Program Submission Form

AMERICAN INNS of COURT®

Program Title "Kennedy Feud" (This title is a play on the game show "Family Feud"; any Inn name can be substituted for "Kennedy" ("Family")

Date Presented September 20, 2016 Inn Year 2016-2017

Presenting Inn Anthony M. Kennedy Inn of Court Inn Number 30048

Inn City Sacramento Inn State CA

Contact Person Justice Elena J. Duarte Phone 916-653-0687

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Please consider this program for the Program Awards: ☑ Yes ☐ No This program is being submitted for Achieving Excellence: ☑ Yes ☐ No
(Submit within 60 days of presentation.)

Program Summary:

Be concise and detailed in summarizing the content, structure, and legal focus of your program. Please attach additional sheets if necessary.

Please see attached continuation sheet for details. Basically, this program was a VERY fun program to present and participate in; it involved 5 members of the presenting team as the returning champion "Inn family" in a parody of the game show "Family Feud." The point of the questions and answers (at which teams of audience members guessed) was to present the issues for the two moderation periods, one following each "round" of play. The theme was recent attacks (by legal professionals) on judicial decision-making and the tension between advancing the client's cause with supporting the justice system and the trust of the public therein.

Program Materials:

The following materials checklist is intended to insure that all the materials that are required to restage the program are included in the materials submitted to the Foundation office. ***Please check all that apply and include a copy of any of the existing materials with your program submission:***

☑ Script ☑ Articles ☑ Citations of Law ☑ Legal Documents ☑ Fact Pattern ☑ List of Questions ☑ Handouts

☑ PowerPoint Presentation ☐ CD ☑ DVD ☐ Other Media *(Please specify)* _____

Specific Information Regarding the Program:

Number of participants required for the program 7-10 people Has this program been approved for CLE? ☑ Yes ☐ No

Which state's CLE? CA How many hours? 1.5 ☐ Pending ☑ Approved

Recommended Physical Setup and Special Equipment:

i.e., DVD and TV, black board with chalk, easel for diagrams, etc.

Ideal to have computer/projector/screen for "Family Feud" powerpoint effects (included in packet) but poster board would work too!

Comments:

Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on Inn members' response regarding the demonstration.

This game show theme was the opening program at AMK Inn, and provided a good way for the later teams (2-8) to sit together, play together, and get to know each other on the first program night. The procedure is illustrated by the DVD of the program, as well as the script and in the attached continuation page. It went over very well with the audience!

Program Submission Form

Roles:

List the exact roles used in the demonstration and indicate their membership category; *i.e.*, Pupil, Associate, Barrister or Master of the Bench.

Role	Membership Category
Kennedy Feud Producer	Master
Kennedy Feud Staffers (2)	Law students
Kennedy Feud Host (Named "Dawson Harvey")	Master
Team 1 "Kennedy Family" (5)	One Barrister and 4 Associates
Moderator (2 moderation periods)	Judicial Master
Technical support (powerpoint operator)	Barrister

Agenda of Program:

List the segments and scenes of the demonstration and the approximate time each item took; *i.e.*, "Introduction by judge (10 minutes)."

Item	Time
Act 1 - Introduction by Producer	5 min.
Act 1 - Team 1 vs Challenger play the Feud	15 min.
Moderation	20 minutes
Act 2 - Two additional Teams selected and play the Feud	15 minutes
Moderation	25 minutes
Wrap up question to audience and prizes	10 minutes

Program Awards: *Please complete this section **only** if the program is being submitted for consideration in the Program Awards.*

Describe how your program fits the Program Awards Criteria:

Relevance: How did the program promote or incorporate elements of our mission? *(To Foster Excellence in Professionalism, Ethics, Civility, and Legal Skills)*

Please see attached continuation sheet.

Entertaining: How was the program captivating or fun?

Please see attached continuation sheet.

Creative and Innovative: How did the program present legal issues in a unique way?

Please see attached continuation sheet.

Educational: How was the program interesting and challenging to all members?

Please see attached continuation sheet.

Easily Replicated: Can the program be replicated easily by another Inn? ☑ Yes ☐ No This program is: ☑ Original ☐ Replicated

Questions:

Please contact program library staff at **(703) 684-3590** or by e-mail at **programlibrary@innsofcourt.org**.

Please include ALL program materials. The committee will not evaluate incomplete program submissions.

Continuation to Program Submission Form:

Program Summary: (content, structure, and legal focus of program)

As noted, this program was a VERY fun program to present and participate in; it involved 5 members of the presenting team as the returning champion "Inn family" in a parody of the game show "Family Feud." There is an accompanying PowerPoint with music that really added to the theme (included on flash drive but please see DVD for illustration of how it plays out with the script, both also included with packet, script on flash drive). That said, the program can be presented manually as well, using questions and selected answers on poster boards that could be turned over when the correct answer was guessed (similar to Wheel of Fortune). For smaller groups or more informal settings, this might be the way to go. Either way, preparation was fairly easy once we had the questions and answers formulated, and much of the interaction (all of it outside Team 1) was unscripted, so preparation was not too time-consuming. The moderation preparation took the most time.

