alleging violations of the Canons of Judicial Conduct. The Commission charged the judge with violating several canons which prohibit “willful misconduct prejudicial to the administration of justice.” A divided Mississippi Supreme Court upheld the judge’s right to speak on political and religious issues without fear of professional discipline. The court applied strict scrutiny in determining whether the judge could be disciplined under the canons for expressing his views in a public forum, consistent with the First Amendment. While judicial impartiality is a compelling state interest, the court held that there was not a sufficient nexus between the state interest and the restriction on the judge’s right to publicly state his opinions. In fact, the court opined that requiring judges to conceal their private views on homosexuality might lead to more discrimination. A judge with these unrevealed, negative views might be arbitrary in his rulings affecting gays and lesbians without an opportunity for the prejudiced parties to seek recusal. The court’s reasoning is counterintuitive. It could be argued that impartiality requires a judge to decide based on the facts or law of the particular case, irrespective of her personal prejudices. Therefore, publicly stating a personal bias could create at least the appearance of partiality, even if that particular judge could set aside her personal beliefs in deciding the case.

However, the supposition that protecting the judge’s right to express his private opinions in a public forum will promote, rather than impede, judicial impartiality is consistent with a

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207 Id. at 1008, 1021.
208 Id. at 1009.
209 Id. at 1012-13, 1014.
210 Id. at 1011.
211 Id. at 1014-15.
212 Id. at 1015.
213 Id.
“market place of ideas” theory of the First Amendment. This theory favors more speech, not less. Ample research supports the notion that “uninhibited, robust discussion” of the judiciary, by those most informed, will build public confidence.

The National Center for State Courts, an independent non-profit organization, publishes research findings on several issues relating to public trust and confidence in the state courts. One of those publications sums up survey results in the following way:

National and state surveys over the past 23 years paint a detailed and consistent portrait of what the public likes and dislikes about the state courts. Perceptions that courts are too costly, too slow, unfair in the treatment of racial and ethnic minorities, out of touch with the public, and negatively influenced by political considerations are widely held.

While it can be difficult to know exactly what these surveys mean in terms of influencing public opinion about the judiciary, most studies agree that information is the key to affecting public perception. Newspapers and television play a major factor in shaping public opinion about the judicial system. Studies show that all media, including TV shows, have a greater impact in shaping the perceptions of people with less knowledge.

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215 Id. at 1.
216 DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS – A SURVEY OF THE PUBLIC AND ATTORNEYS, PART I: FINDINGS AND RECOMMENDATIONS, 11 (2005), http://www.courtinfo.ca.gov/reference/documents/factsheets/trust_p1.pdf; Florida Statewide Public Opinion Survey: Staff Report, Judicial Management Council, Committee on Communication and Public Information 27 (July 1996); PUBLIC TRUST & CONFIDENCE IN THE JUSTICE SYSTEM–THE WISCONSIN INITIATIVE 67 (Oct. 2000), http://wicourts.gov/about/pubs/supreme/doc/publictrustfinal.pdf [hereinafter WISCONSIN INITIATIVE] (“In 1983, the Hearst Corporation undertook a national telephone survey of 1,000 adults, “The American Public, the Media and the Judicial System: A National Survey of Public Awareness and Personal Experience.” That survey found that Americans were largely ignorant about the legal system, that jury service was experienced by only a small proportion of the population and that public opinion about the courts was strongly influenced by the mass media.”).
217 WISCONSIN INITIATIVE, supra note 216, at 77 (reprinted with permission from Perceptions of the U.S. Justice System, ABA Division for Media Relations and Public Affairs (Feb. 1999)).
Lawyers, however, play a small role in shaping public perception about the judicial system.\textsuperscript{218} One statewide public survey indicated that of the factors which influence public opinions about the judicial system, lawyers constituted only 4.6 per cent.\textsuperscript{219} Despite their low ranking among sources that shape public opinion, lawyers are considered good resources to educate the public about the judicial system. When people were asked to identify the best source for information about the judicial system, the answer was “from those most involved in the system.”\textsuperscript{220}

While these surveys may not be conclusive about the correlation between attorneys’ criticism and public perception of the judiciary, they are strong evidence that the connection between the two is attenuated, at best. Certainly, any First Amendment analysis would require some showing of a nexus between the interest in promoting public confidence in the judiciary and the restriction on core political speech imposed by the ethical rules.

