An Alternative Approach to Evaluating Attorney Speech Critical of the Judiciary: A Balancing of Court, Attorney, and Public Interests

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I. INTRODUCTION

In 2006 Judge Cheryl Aleman assigned attorney and member of the Florida Bar[1] Sean Conway to represent an indigent client in a criminal proceeding.[2] The client was arraigned on October 18 and then on October 24 Conway received a notice from the court clerk that the trial would begin on October 30.[3] When Judge Aleman asked Conway whether he wanted to begin trial or receive a continuance in order to serve witnesses or engage in discovery, the judge insisted that the client waive his right to a speedy trial.[4] The client decided to waive that right.[5] The next day, on Halloween, Conway posted a blog entry on a website frequented by local attorneys.[6] In the entry, titled "Judge Aleman's new (illegal) 'One-week to prepare' policy," Conway criticized Aleman for pressuring defendants to waive their right to a speedy trial in exchange for a continuance.[7] Conway wrote that Aleman was "clearly unfit for her position and knows not what it means to be a neutral arbiter," and he called her an "Evil, Unfair Witch."[8] In April 2007 the Florida Bar began investigating Conway for his remarks.[9] On November 27, 2007, a grievance committee found probable cause for violations of numerous Florida Bar rules,[10]

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1. In this Note, the term "bar," unless otherwise indicated, refers to *Black's Law Dictionary* definition of a "state bar association": "State bar associations are usu[ally] created by statute, and membership is often mandatory for those who practice law in the state. Unlike voluntary, professional-development bar associations such as the American Bar Association, state bar associations often have the authority to regulate the legal profession, by undertaking such matters as disciplining attorneys and bringing lawsuits against those who engage in the unauthorized practice of law." BLACK'S LAW DICTIONARY 169 (9th ed. 2009).

2. Respondent Sean William Conway's Response to this Court's Rule to Show Cause Order at 1, Florida Bar v. Conway, No. SC08-326 (Fla. Oct. 29, 2008), *available at* http://jaablog.jaablaw.com/files/34726-32374/conway_response.pdf.

3. *Id.* at 1–2.

4. *Id.* at 2–3.

5. *Id.*

6. *Id.*

7. Letter from Alan Anthony Pascal, Bar Counsel to the Florida Bar, to Sean Conway (Apr. 3, 2007), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2007-04-03-letter%20notifying%20conway%20of%20bar%20investigation.pdf (informing Conway that the bar was investigating him for his statements about Judge Aleman).

8. *Id.*

9. *Id.*

10. Notice of Finding of Probable Cause for Further Disciplinary Proceedings at 9–10, Florida Bar v. Conway, No. SC08-326 (Fla. Oct. 29, 2008) (on file with author), *available at* http://

including Rules 4-8.2 and 4-8.4, which make attorney speech sanctionable if it falsely and recklessly criticizes the integrity of the court or prejudices the administration of justice.[11] Conway agreed to a public reprimand and a fine, but the Florida Supreme Court asked to be briefed on the First Amendment implications of the matter.[12] In an unpublished disposition, the Florida Supreme Court approved Conway's discipline agreement.[13]

If Conway had not been a lawyer, any punishment for his comments would likely have been unconstitutional.[14] The American Bar Association's Model Rules of Professional Conduct, which in some variation or another have been adopted by almost all states, limit what attorneys may say about judges or the judicial process under Model Rules 8.2[15] and 8.4(d).[16] Additionally, many court rules forbid attorneys from conduct that "impugns the integrity of the judiciary."[17] If an

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www.citmedialaw.org/sites/citmedialaw.org/files/2007-04-03-letter%20notifying%2cConway%20of%20bar%20investigation.pdf (informing Conway that the Seventeenth Judicial Circuit Grievance Committee B had found probable cause that Conway violated bar rules).

11. Letter from Alan Anthony to Sean Conway, *supra* note 7. Specifically, Conway was charged with violating rules 4-8.2(a), 4-8.4(a), 4-8.4(c), and 4-8.4(d). *See* FLORIDA RULES OF PROF'L CONDUCT R. 4-8.2 (2007) ("8.2(a) Impugning Qualifications and Integrity of Judges or Other Officers. 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, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office."); FLORIDA RULES OF PROF'L CONDUCT R. 4-8.4 (2007) ("A lawyer shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except [in certain circumstances involving undercover investigations]; (d) 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 litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic . . . .").

12. *See* Response to Rule to Show Cause at 2–8, Florida Bar v. Conway, No. SC08-326 (Fla. Oct. 29, 2008), *available at* http://jaablog.jaablaw.com/files/34726-32374/response_bar[1].pdf.

13. Florida Bar v. Conway, No. SC08-326, 2008 WL 4748577, at *1 (Fla. Oct. 29, 2008).

14. The United States Supreme Court has consistently ruled that content-based restrictions on speech must meet strict scrutiny. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321–22 (1988). Restricting speech critical of judges is a content-based restriction because it allows for uncritical speech but punishes comments that are critical. However, some courts have allowed restrictions when attorneys have made such critical speech. *See, e.g.*, *In re* Palmisano, 70 F.3d 483, 487–88 (7th Cir. 1995).

15. MODEL RULES OF PROF'L CONDUCT R. 8.2 (1983) ("(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.").

16. MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983) ("It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice . . . .").

17. SOUTHERN DISTRICT OF CALIFORNIA CIVIL R. 83.4(b); *see also* MISSISSIPPI RULES OF

attorney violates one of these rules, he or she can be referred to a court or state bar's disciplinary committee for sanctions or even disbarment.[18] Therefore, this issue has serious implications for the way attorneys present cases, supply information to the public about the judiciary, and keep judges in check. Several scholars have argued that attorney speech[19] is integral to the public interest and restrictions on attorney speech should therefore receive the highest constitutional scrutiny.[20] However, many courts have held that attorneys are a unique class that merit additional burdens on speech.[21] For example, in the words of Supreme Court Justice Potter Stewart, "A lawyer belongs to a profession with inherited standards of propriety and honor . . . [and] must conform to those standards."[22] Today, the extent to which the bar can regulate attorney speech is a particularly salient issue due to the pervasive use of social media websites.[23]

Federal appellate and state supreme courts are divided on what legal standard to apply when determining whether an attorney's judicial criticism should receive protection under the First Amendment. In *Standing Committee on Discipline of the U.S. District Court for the Central District of California v. Yagman*, the Ninth Circuit held that "statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false."[24] The court also ruled that a statement that prejudices the administration of justice may be sanctioned only when it poses a "clear and present danger."[25] In contrast, in *In re Palmisano*, the Seventh Circuit rejected *Yagman* and held that attorneys are subject to greater restrictions on speech by virtue of their bar membership.[26] The state supreme courts have also failed to adopt a uniform standard. A majority of state supreme courts have adopted an objective standard that evaluates a lawyer's critical comments based on what the reasonable attorney would have said in the same circumstances.[27] A minority of state supreme courts have provided greater

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PROF'L CONDUCT R. 8.2 (2006); FLORIDA RULES OF PROF'L CONDUCT R. 4-8.2(a) (2007).

18. The Iowa State Bar Association explains its disciplinary procedures on its website. *See Discipline Procedures*, IOWA JUDICIAL BRANCH, http://www.iowacourtsonline.org/Professional_Regulation/Attorney_Discipline/ Discipline_Procedures (last visited Jul. 4, 2011).

19. "Attorney speech" will be used as a term throughout this article to refer to statements and opinions made by lawyers that are critical of judges or courts.

20. *See* Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998); Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363 (2010).

21. *See infra* Part III.D.

22. *In re* Sawyer, 360 U.S. 622, 646–47 (1959).

23. *See* Julie Hilden, *Should Lawyers Be Allowed to Blog Critically About Judges?*, FINDLAW (Sept. 21, 2009), http://writ.news.findlaw.com/hilden/20090921.html.

24. Standing Comm. on Discipline of U.S. Dist. Court for the Cent. Dist. of California v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995).

25. *Id.* at 1443.

26. *In re* Palmisano, 70 F.3d 483 (7th Cir. 1995).

27. Only a couple of state supreme courts, Colorado and Oklahoma, apply the subjective standard. A majority of states, including Mississippi, Michigan, Ohio, Kansas, Kentucky, Idaho,

protection for attorney speech critical of the judiciary by adopting the subjective actual malice standard established by the Supreme Court in *New York Times v. Sullivan*.[28]

In this Note, I will argue that a balancing test should be used when deciding whether attorney speech critical of the judiciary should be punished. Although almost all of the courts have rooted their standards in defamation law, I assert that defamation does not provide the most appropriate standard for attorney speech cases. Defamation is a unique private tort that redresses reputational harm.[29] If reputation is the theory behind restrictions on attorney speech, then lawyers should not be treated any differently than nonlawyers. Attorney speech is different because the bar has an organizational interest in regulating its members. Therefore, another standard should be introduced that addresses the judiciary's need to maintain professional standards but also takes into account public interests, such as the right to receive information and the need for zealous advocacy from lawyers. I propose a three-part balancing test that weighs judicial and public interests and examines where the speech occurred in order to determine whether attorney speech critical of the judiciary may be sanctioned.

In Part II of this Note, I describe the current splits in the federal and state courts. In Part III, I explain why courts have held that attorney speech may be restricted. In Part IV, I discuss the policy reasons for and against having restrictions on attorney speech. In Part V, I explain why courts should not use standards developed for defamation law to analyze attorney speech critical of the judiciary. In Part VI, I elaborate on why a balancing test is the most effective standard of review and I apply the balancing test to the Conway case. I conclude in Part VII.

II. THE CONFLICT IN THE LAW

Normally under First Amendment analysis, content-based and viewpoint-based restrictions on speech must survive the strictest level of constitutional scrutiny. The government may not restrict or prohibit the content or the topic of speech unless the government law or action is narrowly tailored to achieve a compelling government purpose.[30] However, courts have never applied this

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Massachusetts, New York, Florida, and West Virginia, use the objective standard.

28. New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

29. *See* Jeffrey A. Plunkett, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 OHIO ST. L.J. 149 (1983).