We started out with an introduction to the rules by the Producer -- an explanation that Feud Team 1 (5 members of AMK Team 1, the presenting team for September) was the “returning champion” team and the Host would be selecting a challenger team using a question aimed at each of the remaining teams in the audience (teams 2 through 8, October through May presenting teams). To select a team, the Host asked the first of 4 Feud questions and took answers from each team in the audience. The highest scoring answer “won” and 5 members of the winning team came up to the front and competed with Team 1 to answer another question. The point of the questions and answers was to present and frame the issues for the two moderation periods, one following each "round" of play (or each Act).

The overarching theme dealt with recent attacks by other legal professionals -- lawyers and law professors -- on judicial decision-making and other aspects of the judicial system, and the tension between advancing the client's cause (or the lawyer's cause, or both) on one side and supporting the justice system and the public's trust therein on the other. Examples are in the moderation notes and materials, included on the flash drive, but include the prosecutor's and law professor's reactions to the sentence by Judge Persky in the (Stanford) Brock Turner sexual assault case as well as the prosecutor's actions and statements to the press in the (Baltimore) Freddy Grey murder case (where 6 police officers were charged), to name two. (I should note here that we also had examples from civil cases such as the Trump University litigation before Judge Curiel in San Diego.)

The two questions from Act 1 were geared toward the moderation topic "appropriate reactions to unpopular (court) rulings and the interplay of outside influences," as set forth in the Playbill. The first question was "Name someone who tells a lawyer what to do"; the answers were: (8) their colleagues; (7) their mothers; (6) the State Bar; (5) their clients; (4) their supervisors; (3) their spouses/S.O.s; (2) Judges, and (1) their financial advisors. This question/answers set up the discussion on outside influences -- for example, the lawyer who holds a press conference to criticize a judge or complains publically about a plea bargained sentence or a sentence within the guidelines and recommended by probation, knowing the press and public don't know the sentence was arguably quite appropriate, to what external influences might that lawyer be responding? The client, victim, supervisor, public pressure, dinner table conversation? Is this ethical and professional? Do we worry justice is disserved and the public is led astray when we capitalize on public sentiment to advance our own (and/or our client's) interests?

The second question was "Name something you do when a judge's decision disappoints you"; the answers were (6) suck it up/nothing; (5) call news/newspaper; (4)

Tweet/Facebook; (3) blanket 170.6; (2) recall/election challenge; (1) cry. (Re #3, to challenge by 170.6, or "paper," references the Code of Civil Procedure section allowing an attorney to challenge the assigned judge for bias; "blanket paper" is challenging that judge every time he or she is assigned to a case.) This question/answers set up the discussion about appropriate reactions toward adverse or otherwise unpopular rulings, given that all legal professionals presumably have an interest in preserving the public's confidence in the actions of judges, lawyers, and the functionality and credibility of the justice system as a whole.

The two questions from Act 2 were geared toward the moderation topic: "Who do we want our judges to be, and who will defend the judge if there is a public outcry?" The first question was "Name something you want your judge to be?"; the answers were: (8) well-groomed/nice looking; (7) fearless/afraid; (6) fair; (5) decisive; (4) obedient (3) independent; (2) consistent; (1) nice. (Intentionally omitted were responses like "smart" and "well-informed" to stimulate discussion of why no one named those qualities as important. Note also that in general we added the occasional funny answer to all of these questions to keep everyone on their toes and laughing, like "nice-looking" and "obedient." Although some of the funny answers ended up discussion points as well!)

This question/answers set up the next question and second area of moderation -- asking what you want your judge to be and if he or she meets your expectations in that regard, do you owe it to him or her and the entire justice system to defend his or her discretionary decision-making? Along those lines, the final question was to judges: "We asked 100 trial judges: Who should defend your discretionary decision-making?" The answers were: (8) other trial judges; (7) the press/pundits; (6) bailiff/court attendant; (5) the parties; (4) law professors; (3) lawyers; (2) mom/family member; (1) appellate courts. This question was intended to make people think about (and promote discussion of) how each of the areas of influence on our practice and profession contributes to our reactions to rulings. And how our reactions to rulings affect the public's perception of judges'

discretion and decision-making, and affect the way those outside our profession see us and the entire system. Generally, the second moderation asked whether we owe it to our profession to promote its function over our own self-interest where our self-interest may imperil that function or the public's confidence therein. As seen in the program's title, this was the main theme of all 4 questions and moderation.

The program was funny, fun, and well-received, but also got people thinking about public and news-making behaviors in connection with our profession's treatment of one another, and the treatment's effect on the integrity of the very system.

Program Awards Criteria Descriptions

Relevance: How did the program promote or incorporate elements of the Inn's mission to foster excellence in professionalism, ethics, civility, and legal skills?

As described above, the focus of this program was primarily on the Inn's mission regarding excellence in professionalism and ethics. By discussing how we as professionals treat each other, particularly in the public eye, and how that treatment can reflect poorly on the profession as a whole, we encouraged a lot of thought and discussion about what constitutes professional and ethical conduct in these situations. We used the Feud questions (and answers, whether "serious" or fanciful!) to set up provocative discussion between the members regarding the ethics and professionalism of publically criticizing the justice system, particularly when knowing the criticism will foster misunderstanding about the system among non-legal professionals. We used the game show format to entertain and captivate the audience, while we raised ethical questions and addressed current legal issues in a new and creative way (as recommended by the program awards criteria).