In fact, the studies suggest that the enforcement of these ethical rules may have a negative impact on achieving the state interest in promoting public confidence in the judiciary. Since the public thinks that lawyers are well-qualified “teachers” about the judicial system, the rules may have a chilling effect on attorneys’ speech reducing the overall amount of information available to the public. The story, above, of Mr. Mason’s encounter with The Florida Bar’s Grievance Department illustrates the chilling effect these ethical rules have on First Amendment speech. Uncertainty about which speech is or is not permissible and fear of professional discipline for

\begin{itemize}
  \item \textsuperscript{218}The research discussed did not survey the public perception of lawyers. This author does not suggest that lawyers’ speech is unrelated to the public’s opinion of lawyers and makes no comment on that issue. However, the research indicates that lawyers, as compared to other sources, play a small role in shaping the public’s overall opinions relating to confidence and trust in the judicial system.
  \item \textsuperscript{219}Florida Statewide Public Opinion Survey: Staff Report, Judicial Management Council, Committee on Communication and Public Information 27 (July 1996).
  \item \textsuperscript{220}Wisconsin Initiative, supra note 216, at 77 (over half the respondents named lawyers as good sources from which to learn about the judicial system, 75% said they would like to learn from judges).
\end{itemize}
strongly criticizing judicial performance will result in less vigorous debate on matters of public concern by those most informed.

V. Strategies to Improve Public Perception Unrelated to Speech Suppression

According to a national survey, Americans are “largely ignorant about the legal system.”221 Americans are more familiar with fictional characters from pop culture than Supreme Court Justices. In an AOL.com survey, 77 per cent of Americans could name two of Snow White’s dwarfs, while only 24% knew the names of two Supreme Court Justices.222 Study after study illustrates that Americans are woefully uninformed about government institutions and the people who run those institutions.223

An uninformed citizenry could have catastrophic consequences.224 Recognizing these undesirable consequences on our own system of self-governance and America’s future position in the global world community, many organizations, bar associations and judicial bodies have studied the problem and recommended solutions. The numerous studies on public confidence and trust in the judicial system universally conclude that education and information are the essential “weapons” to combat ignorance and to positively impact public perception.

The National Center for State Courts maintains a web site that publishes and summarizes these various studies and their accompanying recommendations.225 The studies indicate that

221 WISCONSIN Initiative, supra note 216, at 77.
223 Id. Many Americans rely on TV dramas and “Judge Judy” type of shows to inform them on the legal system. As a result, many Americans have completely unrealistic and uninformed expectations of the judicial system.
224 Gillman, supra note 2, (commenting on a warning made by retired Supreme Court Justice Sandra Day O’Connor at a Georgetown University conference).
local courts have more impact on public perception than state or federal courts. As a result, the initiatives recommend increasing judicial and attorney participation in community education.\textsuperscript{226}

Other recommendations address improving access to courts and facilitating more positive interactions with professionals in the justice system.\textsuperscript{227}

Court information officers can play an important role in public education. Since judges

\textsuperscript{226} The Wisconsin Initiative made the following recommendations:
- Make community involvement mandatory for judges and attorneys
- Amend rules so that judges can participate in community service
- Provide attorney CLE ethics credit for service educating the public about the judicial system
- Establish a “People’s Law School” – a series of informational seminars on areas of the law that most affect people
- Establish an “Adopt-a-Neighborhood” or “Adopt-a-High School” program
- Participate in Law Day Events
- Host legal Question & Answer in the community – an evening of free legal advice at the community center or library on commonly asked legal questions
- Get involved with community non-profit boards that interact with under-served groups in the community
- Speak at community functions
- Volunteer to coach a high school mock trial/moot court team

\textit{Wisconsin Initiative, supra} note 216, at 21–23 (Most of the bullet points are the recommendations verbatim from report. The author made minor changes for readability).