30. In *Boos v. Barry*, 485 U.S. 312, 321–22 (1988), a case about a content-based restriction on speech, the Supreme Court ruled that a District of Columbia ordinance banning speech critical of foreign governments in front of their embassies was content-based because it allowed for positive speech but did not allow for critical speech. The Court applied strict scrutiny review, which the ordinance failed. The Supreme Court has also defeated subject matter restrictions on speech when the government has attempted to prohibit certain topics of speech. As an example of a subject matter restriction, the Court in *Carey v. Brown*, 447 U.S. 455 (1980), struck down a Chicago ordinance that

standard to restrictions on attorney speech. All jurisdictions allow restrictions on attorney criticism of the judiciary in certain circumstances; none apply strict scrutiny review, despite the fact that these restrictions are both content- and viewpoint-based. The restrictions are viewpoint-based because they permit laudatory comments about the judiciary but punish critical comments. Even jurisdictions that have opted for stronger protection of attorney speech have not applied strict scrutiny; they rely instead on levels of scrutiny derived from defamation law to protect the speech. Courts have either chosen to adopt the *New York Times v. Sullivan* standard, which evaluates whether the speaker spoke with subjective malice, or they have adopted an objective standard, which asks whether the speech conforms to what the reasonable attorney would have done or said in similar circumstances.[31] Even though the *Sullivan* standard provides strong constitutional protection, traditional First Amendment analysis would evaluate the content- or viewpoint-based restrictions on attorney speech under strict scrutiny review. The use of the *Sullivan* standard has created rifts among courts about how to apply the law of defamation to attorneys who criticize judges.

A. The Ninth and Seventh Circuit Split

The Ninth and Seventh Circuits have reached contrasting conclusions on attorney speech critical of the judiciary. In *Yagman*, the Ninth Circuit held that attorney speech "impugning the integrity of a judge or the court" could only be punished if it was factually determined to be false.[32] Additionally, the court held that attorney speech that "prejudices the administration of justice" could only be punished if it creates a "clear and present danger."[33] The case involved Stephen Yagman, a prominent civil rights attorney. A legal publication quoted Yagman accusing a federal district judge of being anti-Semitic and having a penchant for sanctioning Jewish attorneys.[34] Yagman also accused the judge of being "drunk on the bench," although that comment was not published.[35] Yagman placed an advertisement in the same publication asking lawyers to contact him if the judge had ever sanctioned them.[36] He was referred to the court's disciplinary committee, which sanctioned him for violating rules of court that prohibit attorneys from "degrad[ing] or impugn[ing] the integrity of the Court" and "interfer[ing] with the

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restricted public picketing unless it concerned labor disputes. The Court did so because the law favored one topic of speech over others.

31. Standing Comm. on Discipline of U.S. Dist. Court for the Cent. Dist. of California v. Yagman, 55 F.3d 1430, 1441–42 (9th Cir. 1995) (adopting the *Sullivan* standard); Holtzman v. Grievance Comm. for the Tenth Judicial Dist., 577 N.E.2d 30, 33 (N.Y. 1991) (adopting the objective standard).

32. *Yagman*, 55 F.3d at 1441–42.

33. *Id.* at 1443.

34. *Id.* at 1433–34.

35. *Id.*

36. *Id.*

administration of justice."[37] As a result, a district court disciplinary committee suspended him from practice in the Central District of California for two years.[38]

Judge Alex Kozinski, writing for the Ninth Circuit, reversed the district court's ruling. Rather than rely on *Sullivan*, Kozinski looked to other defamation cases such as *Milkovich v. Lorain Journal Co.*[39] and *Hustler Magazine, Inc. v. Falwell.*[40] Kozinski concluded that Yagman could not be punished unless there was an implied factual basis for the statement or the reasonable person would not perceive the statement to be rhetorical hyperbole.[41] Kozinski ultimately held that Yagman's statement that the judge was anti-Semitic was a constitutionally protected statement of opinion because the statement did not imply the existence of undisclosed facts, but instead was an inference drawn from the facts specified.[42]

Kozinski held that to prove that Yagman prejudiced the administration of justice, the district court must show that the statement was a "clear and present danger" to the administration of justice.[43] In holding that Yagman's statements did not amount to a clear and present danger to the administration of justice, Kozinski distinguished Yagman's situation from the circumstances in *Gentile v. State Bar of Nevada*.[44] In *Gentile*, the Supreme Court ruled that attorney speech occurring during a pending case in which the attorney was involved could be sanctioned if it had a "substantial likelihood" of materially prejudicing the fairness of the trial.[45] The case concerned a criminal defense lawyer who held a pretrial press conference in which he declared that his client was a "scapegoat" and a victim of "crooked cops."[46] Kozinski distinguished *Gentile* because Gentile's speech concerned a pending case, while Yagman's statements did not.[47] In evaluating the rules of court that Yagman violated, the Ninth Circuit decided to grant wide protection to extrajudicial attorney speech. The *Yagman* court ruled that statements that may "impugn the integrity of the court" are only punishable if they imply an assertion of fact or would not be seen as hyperbole by the reasonable person.[48] For claims regarding the prejudice of the administration of justice, the Ninth Circuit adopted

37. *Id.* at 1435–36.
38. *Id.* at 1435.
39. 497 U.S. 1 (1990) (holding that a statement made in the form of an opinion is not automatically protected speech).
40. 485 U.S. 46 (1988) (holding that public officials and public figures who are targets of parody cannot recover for intentional infliction of emotional distress unless there is proof of actual malice).
41. *Yagman*, 55 F.3d at 1438.
42. *Id.* at 1440.
43. *Id.* at 1442–43.
44. *Id.* at 1442–44.
45. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1063 (1991).
46. *Id.* at 1034.
47. *Yagman*, 55 F.3d at 1442–44.
48. *Id.* at 1438.

a test that protects the speech unless it poses a "clear and present danger."[49]

In *In re Palmisano*, the Seventh Circuit used a standard very similar to *Yagman* but reached a different result.[50] The court evaluated attorney speech critical of the judiciary by determining whether the statement implied an assertion of fact that could be verified as true or false.[51] However, unlike *Yagman*, the *Palmisano* court decided to uphold the attorney sanctions because it characterized the attorney's speech as statements of fact, rather than opinion.[52] There, Judge Easterbrook considered a situation where an attorney accused several federal district judges of corruption and taking bribes.[53] Judge Easterbrook approached the situation by immediately recognizing that attorneys lack the same freedom to speak as nonattorneys.[54] Because indiscriminate accusations against judges affect the functioning of the court, Easterbrook reasoned that "[c]ourts therefore may require attorneys to speak with greater care and civility than is the norm in political campaigns."[55] In deciding to uphold the sanction, the court wrote, "[T]he Constitution does not give attorneys the same freedom as participants in political debate."[56] Much like the *Yagman* court, Easterbrook invoked notions of defamation law, relying on *Milkovich* to explain that Palmisano could not hide behind a defense that his statements were opinion when they were embedded in facts.[57]

In contrast to the Ninth Circuit, the Seventh Circuit granted wide discretion to disciplinary committees of federal courts to sanction attorney speech critical of the judiciary. The Seventh Circuit went beyond Palmisano's particular case, and essentially held that attorneys forego certain First Amendment rights as members of the bar. The Ninth Circuit, on the other hand, did not explicitly rule on whether attorneys lose some First Amendment privileges, but clearly suggested that attorney speech should be judged in the same way as speech by nonlawyers. This circuit split therefore reflects a fundamental difference in policy regarding the ability of attorneys to criticize judges and the judiciary.

B. The Conflict Among the States

State supreme courts are equally divided on this issue. Whereas the Seventh and Ninth Circuits grounded their rulings in a variety of federal defamation cases, state supreme courts have either adopted the defamation standard established in *Sullivan* with its prong of actual or subjective malice, or they have chosen an

49. *Id.* at 1442–43.
50. 70 F.3d 483 (7th Cir. 1995).
51. *Id.* at 487–88.
52. *Id.*
53. *Id.* at 485.
54. *Id.* at 487.
55. *Id.*
56. *Id.*
57. *Id.*

objective malice standard that asks what the reasonable attorney would say in the same circumstances. The objective standard has been best described by the New York Court of Appeals, which concluded in *Holtzman v. Grievance Committee for the Tenth Judicial District* that "[i]t is the reasonableness of the belief, not the state of mind of the attorney, that is determinative."[58] A majority of state supreme courts have chosen the objective approach.[59] The division among state supreme courts ultimately centers on the question of whether attorneys should be subject to more restrictions on speech by virtue of bar membership. In most cases, the courts have expressed fear that failing to sanction attorney speech will inevitably lead to a poorer-functioning judiciary and erode its efficacy as an institution.[60] As a practical concern, judges have also worried that attorney speech might unnecessarily disrupt proceedings.[61] Another reason implied and sometimes stated by judges is that the public might lose confidence in the judiciary as an institution if attorneys constantly scrutinized courts, particularly with offensive, accusatory, or false statements.[62] This argument concludes that if the courts lose public confidence, then their decisions will have less power and society will become more disorderly. While state supreme courts have not banned critical attorney speech wholesale, they have indicated three situations where speech critical of judges or the judiciary may be punished: (a) statements made during a judicial proceeding, (b) statements made after a judicial proceeding, and (c) statements made without connection to a judicial proceeding.

1. Punishable Statements Under the Objective Standard

a. During Judicial Proceedings

Courts using the objective standard have upheld the punishment of attorney criticism made in an official court submission or during the course of a case. In *Office of Disciplinary Counsel v. Gardner*, the lawyer, Gardner, criticized a panel of judges in a motion for reconsideration, writing that they should have been "ashamed" of their initial opinion.[63] He also accused them of ruling based on their desire to be seen as tough on crime.[64] In reviewing the sanctions against Gardner, the Ohio Supreme Court adopted an objective malice standard, explaining that the

58. 577 N.E.2d 30, 33 (N.Y. 1991).

59. *See supra* note 27.

60. *See* Mississippi Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005), *reinstatement granted sub nom.*, *In re* Lumumba, 962 So. 2d 536 (Miss. 2007) (holding that attorney statements are sanctionable when they directly relate to judicial proceedings and damage the public confidence in the judiciary).