Entertaining: How was the program captivating or fun?

Please see above for a full description of the interactive and humorous nature of the program (best witnessed by viewing the (short) game segments of the included DVD). The format was unique--no one I talked to had ever seen a program presented this way, with such complete interaction with the entire membership--and the program went over very well with the membership audience. (Plus it is a ton of fun to perform!) The best compliment about the captivating and fun nature of the program that I received after the program came from an emeritus member who told me that he "always" leaves early because the 90 minute programs make for a long night, but that our program was so much fun he had stayed for the entire thing before he realized it! The team received other comments along the same lines.

Creative and Innovative: How did the program present legal issues in a unique way?

As described above, the use of the game show question and multiple answer format, with team and audience members guessing at other responses and discussing the included as well as omitted responses to the thought-provoking questions presented, was something new to our Inn. We received many comments on how unique and fun the program was. But I don't think it was so unique that it couldn't be easily replicated, with or without a bit of tweaking to customize the questions and answers with current issues/examples and also to adjust as needed for membership/team differences (in size, composition, etc.) for presentation in different Inns.

Educational: How was the program interesting and challenging to all members?

We had something to offer every area of the profession, both in the examples presented by the questions as well as the research/moderation materials and examples. We discussed law professors' activism in the recent news and law students' perceptions of such actions by their teachers, as well as what the students may have seen play out in the press based on actions by judges and practitioners. We discussed lawyers' actions in both civil and criminal cases, in "taking their case" to the public through the press, and whether those tactics were responsible, professional, ethical, and under what circumstances might the tactics' characterization as such change. As I described above, for these and various other reasons the program seemed to hold all members' attention! I could tell it was challenging because the discussion was a little slow to get started, as people were obviously thinking very carefully through the issues and about what they felt comfortable saying about them, but once we got going there was a lot of lively discussion.

KENNEDY FEUD:
IS JUSTICE IN JEOPARDY OF LOSING TO SELF-INTEREST?

Anthony M. Kennedy Inn of Court

Team 1

September 20, 2016

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5. Miscellaneous:

AALS Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities, Washburn University School of Law

A Call to Action: Threats to Judicial Independence Risk Fair & Impartial Justice, Judge and Michael Kronlund

Lost in the Debate: The Threat to Judicial Independence, ABOTA

ABOTA defends federal district court judge against unfair attacks . . . , ABOTA

Brock Turner's Judge: Join us next Wednesday, forwarded email

In the Matter of: Baltimore State's Attorney Marilyn Mosby (before the Attorney Grievance Commission of Maryland, Office of Bar Counsel), scribd.com

The Anthony M. Kennedy Inn of Court certifies that this activity has been approved for MCLE credit by the State Bar of California.

Go to the Kennedy Inn website at http://kennedyinn.org for complete presentation materials.

To Access Inn of Court Members Website

1. Go to www.kennedyinn.org
2. To get to "Members Only section, click on "Members Only"
3. Log in using generic member name (i.e., "Kennedy")
4. Password Ethics
5. Click on Presentation Materials and then click on the presentation's title to access materials.

University of the Pacific,

McGeorge School of Law

Anthony M. Kennedy Inn of Court

Team 1 Presents

Kennedy feud

Moderation by

Hon. Elena Duarte

Audio and Visual Effects by

Robert Wilson

Starring

LeeAnn Whitmore Jill Telfer Crystal Vizina

Stacy Shelly Todd Irby Dillon Hockerson

Weiru Wang Michael Wood Charles Wiseman

Special Thanks To:

Dave Puketza

Melissa Currier

Wilson Bao

PLAYBILL®

KENNEDY FEUD: IS JUSTICE IN JEOPARDY OF LOSING TO SELF-INTEREST?

Cast

Team 1 Members

Moderator ..... Hon. Elena Duarte

Host ..... Jill Telfer

Producer ..... Todd Irby

Players ..... LeeAnn Whitmore
Crystal Vizina
Michael C. Wood
Weiru Wang
Stacey Shelly

Assistant Producer ..... Charles Wiseman

Staffer ..... Dillon Hockerson

Production / Creative

Technical Director..... Robert Wilson

Synopsis

Act 1

Returning champions Team 1 face a new challenger!

First Moderation

Appropriate reactions to an unpopular ruling and the interplay of outside influences.

Act 2

The challenge gets tougher as two new competitors take the stage!

Second Moderation

What do we want our judges to be, and who will defend the judge if there is public outcry?

Act 3

The Final Round and awarding of prizes!