\textsuperscript{227} Initiatives that address access to courts and improving the public’s court-related experiences include:
- Mandate training for public employees concerning empathy; [encourage such training for attorneys, (author’s suggestion)]; professionals, who deal with the public, must learn to treat people as individuals and understand the impact their attitudes have on public perceptions.
- Institutionalize the use of exit questionnaires for litigants, defendants, attorneys, jurors and witnesses that ask how they were treated by the system. Questions may deal with subjects such as courtroom decorum, civility, and timeliness.
- Provide information to court users that address common concerns. Examples of this information include statewide handouts that list the locations and operations of government agencies (courts, driver’s license office).
- Prepare a roster of local attorneys, which includes a list of names, addresses, and telephone numbers, to assist individuals seeking legal assistance. In addition, provide information about the services of the State Bar’s Lawyer Referral Information Services.
- Prepare a glossary of legal terms for users of the court system.
- Encourage creation of local court Web sites and promote their use at the courthouse.
- Institutionalize mechanisms that improve communication and resource sharing among multiple government agencies to avoid the mixed messages and inaccurate information when various employees within an agency or at different agencies do not know information or give wrong information.

\textit{Id.} at 19-35 (The bullet points are the recommendations verbatim from the Report. The author provided an addition to the first recommendation and made minor changes for readability).
are prohibited from speaking about pending cases, court information officers can contribute the “voice” of the judiciary to public debate about cases and legal proceedings. They can counteract media spin on high profile cases and inaccurate reporting on the role of the court and judges.

At least forty-one states have some type of public relations or court information officer. The federal courts, also, employ some court information officers through the Administrative Office of the U.S. Courts. Additionally, the Administrative Office has a dedicated newsroom site and a newsletter online. As the public relies more on information from the Internet, where information is abundant and accuracy is difficult to ascertain, it is imperative that the judiciary, through court information officers, counteract misinformation and contribute to the overall pool of information necessary to educate the public.

VI. Conclusion

It is not surprising that the role of judges engenders controversy and their performance is scrutinized under an intense spotlight. Judges make life and death decisions, determine the sustainability of family relationships, influence the riches of individuals and corporations, change social policy, and even decide presidential elections. In their hands, individuals and

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233 Bush v. Gore, 531 U.S. 98, 111 (2000) (in reversing the Florida Supreme Court’s decision allowing a recount of Florida ballots in the 2000 presidential election, the Court held: “None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront”).
communities place responsibility for making life-altering decisions. In reality, judges are not alone in making these decisions; many others affect which issues reach the courts and how those issues are decided. Yet, the judge is the one identifiable person who controls the judicial process. To the public, the judge is the embodiment of the whole judicial system.

The fear that the lack of respect for the judiciary will weaken the independence of the judiciary and spiral downward toward anarchy may be overly dramatic. Nevertheless, the strong concern that draws attention to this problem is real and warrants the resources dedicated to studying, reporting, recommending and implementing action plans to increase public trust.

There is no debate that information and education, or the lack thereof, are both the cause and the solution. Lawyers can and should play a vital role in educating the public about the judicial system.

However, subjecting attorneys to disciplinary proceedings for their negative opinions of judicial performance is counter productive to promoting confidence in the judiciary. The courts should review enforcement of the ethical rules that restrict attorney criticism of judges under the highest level of scrutiny. When there are no countervailing fundamental rights, such as a fair and impartial trial, to weigh against the suppression of core political speech, First Amendment rights should triumph over considerations of public perceptions and civility. The application of these ethical rules under less than exacting scrutiny based on a fear that criticism of individual judges will erode public confidence in the judicial system violates the principles of a free and open democracy. American democracy depends upon confidence and trust in the institutions of government and the rule of law, not in the person who happens to occupy the seat of power at any given time. The judiciary is an institution of government; individual judges are not. Judges serve the public through their work within the judicial branch of government. If the First
Amendment stands for nothing else, it stands for the right of a free people to be informed about those officials they entrust to oversee their government. Shielding the public from negative views about members of the judiciary, even if expressed in poor taste, is detrimental to promoting public trust. Public confidence in government relies upon transparency. Any attempt to silence one point of view from those sources most informed is tantamount to government censorship. Nothing is more dangerous to an independent judiciary than limiting information and silencing disfavored voices.