61. *Id.* at 878.

62. *See, e.g.*, U.S. Dist. Court for E.D. of Wash. v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993); *Lumumba*, 912 So. 2d at 885–86; *Holtzman*, 577 N.E.2d at 33.

63. 99 Ohio St. 3d 416, 417, 2003-Ohio-4048, 793 N.E.2d 425, 427, *reinstatement granted*, 101 Ohio St. 3d 1241, 2004-Ohio-1209, 805 N.E.2d 98.

64. *Id.*

"state's compelling interest in preserving public confidence in the judiciary supports applying a standard in disciplinary proceedings different from that applicable in defamation cases."[65] The court elaborated that "[u]nder the objective standard, an attorney may still freely exercise free speech rights and make statements supported by a reasonable factual basis, even if the attorney turns out to be mistaken."[66]

Applying this standard, the Ohio Supreme Court found no trouble upholding Gardner's six-month suspension. The court wrote that "[u]nfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law."[67] No other state court has gone so far. Some attorneys note that the purpose of motions and appeals is to criticize the judiciary in some respect by pointing out its errors.[68] While Gardner may have been zealously advocating on behalf of his client, the Ohio Supreme Court suspended him from practice, perhaps because the criticism was in an official court document.

In most cases, the speech under scrutiny occurs when the lawyer criticizes a judge's action in the lawyer's case, usually in an off-handed comment in or out of court. In *Mississippi Bar v. Lumumba*, for example, an attorney in a criminal proceeding, Lumumba, implied the judge was corrupt by telling the judge he was "willing to pay for justice" at a hearing for posttrial motions.[69] Lumumba was charged with contempt for his in-court comments, and subsequently called the judge a "barbarian" out of court during an interview regarding the contempt charges.[70] The Mississippi Supreme Court held that Lumumba's conduct prejudiced the administration of justice.[71] It reasoned that both Lumumba's out-of-court and in-court statements were punishable because they were still "connected" to a current judicial proceeding, in this case the trial that Lumumba was conducting for his client.[72]

While the "connection" that the Mississippi Supreme Court viewed as prejudicial to the administration of justice was arguably attenuated, most jurists would probably agree that attorney speech should be sanctioned if it actually disrupts the judicial process.[73] Although most state supreme courts assume that attorney speech criticizing a judge or court can seriously disrupt the functioning of a trial, courts rarely find that the attorney actually caused a disruption.[74] Reviewing

65. *Id.* at 423.
66. *Id.*
67. *Id.* at 424.
68. *See* Steven Wisotsky, *Incivility and Unprofessionalism on Appeal: Impugning the Integrity of Judges*, 7 J. APP. PRAC. & PROCESS 303 (2005).
69. *In re Lumumba*, 912 So. 2d 871, 875 (Miss. 2005).
70. *See id.*
71. *Id.* at 882.
72. *Id.* at 883.
73. Defining what constitutes an "actual disruption" may be difficult for jurists.
74. *Cf. Lumumba*, 912 So. 2d at 888–89 (attorney's comments were so disruptive that they

courts have merely speculated about the potential damage, as opposed to requiring any actual disruption caused by the speech.

b. Statements Made After a Proceeding

The more controversial rulings that affect attorney speech occur in situations where lawyers speak outside of the courtroom about a case in which they were involved after the proceeding has ended. For example, in *In re Westfall*, a Missouri prosecutor named George Westfall went on television to criticize an opinion by an appellate court.[75] Westfall accused one judge of distorting the law to the judge's liking.[76] In reviewing the advisory committee's findings and recommendations, the Missouri Supreme Court applied the objective test and ruled that Westfall had failed to adequately research his claims and that his "statements imputed lack of integrity and misconduct in the judge's professional work."[77] Similarly, in *Grievance Administrator v. Fieger*, Fieger, a Michigan lawyer who represented a client in a medical malpractice proceeding, made a radio appearance after the appellate court's ruling and launched vulgar comments against the judges, stating that one particular judge should stick his finger up his anus.[78] The Michigan Supreme Court held: "[S]uch coarseness in the context of an officer of the court participating in a legal proceeding warrants no First Amendment protection when balanced against this state's compelling interest in maintaining public respect for the integrity of the legal process."[79] In both *Westfall* and *Fieger*, the trial or hearing was over, yet the courts extended the reach of the professional conduct rules to all matters pertaining to the litigation. The consequence of such a rule is that the attorneys who try a case and have the greatest perspective and knowledge to comment on the matter may be prohibited from making public comments criticizing the judiciary because of their involvement in the litigation.

c. Statements Made Without Involvement in a Proceeding

Punishment for attorney speech that is not connected to a pending trial or proceeding is even more problematic. In *Idaho State Bar v. Topp*, for example, the Idaho Supreme Court punished an attorney who was not involved in the proceeding at issue.[80] Topp was a part-time county lawyer who observed a heated public judicial proceeding where the county government requested a judicial confirmation of a multimillion dollar expenditure.[81] After the proceedings, local

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caused mistrial).

75. 808 S.W.2d 829, 831–32 (Mo. 1991).
76. *Id.*
77. *Id.* at 838.
78. Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006).
79. *Id.* at 142.
80. Idaho State Bar v. Topp, 925 P.2d 1113, 1114 (Idaho 1996).
81. *Id.*

media interviewed Topp about the judge's decision to decline the county's request.[82] Topp suggested that the elected judge's decision might have been motivated in part by political concerns due to the public frenzy surrounding the funding request.[83] The Idaho Supreme Court held a reasonable attorney would not have made Topp's statement in that situation and upheld a lower court's public reprimand of Topp.[84]

Of increasing concern for younger attorneys is the use of social media websites, such as blogs, to express their views. As discussed in Part I, the Florida Supreme Court upheld monetary sanctions against attorney Sean Conway, who called a judge "an Evil, Unfair Witch" on a blog in response to the judge's practice of allowing defense lawyers only one week to prepare for trial.[85] While the Florida Supreme Court did not explain its ruling, the case has many implications for attorneys who maintain personal web-based profiles or diaries that may include off-the-cuff remarks about the judicial competency of specific judges. It is perhaps the fear incarnate of Judge Kozinski's concern in *Yagman* that punishing such speech could result in a chilling effect: "[A] speech restriction that is not bounded by a particular trial or other judicial proceeding does far more than merely postpone speech; it permanently inhibits what lawyers may say about the court and its judges—whether their statements are true or false."[86]

2. Protected Attorney Speech Under the Sullivan *Standard*

Other state supreme courts have directly disagreed with the objective standard used in the majority of states because it conflicts with public policy interests. In *In re Green*, Green, an African American attorney practicing in Colorado, sent a letter to a judge and opposing counsel in the course of proceedings.[87] The letter suggested that the judge was biased against him and his client and accused the judge of being racist based on a previous encounter in the clerk's office.[88] The Colorado Supreme Court adopted a subjective standard similar to that in *New York Times v. Sullivan*, becoming the most recent state supreme court to do so.[89] However, *In re Green* is distinguishable from the cases

82. *Id.* at 1114.

83. *Id.*

84. *Id.* at 1117.

85. Florida Bar v. Conway, No. SC08-326, 2008 WL 4748577, at *1 (Fla. Oct. 29, 2008) (order approving report of referee and conditional guilty plea); John Schwartz, *A Legal Battle for Lawyers: Online Attitude Vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, http://www.nytimes.com/2009/09/13/us/13lawyers.html.

86. Standing Comm. on Discipline of U.S. Dist. Court for the Cent. Dist. of California v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995).

87. *In re* Green, 11 P.3d 1078, 1082–83 (Colo. 2000).

88. *Id.*

89. *Id.* at 1085 (The court laid out the following test: "(1) whether the disciplinary authority has proven that the statement was a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact); and (2) assuming the statement is false, whether the

noted above because the audience of the critical speech was limited to the judge and opposing counsel, and, at least in regard to the racism charge, Green cited to an actual personal encounter with the judge to support his contention that the judge was bigoted.[90]

The facts of the case are such that the Colorado Supreme Court could have probably ruled in favor of Green using the objective test, but it decided to expand First Amendment protection for attorneys by adopting the subjective standard. Even though Green's criticism was not meant to reach the public, the justices of the court found particularly compelling the argument that attorney speech should be highly protected because it is the main informational pipeline to the public about the functioning of the judiciary.[91] The court wrote that protecting attorney speech is particularly important in a state that elects its judges.[92] The court noted that attorneys play a unique role in educating the public about the judiciary because lawyers are the "class of people in the best position to comment on the functioning of the judicial system."[93] Much of the Colorado Supreme Court's reasoning was based on rulings from the supreme courts in Oklahoma and Tennessee, which found it especially important for lawyers to have full First Amendment protection to criticize judges in order to have a more informed public.[94] Despite this strong public policy rationale of fully protecting attorneys' speech because they are in the best position to inform the public, the vast majority of states have continued to uphold restrictions on attorney speech critical of the courts and judges.

III. SUPREME COURT RULINGS PROVIDE LEGAL AND HISTORICAL SUPPORT FOR MAINTAINING RESTRICTIONS ON ATTORNEY SPEECH

Many scholars have decried the ease with which some courts restrict attorney speech and have called for the highest constitutional protection for speech criticizing judges.[95] The jurisprudential disagreement on these restrictions seems to turn in large part on whether protecting the integrity of the judiciary justifies a restriction on attorney speech. Whether the current standard is desirable will be discussed later, but nowhere in their decisions have courts discussed whether the bar has the legal ability to make content- or viewpoint-based restrictions on speech. Although the United States Supreme Court has never decided a case regarding criticism of the judiciary by attorneys, analogous First Amendment

attorney uttered the statement with actual malice—that is, with knowledge that it was false or with reckless disregard as to its truth.").

90. *Id.* at 1082.

91. *Id.* at 1085.

92. *Id.*

93. *Id.*

94. State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958 (Okla. 1988); Ramsey v. Bd. of Prof'l Responsibility, 771 S.W.2d 116, 120–22 (Tenn. 1989).