KENNEDY FEUD: Presented by Team 1

ACT I

STAFFERS and **TODD**	organize audience to appropriate seating. Audience members should have tickets	
TODD	As president introduces team 1, **TODD** breaks away from attending to the audience and makes way to stage <u>WHILE</u>	
BOB **STAFFERS IN FRONT**	Start theme song as soon as Louie introduces team 1 and play PPT intro. Dance in front with applause signs.	
	Music ends, **TODD** is in place up front, **STAFFERS** go back into audience **TODD** Thanks to all for coming out to open mike night and to help us with filming Kennedy Feud!	
(**STAFFERS** are going around making sure teams have spokesperson)	**TODD** Before we start, a few reminders about how we roll -- I know you all applied and were accepted to be here tonight, but we still need to go over a few ground rules. First, you should be sitting in teams (we call them families here, because here at Kennedy Inn we are all so close!) and I am going to ask the emeritus members if you haven't already to at least loosely associate yourselves with a team. (Come on, do as I ask, set a good example for the young folks.) Second, remember that unfortunately we can only play 5 team members -- 5 of each group of you. And you also need a team spokesperson! So choose a spokesperson if you haven't already and start thinking about which 5 players from your team or emeriti you will send up front if your team gets	

	one of several chances to win…A BRAND…NEW…CAR!!!	
BOB	Queue ppt to show BRAND NEW CAR. Applause and Staffers applaud too.	
	TODD Our first team up will be facing our returning champions, Team 1! And here they are with your host, DAWSON HARVEY, to get us started!	
BOB	Queue FF music for HOST and **TEAM 1**	
TEAM 1 **JILL**	When music plays, enter stage from the back. Enter with enthusiasm and move towards positions. Enters at the same time from back, shaking hands. Everyone in position by the time the music ends	
	JILL Good evening everyone! Thanks so much for coming out and joining us here for our Kennedy Feud taping tonight! Some of you will remain our studio audience and some will get the chance to challenge our current champions, **TEAM 1**. (Pause while **TEAM 1** cheers)	
TEAM 1 and **BOB**	Enthusiastic cheers and high fives. (**BOB** play applause on PPT)	
	JILL Who gets to challenge depends on who beats team 1 at their game. But let me warn you, they've been on fire and have already won $10,000 . . . although I hear they would trade it all in for a few measly Hammy awards! So to choose our challenger and remind those of you that may have forgotten how the game is played, let's put up our sample question:	
BOB	Display PPT for Q1	
	JILL We asked 100 people drinking at Poor Reds to name someone who tells lawyers what to do. that's right, someone who tells lawyers what to do. Think about it everyone, give your spokesperson your ideas; the	

	highest scoring answer of our 8 up on the board will come up and challenge team 1. But we are short on time, so hurry up and get an answer or 2 together, teams 2-8. We'll go in numerical order, you'll have 5 seconds each to give me an answer when I call on you, so come up with an answer NOW!	
BOB	Queue JEOPARDY timer music, first half only	
STAFFERS	Move into position to get answer from TEAM 2 – TEAM 8	
	JILL OK, Team 1 will go last so Team 2, you're up! We asked 100 people drinking at Poor Reds to name someone who tells lawyers what to do. 5 seconds!!	
BOB	[**insert answers with corresponding rank**]; flip over right answers as they come up and ppt applause. For wrong answers do "X" and "Boos" or other disappointed sound effect. ANSWERS ARE: (8) their colleagues; (7) their mothers; (6) the State Bar; (5) their clients; (4) their supervisors; (3) their spouses/S.O.s; (2) Judges, and **(1) their financial advisors**	
JILL	Repeat question (someone who tells lawyers what to do) for next team (2-8) and continue until all teams answer. Keep reminding each 5 seconds. Keep track of team with best ranking answer. **STAFFERS** should signal, with fingers, the winning TEAM to **JILL** after TEAM 8 answers. *JILL can also note on note cards/clipboard	
STAFFERS	Give teams right answer hints if the first few teams are not guessing any correct answers or if they are too slow. **Do not give away number 1 answer financial advisors**.	
	JILL Excellent, TEAM **X** you got the most popular answer on the board but the #1 answer is still up for grabs. Come on up and take your positions (gesture) as directed by our staffers!! While our **STAFFERS** are helping your 5 representatives come on up to play, let's see if Team 1 has figured out the number one answer.	

JILL	walk over to Team 1 and start -- do not wait for the other team to come up! Todd and the staffers will take care of that while you keep going	
STAFFERS and **PRODUCER**	Get 5 reps from winning team up and behind their table QUIETLY while **JILL** is questioning team 1. Explain to them they should decide the order they are chosen and there will be a new question coming up next so they should start thinking about answers as soon as they hear it. One or both staffers stay with them throughout.	
	JILL Team 1, if you can get the highest answer, you will start the game and your challenger, **Team X**, will take over if you strike out. For the right to go first, Team 1, name someone who tells lawyers what to do!	
TEAM 1	Huddle, confer, talk loudly [**insert possible adlib**]	
	WEIRU Host, we're going to say . . . their financial advisors!!	
	TEAM 1 Good answer! Good Answer! Nice! Etc.	
	JILL Wow you don't think much of lawyers, do you team 1? OK, for the first crack at our next question, show me THE MONEY!!	
BOB	Queue PPT for #1 answer, canned applause from ppt.	
TEAM 1	Ecstatic they got the answer right. Jump up and down. High five. Hug.	
	JILL Well I guess the 100 people we asked also think lawyers have money on their minds, [any other answers left? If so, call out #s from last to first and reveal]	
BOB	[**Reveal unanswered questions if there are any**]. **TEAM 1**, **STAFFERS** and **TODD** (with challenging team if you can get them to do it) should be saying the answers as they are revealed in **unison**.	