95. *See* Chemerinsky, *supra* note 20; Tarkington, *supra* note 20.

decisions by the Court suggest that curtailing such speech does not violate the First Amendment.

A. The Supreme Court's Affirmation of the Hatch Act Supports the Claim That a Branch of Government Can Restrict the Speech of Its Employees or Members

The Supreme Court cases that have affirmed the Hatch Act support the bar's ability to restrict attorney speech. In 1939 Congress passed the Hatch Act, which prevents federal civil servants from using their influence in political campaigns.[96] The Supreme Court has consistently upheld this law. The Supreme Court first ruled on the law's constitutional validity in *United Public Workers of America (C.I.O.) v. Mitchell*.[97] In upholding the law, the Court listed several policy reasons, including preventing a one-party political system, preventing government employers from forcing employees to ascribe to certain political views or political parties, and preventing a distortion of the political process.[98] Another key policy reason that the Court accepted was Congress's desire to efficiently run government.[99] The Court deferred to Congress's judgment on how best to achieve governmental efficiency.[100] Though the Court recognized that upholding the law would restrict political speech and association outside the realm of the employees' offices, the Court explained that "[t]he influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours."[101] In deferring to congressional and executive judgment, the Court decided that the branches of government could regulate the political activities of federal employees outside of work. A few decades later the Court reaffirmed *Mitchell* in *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*.[102] The Court wrote in revisiting the law that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees."[103]

What makes these rulings so important to any justifications by courts to restrict certain speech is the Supreme Court's deference to institutional wisdom in order to achieve greater governmental efficiency. The Court confronted issues of regulatory restrictions on employee speech and chose efficiency and other rationales over the First Amendment concerns of civil servants.[104] These cases

96. 5 U.S.C. §§ 1501–1508, 7321–7326 (2006).
97. United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).
98. *See id.* at 100.
99. *Id.* at 101.
100. *Id.* at 99.
101. *Id.* at 95.
102. U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973).
103. *Id.* at 556.
104. Caprice L. Roberts, Standing Committee on Discipline v. Yagman*: Missing the Point of*

support the proposition that people who choose to join a regulated profession may not enjoy the full protection of the First Amendment.[105] They also suggest that, as long as the government provides strong policies justifying the First Amendment restrictions, courts will find that those policies will outweigh the rights of employees.[106] Justifications for maintaining certain restrictions on attorney speech will be discussed in detail in Part IV, but these Supreme Court rulings appear to give the government wide discretion in regulating the conduct, participation, and speech of employees, particularly when weighed against efficient government administration.

However, there are some weaknesses in the analogy between government employers and their employees under the Hatch Act and lawyers and the bar associations that regulate them. First, the bar does not employ its members. Second, and most importantly, it is questionable whether courts can be considered government policy makers[107] like the members of the legislative and executive branches. State and federal bars may also be analogous to legislative policy makers because ultimately their authority is derived from the political branches of government.[108] If the Supreme Court determines that courts can be considered policy makers, then court rules concerning attorney speech would likely be given deferential treatment similar to that of Congress. Without clarity from the Supreme Court it is difficult to determine whether a court restriction on its members can be likened to legislative restrictions under the Hatch Act, but in certain situations the Supreme Court has ruled that the courts can be considered government actors.[109] Accepting the analogy of bar associations or courts as policy makers would support restrictions on attorney speech under the Hatch Act line of cases.

B. The Supreme Court Has Upheld Restrictions on Attorney Solicitation and Advertising

Supreme Court rulings regarding advertising services and the solicitation of potential clients also lend support to restrictions on attorney speech. In *Ohralik v.*

Ethical Restrictions on Attorney Criticism of the Judiciary?, 54 WASH. & LEE L. REV. 817, 852–53 (1997).

105. *Id.* at 852.

106. *Id.* at 853.

107. In state courts, the state bar, which is generally an administrative arm of the state supreme court, regulates professional discipline. California, for instance, has the State Bar Court, a special court that administers professional discipline. *See State Bar Court of California: General Information*, STATE BAR COURT OF CAL., http://www.statebarcourt.ca.gov/home.aspx (last visited Jul. 10, 2011). In federal court, each individual court or circuit may have its own individual set of rules.

108. As an example, "[t]he State Bar of California was created by legislative act in 1927 and codified in the California Constitution at Article VI, section 9." Ctr. for Pub. Int. Law, *State Bar of California*, 17 CAL. REG. L. REP. 339, 339 (2001). Federal trial and appellate courts each have their own bars; however, each court, excluding the Supreme Court, is created and funded by Congress.

109. Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (holding "[t]hat the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment").

Ohio State Bar Ass'n, the Supreme Court ruled that the government may ban in-person solicitations by attorneys.[110] The Court found the government's argument in favor of the restrictions persuasive mainly because the law protected victims from "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'"[111] The Court distinguished *Ohralik* from *In re Primus*,[112] where the Court struck down restrictions on in-person pro bono solicitations. The Court revisited the issue a decade later in *Shapero v. Kentucky Bar Ass'n* and struck down restrictions on direct-mail solicitations.[113] Professor Erwin Chemerinsky has pointed out that *Ohralik*, *Primus*, and *Shapero* establish that states may prohibit in-person solicitations of clients for profit, but may not prohibit in-person solicitations if the attorney works without pay or solicits through the mail.[114] However, the Supreme Court eroded this proposition in *Florida Bar v. Went For It*.[115] In *Went For It*, the Supreme Court upheld Florida's thirty-day prohibition on attorneys for communicating with victims who have suffered from personal injury or wrongful death.[116] In upholding the law, the Court applied intermediate scrutiny: "The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered."[117] *In re Primus* and *Went For It* establish that the Court is willing to uphold restrictions on attorney conduct that might damage the integrity of the legal profession.

The Court has singled out attorney speech for a higher level of regulation than other professions because of the unique status attorneys have in American society. The Supreme Court illustrated this point when deciding the constitutionality of a state law that prohibited in-person solicitation by accountants.[118] In *Edenfield v. Fane*, the Court struck down the law but distinguished its ruling from *In re Primus* by noting that, unlike a lawyer, a certified public accountant is not "a professional trained in the art of persuasion."[119] An accountant's training emphasizes "independence and objectivity rather than advocacy."[120] The Court essentially acknowledged that attorneys might be subject to more speech restrictions than other groups of professionals because of their high level of sophistication. While the argument that lawyers are generally more persuasive than accountants may be spurious, this signals that courts may be

110. 436 U.S. 447, 466–68 (1978).
111. *Id.* at 462.
112. *In re* Primus, 436 U.S. 412 (1978).
113. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).
114. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1097 (3d ed. 2006).
115. Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).
116. *Id.* at 618–19.
117. *Id.* at 635.
118. Edenfield v. Fane, 507 U.S. 761 (1993).
119. *Id.* at 775.
120. *Id.*

willing to permit greater regulation of speech by attorneys than other professional groups. Although these cases fall mainly under commercial speech jurisprudence, the fact that the Court has singled out lawyers as a group and curtailed some aspects of their free speech suggests that court rules limiting attorneys' ability to criticize the judiciary can survive higher levels of constitutional scrutiny.

C. Attorneys Are Subject to Restrictions Under First Amendment Jurisprudence in the Workplace

One commonly offered rationale for restrictions on attorney speech is attorneys' status as officers of the court. In cases stretching back 150 years the Supreme Court has recognized that attorneys, as officers of the court, assume restrictions on their speech and actions.[121] While the phrase "officer of the court" is nebulous in terms of additional duties placed on attorneys, it does invoke similarities to an employer-employee relationship.[122] State and federal bars administer the regulatory aspects of the legal profession, including admission and disciplinary action, but they do not employ their members.[123] Nevertheless, the relationship resembles that of employer to employee in that the bar dictates the way lawyers must conduct themselves in order to maintain their licenses to work. Professor Terri Day observes that attorneys have the same responsibilities as public employees to facilitate the administration of justice and that they are subject to significant control and restrictions by courts, particularly in the courtroom and during trials.[124] Similarly, Professor W. Bradley Wendel observes that, although nongovernment lawyers represent private interests, they still must conform their strategies to the rule of law and may not help their clients in furthering a crime.[125] Wendel writes, "[l]awyers are not literally public employees, but their acts do take on a public quality by virtue of the power of lawyers to invoke the official apparatus of the state."[126] Accepting that lawyers resemble public employees in some manner, the law gives wide discretion to the employer in regulating employee speech, although this depends on whether the speech was made on or

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> 121. But on the other hand the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the [B]ar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This 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.

Bradley v. Fisher, 80 U.S. (1 Wall.) 335, 355 (1871).

122. Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 187–88 (2008).

123. For a description of how disciplinary proceedings work in the Ninth Circuit, see PAUL W. VAPNEK ET AL., CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY 11-173 to -178 (2010).

124. Day, *supra* note 122.

125. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 375 (2001).

126. *Id.*

off the job.

In *Pickering v. Board of Education*, a public school teacher was fired for sending a letter to a local newspaper criticizing how the school board and the school district superintendent had handled past proposals to raise new revenue.[127] The Supreme Court ruled that the teacher's First Amendment rights had been violated. The Court adopted a balancing test which provides that the government employee's speech cannot be punished if the speech involves a matter of public concern and the employee's free speech interests outweigh the government's interest in efficiently administering a public service.[128] The Supreme Court in *Garcetti v. Ceballos* altered the analysis of public employee speech in regard to statements made in the course of employment.[129] In that case, a Los Angeles deputy district attorney's superiors allegedly retaliated against him for writing memos criticizing the way the district attorney's office had handled a case.[130] The Supreme Court held that "when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline."[131] The Court largely deferred to the judgment of supervisors in regulating employee speech to make sure it is both accurate and reflects the goals of the institution.[132] One of the key questions the Court answered was whether Ceballos was writing in the capacity of a private citizen. The Court answered no.[133]

Pickering and *Ceballos* may not have an effect on attorney speech because lawyers are not public employees by virtue of bar membership. However, if courts decide to accept the employer/employee analogy, *Ceballos* may give them more power to restrict attorney speech. If an attorney criticizes a judge in relation to an ongoing proceeding, the bar's analogous role as employer might give it the power to restrict the attorney's speech under the notion of general deference to professional standards described in *Ceballos*. However, if speech critical of the judiciary did not occur in connection with an ongoing proceeding, then the *Pickering* test would probably protect attorney speech as long as the speech related to a matter of public concern. Perhaps the Court's conclusion is similar to Professor Kathleen Sullivan's statement, before *Ceballos* was decided, that "when speaking in capacities that might adversely implicate the administration of justice or perception of administration of justice by the government . . . the Court has regarded the government as freer to place conditions on its sponsorship."[134]

127. Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968).
128. *See id.* at 568.
129. Garcetti v. Ceballos, 547 U.S. 410 (2006).
130. *Id.*
131. *Id.* at 421.
132. *Id.* at 422–23.
133. *Id.* at 422.
134. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on*

However, *Ceballos* only indirectly concerned lawyer speech. It is uncertain whether the result would have differed had nonlawyers been involved, but it is plausible that the Court took into account that the speech in controversy was made by attorneys.

Much like the Hatch Act cases, the *Ceballos* Court easily deferred to the judgment of the government employer. These cases do not articulate a standard by which to evaluate attorney speech, but they do suggest that public employers, which can be analogized in certain respects to the bar, sometimes have the power to curb attorney speech.

D. Attorney Speech Has Historically Been Limited by the Conception of Attorneys as Officers of the Court

The debate surrounding attorney speech has much to do with the notion that lawyers are officers of the court. This terminology is in many ways a fiction. It is a commonly used legal phrase that carries with it very little substance, but in this context has been used to describe the ethical and professional duties a lawyer acquires as a bar member. The notion of how an officer of the court should act has its roots in early discussions of how to regulate the legal profession.

In the first half of the nineteenth century, American jurists who began formulating ethical guidelines for attorneys confronted issues about the way attorneys ought to act. According to Alfred Konefsky, there were two camps of thought in antebellum legal circles.[135] The camp led by University of Maryland Professor David Hoffman believed that attorneys' duties should be guided by both moral judgment and the public interest.[136] Hoffman maintained that ethical codes would be necessary to describe and prescribe virtue in a world of open bar membership, where lawyers were no longer only from elite families.[137] The other camp, led by Professor George Sharswood, cut away at Hoffman's image of the virtuous lawyer, instead arguing that an attorney should be a zealous advocate constrained only by the law.[138] The Hoffman-Sharswood debate is at the center of defining whether the attorney, as an officer of the court, acquires additional behavioral responsibilities as a bar member. Although scholars have debated about what makes one an officer of a court, the Supreme Court has consistently held that attorneys are subject to more speech restrictions, even when their speech occurs outside the courtroom.

The first case, *Bradley v. Fisher*, dates back to 1871 when an attorney

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Lawyers' First Amendment Rights, 67 FORDHAM L. REV. 569, 587 (1998).

135. Alfred S. Konefsky, *The Legal Profession*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789–1920) 68, 101 (Michael Grossberg & Christopher Tomlins eds., 2008).

136. *Id.*

137. *Id.*

138. *Id.*

defending a conspirator in the killing of Abraham Lincoln insulted the trial judge with "chastising" comments as he descended from the bench.[139] In affirming the lawyer's disbarment for comments made in court, the Supreme Court wrote that maintaining respect and integrity to the court does not end in the courtroom, "but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts."[140] The Court recognized that "professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court."[141]

The next time the Supreme Court dealt with attorney speech was in *In re Sawyer*. In *Sawyer*, an attorney was representing a group of defendants being prosecuted under the Smith Act.[142] In an address to the public, the attorney said, "[t]here's no fair trial in the case. They just make up the rules as they go along."[143] She was referred to a disciplinary committee and sanctioned because the committee thought that her comments impugned the integrity of the trial court judge.[144] The Supreme Court reversed Sawyer's sanction because it ruled that lawyers are free to criticize the state of the law.[145] However, in the very same opinion, Justice Brennan, writing for the majority, concluded that a lawyer does not acquire a "license" to impugn the integrity of a judge or attack a judge's administration of justice, even if the lawyer is not involved in pending litigation.[146] Justice Stewart's concurrence is perhaps the most quoted opinion in attorney speech discussions. He stated that lawyers belong to a profession with "inherited standards of propriety and honor" and then compared lawyers to doctors, who cannot use the First Amendment as protection from discipline if they reveal confidential information about patients.[147] In Justice Frankfurter's dissent, he argued that attorney speech critical of the judiciary can be dangerous because of the potential "inflaming and warping significance" it may have on the public's view of the judicial process.[148]

In the 1985 case of *In re Snyder*, the Supreme Court addressed a situation where an attorney was sanctioned for a letter he wrote criticizing the way the Court of Appeals had treated an indigent defendant.[149] The Court struck down the

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139. Bradley v. Fisher, 80 U.S. (1 Wall.) 335 (1871).

140. *Id.* at 336.

141. *Id.* at 355.

142. *In re* Sawyer, 360 U.S. 622 (1959). The Smith Act is a federal law passed in 1940 that sets criminal penalties for people who advocate or aid in the overthrow of the United States. 18 U.S.C. § 2385 (2006).

143. *Sawyer*, 360 U.S. at 630.

144. *Id.* at 623–25.

145. *Id.* at 630.

146. *Id.* at 636.

147. *Id.* at 646–47.

148. *Id.* at 669.

149. *In re* Snyder, 472 U.S. 634 (1985).

sanction because it decided that the attorney was mainly criticizing the law, which is permissible. However, in dicta the Court wrote:

> As an officer of the court, a member of the Bar enjoys singular powers that others do not possess; by virtue of admission, members of the Bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the Bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.[150]

In its most recent case addressing attorney speech, the Court in *Gentile v. State Bar of Nevada* struck down the punishment of an attorney who made statements to the press about the innocence of his client after an indictment was issued against the client.[151] While the main issue the Court decided was whether the speech would prejudice the trial, Justice O'Connor wrote in her concurrence that "[l]awyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech."[152] She recognized that attorneys do not forfeit all of their free speech rights, but that there are circumstances, such as the one the Court was deciding, where attorney speech could be limited.[153] The Supreme Court has never decided whether rules that prohibit extrajudicial speech critical of the judiciary are constitutional, but the cases cited above are closest to the point. Collectively, they have precedential value and suggest that the Supreme Court would likely view these restrictions as constitutional.

IV. POLICY REASONS FOR SUPPORTING OR REJECTING ATTORNEY SPEECH BASED ON THE INTERESTS OF THE GOVERNMENT, ATTORNEYS, AND THE PUBLIC

The reason why courts are so divided on the issue of attorney speech critical of the judiciary is disagreement about the societal function of such speech. As noted above, the courts that have granted greater protection to attorney speech critical of the judiciary believe that attorneys act as an important informational

150. *Id.* at 644–45.

151. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). In coming to its decision, the Supreme Court analyzed the application of Nevada Supreme Court Rule 177. The rule was based on the American Bar Association's Model Rule of Professional Conduct 3.6, which governs pretrial publicity. The Court wrote that Model Rule 3.6 was not necessarily unconstitutional, but that Nevada's interpretation of the rule was not in constitutional conformity. *Id.* at 1036.

152. *Id.* at 1081–82.

153. *Id.*

source to the public about the state of the judiciary.[154] Judges who have upheld restrictions on attorney speech believe it can unnecessarily damage the integrity of the courts, disrupt the functioning of the judiciary, and undermine its opinions.[155] This Part will discuss why such restrictions may or may not be desirable.

A. Why Restrictions on Attorney Speech Are Not Always Desirable

Some courts justify placing special restrictions on attorneys by asserting or implying that attorneys are a specialized class in American society. The granting of bar membership gives lawyers exclusive access to use the judicial system. Unlike other professional regulatory bodies, the judiciary is a branch of the government. While the political branches of government are heavily covered by the media and can be changed by public involvement, the courts remain somewhat insular. The judiciary's inner workings and opinions go largely unnoticed by the general public. Additionally, most people lack the requisite legal knowledge to effectively evaluate the performance of judges. In states where judges are elected, nonattorneys still have very little exposure to courts unless they are personally involved in litigation, and even then they may not fully understand the implications of a court ruling or a judge's action.

Because lawyers have this exclusive access to the judiciary and have attained advanced legal knowledge, they play an important role in disseminating information about the functioning of the courts as well as the competency of judges. This role is seriously undermined if lawyers face the possibility of sanctions for their criticisms. Thus, attorney speech restrictions threaten not only the rights of lawyers but also the right of the public to receive information.[156] The right of the public to receive information relates to many of the rationales behind the First Amendment, such as promoting individual autonomy, discovering the truth, and enhancing the democratic process.[157] Restricting attorney speech deprives the public of important information about the judiciary. This is particularly important in states where judges are elected. Furthermore, instead of promoting public confidence in the judiciary, restricting attorney speech may in fact erode that trust by creating the appearance that judges are merely attempting to insulate themselves from expected criticism of their professional duties.[158]

Restricting attorney speech may also impair attorneys from fully advocating for their clients. Out-of-court speech can be applied in numerous ways to help

154. *See, e.g.*, *In re* Green, 11 P.3d 1078, 1085 (Colo. 2000).

155. *See, e.g.*, *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995).

156. Angela Butcher & Scott Macbeth, *Lawyers' Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL ETHICS 659, 672–73 (2004).

157. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

158. Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1605–09 (2009).

clients, such as using the media to counter negative publicity or gathering crucial evidence.[159] Sometimes clients have matters that go beyond the courtroom and are meant to galvanize the public.[160] Limiting a lawyer's ability to fully advocate for such clients could call into question the motives of judges who contend that their reputational or judicial efficiency concerns take precedence over client advocacy. If attorney speech is essential to client representation, then any limitations on that speech harm clients.

B. Why Restrictions on Attorney Speech Are Desirable

There are also legitimate professional reasons why these restrictions on attorney speech should be in place. First, speech can damage how courts function. The judiciary is a large organization that relies on its reputation as a neutral arbiter to effectuate its power. If the integrity of the judiciary is severely diminished, then its opinions and rulings may lose effect.