BOB	**JILL [to TEAM 1]** Hi there Player 1. Ready to play??!! Give me your name and a fun fact about you! (**WEIRU** "Hi I'm Weiru and I had the same criminal law professor as Ted Bundy!) **JILL** And you lived to tell about it! Here we go Weiru, name something you do when a judge's decision disappoints you! (**BOB** puts up q on ppt, fades to 6 possible answers which are: (6) suck it up/nothing; (5) call news/newspaper; (4) Tweet/Facebook; (3) blanket 170.6; (2) recall/election challenge; (1) cry)	
TEAM 1	Huddle, confer, yell answer that may or may not be correct, could be funny.	
	WEIRU Blanket paper the SOB!!	
	TEAM 1 Good answer! Good Answer!	
	JILL Wow, that's a bit of a sore loser answer, but who knows, maybe there are a lot of sore losers out there! Let's see how many, show me, paper that disappointing judge!	
BOB	Answer ranked 3 flips. **TEAM 1 celebrates** **BOB plays applause on ppt**	

	JILL Great start, remember you only get 2 strikes here at Kennedy Feud so the pressure is always on, just the way we like it. To **LeeAnn**: Hi there Player 2. Ready to play??!! Give me your name and a fun fact about you! (**LEEANN** "Hi I'm LeeAnn and in my spare time I polish my Hammy awards!") **JILL** Don't we all! OK, name something you do when a judge disappoints you!	
TEAM 1	Huddle, confer, yell answer that may or may not be correct, could be funny.	
	LEEANN Well Dawson, I would tweet about it to warn everyone about that bad judge!	
	JILL Vicious group, wow, OK, show me Twitter!	
BOB	Answer ranked 4 flips. **TEAM 1 celebrates** **BOB plays applause on ppt**	
	JILL Excellent, you are all tuned right in to the Anger Channel To **CRYSTAL**: Hi there Player 3. Ready to play??!! Give me your name and a fun fact about you! (**CRYSTAL**: "Hi I'm Crystal and when I was little I had an imaginary pony named Son of Sam!) **JILL** I'm not sure what to say about that! Name something you do when a judge's decision disappoints you!	
	CRYSTAL I'm gonna say . . . hide from my client!	

TEAM 1	Clap and reassure **CRYSTAL** it was "good answer" and clap.	
	JILL I'm sure we've ALL wanted to do that, show me, hide from my client!	
BOB **STAFFERS**	Reveal an **X** on the board for a wrong answer. **TEAM 1** gets upset. **BOB** plays BOOS on ppt. Make sure challenging team cheers and is paying attention, remind them they will be next with one more strike!	
	JILL One more strike, the pressure is on. Team X, I hope you are warming up!! To STACEY: Hi there Player 4. Ready to play??!! Give me your name and a fun fact about you! (STACY Hi I'm Stacey and I turn the light on and off 20 times before I lay down to sleep!) **JILL** That's a little crazy but aren't we all! Name something you do when a judge's decision disappoints you.	
	STACEY Ok Dawson, if it is me hearing that bad decision, I'm not going to stick with a 140-word Tweet, I'm going to call the local news and give a press conference outside the courthouse!	
TEAM 1	Clap and reassure Stacey it was "good answer" and clap.	
	JILL Why do I get the feeling from the answers already up there that this one is gonna be too, show me, "press conference"	
BOB	Answer rank 5flips. **TEAM 1 celebrates.** **BOB plays applause on ppt**	

	JILL Boy, this poor judge can't get a break from you guys, huh? To MICHAEL: Hi there Player 5. Ready to play??!! Give me your name and a fun fact about you! (MICHAEL "Hi I'm Michael and all I have in my refrigerator is kale!") **JILL** That's healthy . . . physically, if not mentally! Name something you do when a judge's decision disappoints you!	
	MICHAEL I can't say I've ever had a judge rule against me, so I can't even imagine . . . I guess if it happened I would just quit the practice of law!	
TEAM 1	Clap and reassure MICHAEL it was "good answer" and clap.	
	JILL That's a mature response, show me, QUIT!	
BOB	Reveal an **X** on the board for a wrong answer. **BOB** plays "disappointed" sound effect; TEAM1 is devastated.	
	MICHAEL There goes our Hammy!	
	JILL TEAM X, you get a chance to see what Team 1 is missing! Let's play the FEUD!! **JILL** Alright, [**X1 -- call by name from nametag**] representing team ___, in 5 seconds max, name something you do when a judge's decision disappoints you!	
JILL	Repeat for all members of TEAM X when you get to them. Remind 5 seconds if seem slow.	

BOB:	Flips and applause if they get one, X and boos if not	
STAFFER 1	Feed answer to **X3** only if no answers have been guessed. Remaining answers are (6) suck it up/nothing, (2) recall/election challenge, and (1) cry.	
BOB	Don't turn over remaining answers, if any, **ELENA** will do that to start the moderation	
JILL: after 2nd strike or when all answer guessed . . .	**JILL** Thanks for playing TEAM X! Now both teams are in the running for the BRAND NEW CAR, but it is time to audition another two Kennedy Families! So I need you all to take your places in the audience while we see (the rest of the answers on the board) and what the rest of these fine folks can do!	
BOB	Queue music	
STAFFERS	Escort TEAM X and Team 1 back into their seats QUICKLY. **TODD** comes down at the same time the others are going into audience with the **STAFFERS**, the music is still playing, **TODD** starts talking as soon as music ends, so **BOB** ends music as soon as all have left stage and **TODD** is in position. **TODD** LADIES and GENTLEMEN, it is now time for the lawyers to talk talk talk talk, is that all they do? But without the help of our legal professionals, and legal professionals in training, we wouldn't have a show! So please bear with us and spend some quality time with our moderator, **ELENA** Duarte **ELENA** walks out	

END ACT I
MODERATION BEGINS.