Second, judges, in their own capacity or as officers of the court, lack the ability to counter critical speech. Judges are confined by their own canons of judicial conduct that limit what they may say in public.[161] Moreover, these canons of conduct obligate judges to uphold the integrity of the court by enforcing rules of professional conduct.[162] While judges should expect to be criticized because of their immense power, they probably do not expect to endure personal attacks about issues such as financial impropriety, alcoholism, or racial discrimination. One of the primary rationales behind allowing public officials to be open to reputational attack is that they have access to the channels of communication to counter the speech.[163] Judges do not enjoy this same access because they must comply with their own ethical restrictions. Therefore, the inability of judges to effectively counter attorney speech provides some basis for the argument that attorney speech against the judiciary should be restricted.

This rationale also casts doubt on whether defamation law is the proper source to analyze this type of speech. As a government actor, the court or bar cannot sue the attorney for defamation, which leaves these institutions with almost no recourse against the harmful effects of the speech. An individual judge may sue for defamation,[164] but that provides little redress to the integrity of the

159. Chemerinsky, *supra* note 20, at 868–71.

160. *Id.* Countless cases have been brought to raise attention to issues affecting particular segments of American society; they range from racial inequality to reproductive rights.

161. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4 (2009); CAL. CODE OF JUDICIAL ETHICS Canon 2–5 (2008).

162. *See, e.g.*, CAL. CODE OF JUDICIAL ETHICS Canon 3 (2008).

163. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

164. *See* Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993) (district court judge brought and succeeded in part in a defamation claim against a newspaper editor, the author of published letters to the editor, and a city councilman), *aff'd sub nom.*, Keohane v. Stewart, 882 P.2d 1293 (Colo. 1994).

judiciary. It also has the undesirable consequence of having judges act as plaintiffs in order to enforce what should be a professional regulatory matter concerning attorney misconduct.

Third, the bar's restrictions on attorney speech ultimately protect the legal consumer by punishing lawyers who cross the line with the judiciary. Whether or not attorney speech criticizing judges is desirable, it is generally seen as bad lawyering. Punishing such lawyers should deter lawyering that may damage the advocacy of a client and inform the public of the lawyer's professional competence.

The arguments above illustrate several of the policy rationales for allowing or not allowing attorneys to criticize the judiciary with impunity. The ultimate question is the relative value of attorney speech in representing clients and informing the public versus maintaining judicial integrity and effective judicial administration. Courts have either decided to adopt an objective or subjective/actual malice standard depending on how they weigh the importance of these competing values.[165] While an objective or subjective standard would be appropriate in an ordinary defamation context, the fact that restrictions on attorney speech implicate professional regulatory issues changes the analysis. In the next part, I will discuss why defamation standards are not the most effective way of evaluating attorney speech and why another standard should be adopted.

V. THE FRAMEWORK FOR AN ALTERNATIVE STANDARD OF REVIEW

A. Attorney Speech Is Grounded in Professional Conduct

Attorney speech should be treated differently from traditional methods of First Amendment protection because it is uniquely grounded in professional conduct. As Professor Tarkington writes, "attorney speech is special."[166] She explains that attorney speech is unique because it is "tie[d] to the government and the force of law," and its words are used to achieve a desired legal result.[167] Similarly, Professor W. Bradley Wendel recognizes that attorney speech is different because it can change the rights and obligations of others.[168] Professor Wendel observes a distinction between speech by attorneys and ordinary citizens in that the former is an outgrowth of professional conduct.[169] The way attorneys write and speak is how they professionally act. Thus, when lawyers write or speak in relation to something legal they are not merely speaking, but acting in their professional capacities.

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165. *See supra* Part II.

166. Margaret Tarkington, A First Amendment Theory for Protecting Attorney Speech 10 (Aug. 31 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1669617.

167. *Id.* at 13.

168. Wendel, *supra* note 125, at 362.

169. *Id.*

Professor Tarkington believes that, even though attorney speech is unique and different from regular conceptions of speech, it should still receive special protection.[170] While I agree with Tarkington that attorney speech should be given special consideration due to its unique power, the professional nature of attorney speech should also allow the bar more room to impose restrictions for regulatory purposes. If the argument for enlarging the protection of attorney speech is that it has a particularly important place in society, then the bar should be able to make sure that power is not abused. Once there is recognition that attorney speech is different because of the professional context, it is worthwhile to ask whether traditional methods of analysis are the most useful.

B. Defamation Law Is Not the Most Appropriate Standard to Evaluate Attorney Speech Critical of the Judiciary

Courts currently use defamation standards to evaluate whether attorney speech is punishable. Courts have either adopted the *New York Times v. Sullivan* actual malice standard, which grants the widest protection to attorney speech, or they have adopted the objective standard, which generally gives bar disciplinary committees broad discretion to sanction attorneys.[171] However, if we accept the premise that attorney speech is different because of its professional underpinnings, then the purposes behind defamation standards fail to address the professional goals of state or federal bars. Historically, the law of defamation developed as a way to discourage individuals or family members from turning to violent vigilantism in order to vindicate their reputations.[172] Defamation as a cause of action also recognized that reputational harm could have "material consequences, such as pecuniary loss, impairment of social relationships, physical injury, and mental distress."[173] Besides aspects of honor and dignity that are lost with a damaged reputation, other scholars view reputation as a property right.[174]

In its famous 1964 case *New York Times v. Sullivan*, the Supreme Court defined the constitutional standard to protect speech from civil liability.[175] Breaking with common law tradition, the Supreme Court ruled that, if a plaintiff is a public official, he or she must prove actual malice—that the defendant knew the statement was false or acted with reckless disregard for the truth.[176] The Court

170. Tarkington, *supra* note 166, at 10.

171. *See supra* Part II.

172. David A. Anderson, *Developments in the Law of Defamation*, 69 HARV. L. REV. 875, 877 (1956) [hereinafter Anderson, *Developments*]; *cf.* David A. Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747 (1984) (arguing that historical victims of defamation faced serious social and economic repercussions).

173. Anderson, *Developments*, *supra* note 172, at 877.

174. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693–99 (1986).

175. New York Times v. Sullivan, 376 U.S. 254 (1964).

176. *Id.*

acknowledged that this standard would sometimes prevent public officials from recovering for false speech but reasoned that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"[177] In *Garrison v. State of Louisiana*, the court applied the *Sullivan* framework to criminal libel statutes.[178]

Nowhere, however, do the rationales behind the Supreme Court standard of defamation as a cause of action address issues related to organizational administration or aspects of conduct, particularly in the professional context. The law of defamation is designed to redress a private wrong against an individual for harming a reputation. The rules that restrict attorney speech are not meant to protect the reputation of judges, but rather to preserve efficient judicial functioning.[179] While preserving the reputation of the judiciary is related to this goal, the restriction has much more to do with regulating how bar members act as professionals. Thus, according to Wendel, the *Sullivan* standard does not directly deal with the professional goals of the bar, and complicates the adjudication of cases concerning attorney speech.[180]

In contrast to Wendel, Professor Tarkington has defended the use of *Sullivan* and its progeny in attorney speech cases, arguing that reputational harm is the main concern behind these restrictions.[181] She makes three principal arguments. One is a semantic argument in which she simply argues that the word "integrity" in Model Rule of Professional Conduct 8.2 implies the type of reputational harm that defamation law is meant to redress.[182] Second, she argues that defamation is not only a private wrong, but also concerns people being able to speak out against the government and its actors.[183] Finally, using *Gertz v. Robert Welch, Inc.* as her main source, Professor Tarkington rebuts arguments that attorney speech should be restricted because ethical restraints prevent judges from utilizing the media to express their views.[184]

What Tarkington misses in her arguments is that attorneys are in a different position than nonattorneys due to their ability to practice law. Much of what the attorney does is criticize the judiciary. After all, an appeal means the attorney is criticizing a lower court action. Thus, attorney speech is much more powerful than nonattorney speech because attorneys' words are an extension of their professional capacity.[185] With these words motions are argued, objections are

177. *Id.* at 271–72.
178. Garrison v. State of Louisiana, 379 U.S. 64 (1964).
179. Wendel, *supra* note 125, at 431.
180. *Id.*
181. Tarkington, *supra* note 158, at 1629.
182. *Id.* at 1630–31.
183. *Id.* at 1631–32.
184. *Id.* at 1634–36.
185. In distinguishing her views from court opinions that have suggested that defamation law is wrongly applied, Tarkington cites numerous cases that support the inconsistent goals of defamation

made, and advice is given. These words are not merely speech in its literal sense, but professional activity as well. Therefore, when the bar establishes rules that may restrict certain forms of speech, it does so based on professional goals related to regulating certain types of professional activity. Nonattorneys may criticize the courts with impunity, but lawyers do not enjoy the same right because of their professional affiliation.[186] After all, professional groups commonly restrict what their members may say. Most people would agree that medical associations should have rules in place to deter physicians from divulging confidential information.[187] The same is true for clergy.[188] Lawyers should be no different.

The difference between the Tarkington and Wendel approaches seems to center on whether attorney speech critical of judges should be viewed primarily as core political speech or as speech with professional underpinnings. The *New York Times v. Sullivan* standard is useful when viewing attorney speech as political speech stemming from personal opinions. However, the professional context changes the applicability of *Sullivan*. The point is that some amount of attorney speech is always related to professional conduct in either a concrete or an attenuated way. While *Sullivan* was a profound case because it allowed speakers to make claims without absolute precision in order to protect speech, the Court did not consider how it might apply to professional regulations. The Hatch Act, attorney-solicitation, and employer-employee cases discussed above suggest that First Amendment analysis changes in light of different professional contexts. In those cases, the Supreme Court chose to use different levels of protection because of the special professional context of the speech.[189] Likewise, the fact that the speech involved is critical of government actors does not automatically bring that speech within the usual First Amendment standards. In matters concerning bar restrictions on speech, the *Sullivan* standard, although helpful, ultimately does not address the professional and organizational goals of the bar.