ACT 2

	Moderation is winding up.	
TEAM 1	Remain seated under their banner in the audience. They have a mic and are ready to help, particularly with the second question in this act.	
PRODUCER AND **STAFFERS**	Out patrolling audience	
TODD	Runs back up to the stage to end moderation when the time is right and FF music starts playing.	
STAFFERS	stay in audience ready to help other 7 teams with new question.	
BOB	Play FF music as queue to end moderation when either **ELENA** or **TODD** signals;	
STAFFERS	run around with applause signs when music starts until music ends, then back down into audience to help teams 2-8 choose answers	
	[as soon as music ends] **TODD** Ladies and gentlemen, all this talk is fascinating but I have a show to run. Geez, law people, all they do is "talk talk talk"! But we need to get going because 2 more teams out there will get a chance to play! Here again is your host, DAWSON HARVEY to ask the question that will select which 2 teams will play for the BRAND NEW CAR!!	
BOB	cue car on ppt; **TEAM 1** cheers in back No extra music -- try to go pretty fast	
JILL	runs out from back to while BRAND NEW CAR bit is going	
STAFFERS **BOB**:	walk around with applause sign while **JILL** runs out. go help teams as soon as **JILL** is in place Ppt up with question/ 8 answers ARE: (8) well-groomed/nice looking; (7) fearless/afraid; (6) fair; (5) decisive; (4) obedient (3) independent; (2) consistent; (1) nice.	
	JILL Good evening again! The two highest scoring answers from the audience on our next questions will determine who plays our next round. So let's put up our next question:	

	We asked 100 lawyers and litigants: "Name something you want your judge to be; that's right, something you want your judge to be. Lawyers AND litigants!" Think about it everyone, give your spokesperson your ideas; the TWO highest scoring answers of our 8 up on the board will come up and compete for the prize! But we are short on time, so hurry up and get an answer or 2 together, once I call on you you'll have 5 seconds, GO!	
BOB	play Jeopardy "timer" music, half only	
STAFFERS AND **TODD**	make sure the teams are ready	
	JILL OK, everyone gets a guess and we'll go in order but teams 1 and __ [challenger from 1st act] won't get to come up again. Team 1, you're up first!"	
TEAM 1	[**TEAM 1 --** players in back yelling suggestions to spokesperson, loudly so audience can hear, yelling actual answers: "independent!" "no, that's dumb, say 'nice!' " "No, fearless!" "good looking!" etc)	
	WEIRU "Well, Dawson, I don't know about you but I like my judges to be obedient!"	
	JILL "The way this night is going, it wouldn't surprise me if 'obedient' made the cut; show me: Obedient!"	
BOB	board flips #4 over, ppt canned applause	
TEAM 1	players go nuts	
	JILL "Well, **TEAM 1** at this rate you may get your new car, but you can't play again. So settle down back there. Team 2, 5 seconds, what's your answer, how do you want your judge?"	
JILL	(Get answer, say "show me ____" and look at board) Continue through all of the teams in the audience	
BOB	flip answer with applause or "X" with boos, depending on whether answer is one of the remaining 7.	

STAFFERS	keep track of who is scoring what and feed **JILL** top 2 vote getters	
TEAM 1	if there are 2 strikes in a row **TEAM 1** feed a correct answer to the next guesser from the back; **STAFFERS** help too	
	JILL (address higher scorers) "Excellent, Teams __ and __, [given that teams 1 and __ are disqualified from this round, you are the top 2 point-getters for your answers! Come on up with our staffers!	
BOB	(no music yet, **JILL** keeps going)	
STAFFERS and **TODD**	QUIETLY direct highest scorer to former **TEAM 1** position, to the left of the host, other team to the right. One **STAFFER** go with each team, **TODD** keep things moving from the middle.	
JILL	come out toward the audience so all this can go on behind you, you keep going with this while the teams assemble:	
	JILL Let's see those remaining answers, call out numbers one by one, from bottom to top:	
BOB	[if any answers remain, turn them over from bottom up, **STAFFERS**/players/audience shout answers. Keep the assembling teams involved too.] If no answers remain play FF music while teams are assembling	
	JILL "Looks like our two new teams are assembled and ready to play the Feud!"	
BOB	switch from LOGO to next question: Who should defend your discretionary decision-making? (Answers on board are: (8) other trial judges; (7) the press/pundits; (6) bailiff/court attendant; (5) the parties; (4) law professors; (3) lawyers; (2) mom/family member; (1) appellate courts)	
	JILL "OK here we go, we asked 100 trial judges: Who should defend your discretionary decision-making? The top 8 answers are on the board. I'll go down the row and each player will get 5 seconds to answer; we'll switch to team __ when team __ gets 2 strikes or each has had one guess.	

JILL	**JILL** walks to her right side, Guest Player 1	
	JILL "Hi there, [name], ready to play? Tell me, who did judges say defends their decisions?	
JILL	(each player -- repeat above dialogue for all members of TEAM X when you get there. Ask a question about their Team or the Inn if you feel like it and if we have time.	
STAFFER	feed correct answer to X2 if the first one gets a strike. Then to X4 if X3 gets a strike When two strikes or all 5 have guessed, switch to opposing team and repeat Feed an answer if there is a strike, unless there are only one or two remaining on the board, in which case all bets are off!	
BOB	(Don't turn over remaining answers, if any, **ELENA** will do that to start the moderation)	
	(when all team members have gone, both sides, or each side has gotten 2 strikes) **JILL** Thanks for playing TEAMs __ and __! Now all of you are in the running for the grand prize, but it is time take your places in the audience again. Right, **PRODUCER**?	
BOB	music starts, teams and **STAFFERS** go back into audience while **TODD** and **ELENA** come over to stage, cut music when stage is clear and we are in place	
	TODD LADIES and GENTLEMEN, it is now time for the lawyers to talk some more about these interesting responses we've been showing you from our polls. Frankly, I'm glad I'm in the entertainment business instead of the law business. But here is your moderator again	

END ACT II

ACT III

BOB	Moderation wraps up at 8:35 When Elena signals done, do the BRAND NEW CAR bit to intro the following:	
BOB	**ELENA** Alright, before we wrap up we need to award the grand prize, the brand new car, as well as a surprise consolation gift which will go to one of the teams that did not get to compete for the car tonight! For the consolation prize, you all have a chance to answer one more question: _____ Put up next q with room for 8 answers: ** Answers are: (8) chef; (7) zen garden; (6) ice sculpture; (5) lawyers; (4) interns/externs; (3) alcohol; (2) prescription drugs; (1) koi pond) ** _____ ELENA We asked 100 people eating at IHOP: Name something you find in a big law firm. How bout a law student from each team section, or an emeritus if there isn't a law student in the group with an answer, let's start with team 8 and go backwards: And let's get our host up here to help us out while you all think for a minute.	
BOB	Jeopardy music plays	
JILL	**JILL** runs in wile jeopardy music is playing	
	JILL OK, team 8, tell me something our IHOP crowd thought they would find in a big law firm!!	
TEAM 1 **JILL**	starts making "suggestions" in the mike right away. Even though you are **<u>last</u>**. _____ Keep trying to keep Team 1 quiet while you get answers from the other teams, in order 8 to 1. Tell Team 1 they are risking	

	disqualification.	
JILL	Team 7, what’s in a big law firm?? Team 6, what’s in a big law firm? Get response from all teams; down to Team 1:	
BOB	Keep flipping with applause or striking with Xs and boos	
	JILL (gets to Team 1:) Team 1, I am only letting you answer because there are answers left on the board, what’s in a big law firm?? CRYSTAL: “A koi pond!!” JILL: That’s the most ridiculous thing I’ve ever heard, show me, KOI POND??	
BOB	Turns over koi pond, applause	
	JILL: Figures it is there, but I am sorry team 1, you win nothing because of your bad behavior, you are disqualified!! TEAM 1 (complains, boos, “this is rigged!”) TODD This leaves Team ___ as our consolation prize winner, Team __ is the highest on the board and didn’t compete onstage!	
BOB	Applause	

(Staffers are conferring with Jill and letting her know who won the CAR from the 3 teams onstage) **BOB** **BOB and STAFFERS**	Elena gives Todd the game; TODD hands FF game to Team ___ rep (Elena goes to podium to retrieve Brand New Car) _____ TODD That leaves the BRAND NEW CAR!! _____ BRAND NEW CAR graphic _____ (Jill runs up to front during graphic, Elena is there with concealed car) JILL We've finished crunching the numbers and the grand prize for the most correct answers on the board goes to Team ____! Applause, FF music while Jill awards car Applause signs ELENA thanks all for coming and introduces TEAM !!!	

END ACT III

Public statements by lawyers:

CA Rules of Professional Conduct, Rules 5-100 and 5-120

5-120 trial publicity "a member [involved in a matter] should not make an extrajudicial statement that a reasonable person would expect to be disseminated [to the public] if there is a substantial likelihood of prejudice to the proceeding" -- Applies equally to defense attorneys and prosecutors per annotated discussion --

compare Mosby complaint, MD RPC 3.6

CA Business and Professions Code, Section 6068

Attorneys must maintain the respect due to the court of justice and judicial officers

Standing Committee on Discipline . . . v. Yagman, 55 F.3d 1430 (1995)

9th reverses DCt attorney misconduct sanction for impugning integrity of the court, applying "reasonable attorney" standard of objective malice for determining defamation, i.e. impugning court -- needs to be false statements if so.

Judges' statements

CA Code of Judicial Ethics, Canons 1, 2, and 3

3B(9) -- no pending decisions, this keeps us from commenting on Curiel's discovery decisions in the civil (Trump) case for sure, but what about when time to appeal has run and nothing happened (Persky)? Or when acquittal means no appeal (Baltimore)?