The ultimate difference between defamation law and bar rules is that they serve competing social purposes. While defamation law usually concerns an individual plaintiff and provides redress for a defamatory statement, bar rules are

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law and professional rules of conduct. *Id.* at 1631 n.371.

186. Many authors have debated whether restrictions on attorney speech violate a principle of constitutional law known as the unconstitutional condition doctrine. *See e.g.*, Chemerinsky, *supra* note 20, at 873. The doctrine states that the government cannot condition a benefit on someone giving up a right. The Supreme Court has focused on cases where financial subsidies or tax breaks are the benefit. *See* Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001); F.C.C. v. League of Women Voters of Cal., 468 U.S. 364 (1984); Speiser v. Randall, 357 U.S. 513 (1958). Regulations on attorneys that limit what they can or cannot do in the context of professional conduct are distinguishable from the unconstitutional condition cases because attorneys get no direct financial benefit and do not completely give up their rights to criticize the judiciary.

187. Jessica A. Hinkie, *Free Speech and Rule 3.6: How the Object of Attorney Speech Affects the Right to Make Public Criticism*, 20 GEO. J. LEGAL ETHICS 695, 695 n.2 (2007).

188. *Id.* at 695 n.3.

189. *See supra* Part III.A–C.

meant to protect a larger set of social interests. For instance, the State Bar of California states that one of its goals is "[t]o assure that the State Bar is recognized and respected as a contributing and accountable leader in improving the administration of justice and ensuring the rule of law in our civil society."[190] If bar rules are meant to achieve the goal of preserving justice and maintaining civil order in society, then defamation law does not squarely address these broader functional goals. The Indiana Supreme Court noted that, although sanctioning critical attorney speech "may directly affect an individual, [it] is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations."[191] If this is so, it is doubtful whether the *Sullivan* standard truly addresses the professional context.

This does not mean that defamation law is entirely inapplicable to these lines of cases. A judge is free to sue an attorney for libelous and slanderous statements,[192] but the government cannot.[193] Thus, a bar disciplinary committee, as a representative of the federal or state judiciary, cannot sue an individual for reputational harm. But as discussed above, bar punishments are not entirely meant to insulate judges from criticism. Instead, they have a professional regulatory purpose. Because I conclude that defamation, as a legal cause of action, is not the core matter in cases where attorneys are punished for criticizing judges, I suggest that courts adopt a test that balances the professional and public interests of the speech.

VI. THE BALANCING TEST EXPLAINED: THREE FACTORS THAT BALANCE PROFESSIONAL AND PUBLIC INTERESTS

I argue that *Sullivan* and its progeny do not directly address the public and professional interests of attorney speech critical of judges or the judiciary as a whole. In their attempts to set definitive standards for the speech, courts have either selected the subjective *Sullivan* standard or the objective standard for evaluating attorney speech critical of judges. However, these standards have failed to confront the underlying policy question of whether it is desirable to restrict attorney speech critical of judges; instead they have created disunity among the courts.[194] I propose a standard that would balance the professional and public interests in order to determine whether attorney speech critical of judges should

190. *State Bar Overview*, THE STATE BAR OF CALIFORNIA, http://calbar.ca.gov/aboutus/statebaroverview.aspx (last visited Jul. 10, 2011).

191. *In re* Terry, 394 N.E.2d 94, 95 (Ind. 1979).

192. Pennekamp v. Florida, 328 U.S. 331, 348–49 (1946) ("[A] judge has such remedy in damages for libel as do other public servants."); *see also Illinois Chief Justice Settles Defamation Suit Against Newspaper for $3M*, LAW.COM (Oct. 15, 2007), http://www.law.com/jsp/article.jsp?id=900005557872.

193. RODNEY A. SMOLLA & MELVILLE B. NIMMER, 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 23:3.50 (3d ed. 2011).

194. *See supra* Part II.

be sanctioned.

This type of balancing among professional, public, and individual interests was used in *Ramsey v. Board of Professional Responsibility of Supreme Court of Tennessee*.[195] The Court wrote:

> In dealing with First Amendment questions, we must balance the right of the speaker to communicate and the right of the listener to receive his expressions with the need of the courts to enforce attorney discipline to the end that a lawyer will not engage in conduct that is prejudicial to the administration of justice . . . . There is thus a delicate balance between a lawyer's right to speak, the right of the public and the press to have access to information, and the need of the bench and Bar to insure that the administration of justice is not prejudiced by a lawyer's remarks. In balancing these rights, we must ensure that lawyer discipline . . . does not create a chilling effect on First Amendment rights.[196]

This approach employed a three-part balancing test that weighs (1) the public value of the speech, such as informing the public, pointing out abuses of the law, or providing defense to a client or cause; (2) the degree of reputational and administrative damage to a court, either affecting the efficacy of its rulings or its ability to carry out its judicial functions; and (3) the extent to which the speech was connected to the attorney's professional duty as opposed to his private interests.[197]

As with any balancing test, this test has some drawbacks. Because balancing tests require an uncertain weighing of factors, they are less predictable than categorical rules. The most problematic issue with the balancing test is that it does not provide concrete guidelines to attorneys, creating the possibility that it will have a chilling effect on the attorney's willingness to speak. It would be difficult for an attorney to do his or her own balancing to ascertain whether the critical speech will be sanctioned or not. In contrast, the *Sullivan* standard provides the most clarity to lawyers because it protects speech as long as there is no subjective malice, putting the burden of proof on the plaintiff alleging defamation.[198] However, the subjective standard would put too much burden on the bar to effectively regulate professional conduct. The objective standard is probably the least desirable. It might chill attorneys from speaking because it would be difficult to determine what the court might decide that the "reasonable" attorney would say. The balancing test is a better framework because it incorporates the professional and public interests involved.

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195. 771 S.W.2d 116 (Tenn. 1989).
196. *Id.* at 121.
197. *Id.*
198. Tarkington, *supra* note 20, at 433–34.

A. The Balancing Test Applied

A good example of where this balancing test would be useful today is a situation where an attorney criticizes a court or a judge on a personal social media website. Using the case *Florida Bar v. Conway*, described above in Part I as an example, an application of the balancing test can show how the case could have been more equitably resolved.

1. Factor One: The Public Value of the Speech

The first factor of the balancing test evaluates the public value of the speech. The subject matter and context of Conway's criticism had high social value because it informed the public of judicial actions that affected how constitutional protections were handled in the Florida court. Conway's speech directly commented on two important public issues: a defendant's right to a speedy trial and the competency of a judge. The first issue concerned whether the judge's action violated the defendant's right to a speedy trial. As Conway highlighted in his response letter to the Florida Bar, Rule 3.160 of the Florida Rules of Criminal Procedure gives defendants who plead not guilty a "reasonable time to prepare for trial."[199] Judge Aleman interpreted this rule by giving defendants just one week to prepare for trial. Judge Aleman's policy put large burdens on defense counsel, including Conway, to prepare for trial and also pressured defendants to waive their Sixth Amendment right. Conway's criticism of Judge Aleman was closely related to her policy, which affected defendants' constitutional rights.

Furthermore, the fact that Judge Aleman was an elected member of the judiciary held accountable to voters made Conway's speech more valuable to the public interest. In jurisdictions where voters have the power to elect judges, they should be entitled to information that may affect how they vote. Unlike legislative or executive candidates, judicial candidates are more constrained about what they can reveal in political discourse. Because lawyers have legal education and experience, they are better able to evaluate whether a judge is competent. This puts attorneys in the best position to provide information to the voting public. Thus, if voters are able to distinguish bad judges from good and elect the latter, this would increase the quality of the judiciary as a whole.

Another point relevant to this factor is whether there is a distinction between speech directed at elected judges versus appointed judges. The balancing test is somewhat flawed when determining whether speech about an elected judge is more valuable than speech about a federally appointed judge. Although people can attempt to remove a federal judge by lobbying Congress to exercise that power, the balancing test would seem to suggest that speech directed at elected judges is more valuable. This is mainly because elected judges more closely resemble

199. FLA. R. CRIM. P. 3.160.

political figures, in addition to being accountable to the voting public. There is no doubt that this would create inequities because federal court judges, who are arguably just as prone to error as their state court counterparts, would receive more protection from the balancing test. Courts would use the test to evaluate the importance of the speech based on the context of the situation. One of those contexts happens to be elections. The elected versus appointed distinction does not seriously change the analysis of the balancing, but speech about elected judges seems to be more connected to the policy interest of having an informed public because the elected judge is directly accountable to voters.

In this situation, Conway had argued before Judge Aleman, giving him firsthand knowledge about Judge Aleman's application of the law and judicial discretion.[200] By contrast, nonattorneys lack the legal education and training to fully understand the nature and effect of the judicial action, which makes it imperative for attorneys like Conway to express their thoughts to the public. By writing on a blog about Judge Aleman's "one-week policy," Conway relayed information that would be relevant to voters when deciding whether to reelect her. The weakness of this rationale is that it may insulate federal judges more than state judges, the majority of whom are elected. One function of the balancing test is to promote speech that has redeeming value. The balancing test is meant to encourage meritorious speech and only protects vulgarities if the general value of the speech is high. Ideally all attorney speech critical of the judiciary should be meritorious, but federal judges perhaps should be able to withstand more nonmeritorious critical speech because they are not directly accountable to the public.

Conway's speech was also valuable because it warned attorneys in the community about Judge Aleman's actions. Conway did not know how long Judge Aleman would be instituting this practice, and could reasonably have thought that other attorneys would have to confront it in the future. By reading the blog entry, lawyers could better prepare for an encounter with Judge Aleman and perhaps be able to try a case with tighter time constraints without having to waive a defendant's right to a speedy trial. In fact, Conway even provided tactical advice to attorneys, informing them of ways to object to Judge Aleman's tactics using Florida criminal procedure.[201]

An issue that did not occur in Conway's situation but often occurs in matters concerning judicial criticism is how to account for speech that is objectively false. Conway's speech was clearly stated as an opinion, but what if he had made

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200. Respondent Sean William Conway's Response to this Court's Rule to Show Cause Order at 2, Florida Bar v. Conway, No. SC08-326 (Fla. Oct. 29, 2008), *available at* http://jaablog.jaablaw.com/files/34726-32374/conway_response.pdf.

201. Letter from Sean Conway to Alan Anthony Pascal, Bar Counsel to the Florida Bar, attachment 2 (Apr. 17, 2007), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2007-04-03-letter%20notifying%20conway%20of%20bar%20investigation.pdf.

accusations against Judge Aleman that could be proved false? False speech has less public value because it impairs the public's decision-making process during elections and needlessly damages the image of the judiciary. The Supreme Court in *Sullivan* recognized that erroneous statements are inevitable in public debate and should therefore be protected to a certain degree,[202] but in *Milkovich v. Lorain Journal Co.* the Court also ruled that opinions are not protected if they infer facts capable of being proven false.[203] Whether a statement is opinion or fact can sometimes be a gray area, but this determination is largely irrelevant to this balancing analysis. The balancing test is mainly concerned with whether the speech adds to the public interest. Factually false statements and even true statements with some incorrect facts are obviously less valuable than completely true statements. Unlike defamation law, which would grant the speaker First Amendment protections based on the *Milkovich* standard, the balancing test is concerned with the value to the public, including the factual correctness of the statement. Thus, the opinion determination is not dispositive but would be evaluated as part of the public interest analysis.

In this matter, Conway's criticism clearly has high value to the public in terms of informing it of the shortcomings of Judge Aleman's actions.

2. Factor Two: The Degree of Damage to the Court

The second factor of the balancing test evaluates how much institutional damage the court suffers from the speech. Under the balancing test, the bar or disciplinary committee arguing for attorney sanctions would have the onerous task of proving damage to the courts. Empirical evidence through statistics would be the easiest to meet this factor, but the bar can also use indirect showings, such as highlighting reputational damage, the character of the verbal attack, increased acts of disobedience against the court from attorneys inside or outside the courtroom, or general notions of how the bar's administrative efficacy has been diminished. The goals of the bar should be recognized as an important interest, but the bar must be required to demonstrate that the institutional integrity and administration of the judiciary has been compromised to some extent. Therefore, this factor's weight depends on the amount of direct or circumstantial evidence of damage the bar offers to the court.

The Florida court did present some evidence of damage to its institutional efficacy as a result of Conway's statements. Judges are vested with large amounts of discretion, in part to ensure the successful functioning of the court. Conway's blog entry criticizing Judge Aleman's judicial practice of providing a short period of time for attorneys to prepare for trial was an assault on her policies of judicial economy. If attorneys who read the entry started objecting to the judge's rulings

202. New York Times v. Sullivan, 376 U.S. 254, 272–73 (1964).
203. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

using the procedural tactics recommended by Conway, it might have created undue pressure on Aleman to unnecessarily change her policy. Furthermore, Conway's blog entry called Judge Aleman's professional character into question, thereby affecting how the public views the judiciary. The blog post may have caused lawyers to increase unnecessary objections or motions causing unnecessary delays in the judicial process. Conway's criticism of Judge Aleman's discretion may have led to public doubt about court rulings in general. The fact that Conway called Judge Aleman an "Evil, Unfair Witch" also indicates that he intended the speech to be somewhat malicious.

The weight of this factor is in middling favor to the bar because it appears that the court suffered little organizational damage or damage to its integrity. The speech had very little if any actual effect on the judiciary. Only Judge Aleman was singled out in the criticism and not the entire court. Moreover, the criticism was not an allegation of corruption, but a criticism about the way the court was applying a court rule.[204] Thus, the speech was pertinent to judicial administration itself. Furthermore, the context of the speech limited its possible damaging effect. Since the comment was made around Halloween, it is likely that most people who read the blog understood the hyperbolic nature of calling Judge Aleman a witch.

Judge Aleman abandoned her policy of providing minimal time for defense attorneys to prepare for trial only a few weeks after Conway's statements.[205] Altering how a judge manages his or her courtroom is the type of administrative disturbance that bars generally seek to avoid. However, judges have wide discretionary powers and attorneys should not be punished just because their speech persuades a judge to change course. The Florida Bar, in its brief to the Florida Supreme Court, did not argue that Conway's speech weakened the functionality or efficacy of the court.[206] In sum, the relative lack of tangible evidence suggesting that Conway's criticism compromised the court's integrity and administrative capabilities shows this factor of the balancing test weighs only slightly in favor of the bar.

3. Factor Three: The Connection Between the Speech and the Attorney's Professional Duties

The third factor of the balancing test takes into account where the speech was produced. The main question under this factor is whether Conway's speech was private or professional speech. In this case, the speech was not in the courtroom but on the Internet. However, it was made before Conway's client went to trial. This factor in particular weighs in favor of Conway because Judge Aleman was an elected official, making her inherently more prone to criticism.

204. Letter from Alan Anthony Pascal to Sean Conway, *supra* note 7.

205. Letter from Sean Conway to Alan Anthony Pascal, *supra* note 201.

206. Response to Rule to Show Cause at 5–14, Florida Bar v. Conway, No. SC08–326 (Fla. Oct. 29, 2008), *available at* http://jaablog.jaablaw.com/files/34726-32374/Response_Bar[1].pdf.

While the "Evil, Unfair Witch" label may have been caustic, it was made on Halloween, so readers probably understood it as a form of rhetorical hyperbole.

Furthermore, the fact that Conway's criticism was written on a blog reduces the professional impact of the speech.[207] Although millions of blogs now exist and are of growing importance, they are still viewed as limited sources of information. Professor Glenn Harlan Reynolds of the University of Tennessee School of Law, who has one of the most widely read blogs in America, believes that most people do not rely on blogs as a sole source of information, but merely as a jumping-off point.[208] Attorney speech should not be excused because it is on a blog, but it should be less prone to punishment because blog entries are out-of-court statements made on an informal mode of communication. Professor Reynolds contends that "courts should recognize that the blogosphere is a place with its own culture, norms, and readership."[209] Attorney speech critical of the judiciary that is displayed on social media sites warrants more leeway because readers will perceive it to be closer to private speech than professional speech.[210]

Courts should be more cognizant of the type of media that attorneys choose when speaking. Critical speech that is in a court motion should be more scrutinized than something written on a website that has only an attenuated connection to professional conduct. Therefore, the fact that Conway posted his remark on a blog should limit the extent to which the rules of professional conduct can govern his speech.

It should also be noted that the size of the audience does not factor highly into the analysis. The main purpose of this prong is to determine the extent to which the bar may restrict attorney speech when it does not occur inside the courtroom. Whether the audience is large or not may give more effect to the speech, but it should not determine whether the bar should sanction attorney speech.

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207. *See, e.g.*, Lindsay A. Hitz, *Protecting Blogging: The Need for an Actual Disruption Standard in* Pickering, 67 WASH. & LEE L. REV. 1151 (2010) (arguing that public employees who post entries on blogs about work-related activity should only be punished if the speech caused actual disruption in the workplace); *see also* Marcia Clemmitt, *Internet Accuracy: The Issues*, CQ RESEARCHER 627 (Aug. 1, 2008), http://www.cqpress.com/docs/cq_researcher_v18-27_internet_accuracy.pdf.

208. Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157, 1166 (2006).

209. *Id.* at 1167.

210. The American Bar Association (ABA) has recognized that Internet-based social media has implications on disciplinary enforcement rules and client confidentiality. A part of the ABA's Commission on Ethics 20/20 will be devoted to this issue. For an outline, see ABA Comm. on Ethics 20/20, *Preliminary Issues Outline* (Nov. 19, 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/ethics2020/outline.authcheckdam.pdf.

B. The Balancing of the Factors

Because the public interest of the speech is high, relative to its potential negative effect on the judiciary, Conway should not have been sanctioned for his remarks under the balancing test. This situation is extraordinary in that his speech carried significantly more social value than most instances of attorney criticism. It brought to light a judge's policy that could greatly affect the due process rights of criminal defendants. It also made the public more aware about how this elected judge treated criminal defendants in court. The Florida Judicial Qualifications Commission and the Florida Supreme Court eventually took notice of Judge Aleman and reprimanded her for, among other things, forcing a public defender in a death penalty case to craft a motion in a few minutes or face contempt charges.[211] In the Conway case, the bar was not able to proffer evidence that its integrity was harmed, or that its organizational goals were compromised. Furthermore, since Conway's speech was posted on a blog, although a legal one frequented by local attorneys, the speech was more private than professional. Thus, the balancing would favor Conway.

The most decisive factor in the test seems to be the first. The bar's interests, which are covered by factor two, will focus mainly on organizational integrity and administration in every case. The key question then becomes the importance of the speech to the public. The balancing of the factors also changes depending on whether the judge is an elected state judge or a life-appointed federal judge. Attorney speech is more useful to the public's democratic interest when the judge is directly elected by the public. What distinguishes this test from the defamation standards is that it allows for more flexibility in evaluating the particular speech involved. While the subjective actual malice test may not fully recognize the bar's or court's regulatory interests, the objective standard gives a blank check to disciplinary committees and appellate courts to impose sanctions. The balancing test establishes a middle ground between these two extremes and also gives more protection to attorneys. The balancing test is a more desirable standard that considers the interests of the bar or the court, the attorneys, and the public.

VII. CONCLUSION

Courts and bars, legally and traditionally, can regulate the speech of attorneys by limiting lawyers' right to criticize the judiciary. Accepting this assertion, the next question is how attorney speech critical of the judiciary should be judged. Traditionally, courts have looked to defamation law to evaluate the speech. However, defamation standards do not address the rationales for allowing courts and state bars to regulate speech. Instead, courts should adopt a balancing test that

211. *See Aleman Reprimanded for "Unsettling" Use of Power*, FLORIDA BAR NEWS (Jan. 1, 2008), http://www.floridaBar.org/divcom/jn/jnnews01.nsf/8c9f13012b96736985256aa900624829/1a0f096cd022cbea852574e9004a9527.

addresses the interests of the public, the judiciary, and the attorney. Balancing these factors will allow courts greater flexibility and provide a steady framework for courts to evaluate attorney speech critical of judges or the judiciary.