(Commentary says that although this canon only covers pending or impending, judges need be cognizant of cannon 2, appearance of impropriety, as well as 2A, promoting public confidence in the integrity and impartiality of the judiciary)

Judging Justice Ginsburg, S.F. Daily Journal

When is it time to speak up despite any appearance of impartiality? (FF q says other judges will defend discretionary decision-making, but will they?)

Freddy Gray case

In Freddie Gray Trials, Baltimore Judge Sets High Bar for Prosecution, The New York Times

(judge had DOJ civil rights experience investigating claims against police officers) "When you work for DOJ your standards of prosecution are exceedingly high" (per U MD Prof of Law supportive of prosecution) hence the judge could be looking for something more persuasive "to meet the burden of proof than is ordinarily required in state prosecutions"!!

Prosecutor Marilyn Mosby Just Accused Police of Another Crime Without Any Evidence, lawnewz.com

Addressing acquittals and need to drop charges, she claims "police conspiracy" caused acquittals, including manufacturing evidence

Prosecutors of officers accused in Freddie Gray death face pressure for disbarment, The Washington Times

(in urging MD office to drop remaining charges): "People should not be accused of a crime to see a community satisfied. It is absolutely inappropriate." "Every prosecutor has an individual obligation -- the (underlings) are as guilty of ethical violations as the supervisor."

In the Matter of: Baltimore State's Attorney Marilyn Mosby (before the Attorney Grievance Commission of Maryland, Office of Bar Counsel), scribd.com

"activist" GW law professor filed Viol MD RPC 3.6 (limiting public statements by attorneys in connection with judicial proceedings), compare CA RPC 5-120, pretrial publicity -- "I will seek justice on your behalf, this is your moment, our time is now" ("A prosecutor should never initiate a prosecution merely to satiate a mob's desire for revenge.")

Persky

Don't judge Persky sentence in a vacuum, S.F. Daily Journal
Career public defender says don't forget probation = prison exposure if any issues, preponderance standard, so why are all the anti lock-em-up liberals jumping on the "toughen up sex crime sentences" bandwagon??

Sentencing bill inspired by Stanford swimmer case heads to governor/Brock Turner to be released soon, S.J. Mercury News
2 bills broaden definition of rape and mandate prison for sex crimes where victim unconscious -- cover Turner case. Pundits point out progressives on board with this who are usually not in favor of limiting reformative sentences.

Committee approves CJP audit: Momentum to probe agency spurred by Brock Turner sentence, S.F. Daily Journal
State Legislative Committee approves audit -- "Because of Persky, people are beginning to see how secretly the CJP operates" per a Sierra College Professor -- more transparent oversight to more easily see prior complaints against Persky -- audit will analyze who within the commission decides whether someone has "broken the code of ethics" and how consistently it follows its own investigative standards.

Lawmakers move to toughen sex assault penalties, Sacramento Bee
Santa Clara (Turner) prosecutor testified before Senate that "we all need to try to protect the next Emily Doe against the next Brock Turner. It's on us." (insinuating the current system did not protect her) Jeff Rosen (the DA and presumably the DDA's supervisor) testified as well

Persky's Move: A Reaction to the Reactionary, S.F. Recorder
Prof UC Hasting and practitioner says progressives should know better -- conflating a single decision into a litmus test is the same tactic long used by the political right to attack judicial independence of judges who favored abortion rights or opposed the death penalty"

'*Retain Persky' website aims to fight efforts to recall judge*, S.F. Daily Journal
Discusses how Dauber is "expecting a handful of candidates concerned with the fair adjudication of cases involving female victims" to run to fill Persky's seat of recalled; how she is "keeping the heat on the judge" by conducting a full review of his docket.
**Daubers call for recall post categorized Chemerinsky as a Persky defender but wrote (correctly) that he called the sentence a "terrible error." (I read the OpEd, "Don't recall Judge Persky"); he also called it an abuse of discretion, but it wasn't appealed, should he have addressed that? It was in the OCRegister, not the DJ for once, and he still called crime "rape" and an abuse of discretion without explaining what that was and what went into the sentence?)
Dauber interview with democracy now, not in materials, she said "when an individual does perpetrate an offense, [they should be] subject to the same kind of justice and to equal justice, regardless of who they are, whether they have high grades, whether they are a Stanford student or not, whether they are an excellent elite athlete or not. Everyone needs to be subject to the same standard."

(Does that mean no individualized sentencing? Both Fed and state sentencing rules, rules of court and code and GL, require defendant's characteristics be thoroughly considered. Don't the law students need to know that?)

Brock Turner's Judge: Join us next Wednesday, forwarded email
Protesting CJP as it has "been protecting Persky", they are under audit, "momentum is on our side" "if we pile onto the outrage, the commission will have no choice but to listen"

Blame the law, not the judge, S.F. Daily Journal
"To ignore the probationary sentences offered every day by the DA's office in sex cases throughout the state misleads the public about the way we do business in the criminal justice system and how out colleagues who work in the trenches perceive such cases."

Lost in the Debate: The Threat to Judicial Independence, ABOTA
SF ABOTA reminds public in press release that judges can't comment on pending cases, therefore it is important for "attorneys involved in the legal system to provide their insight" In Press release reminds public appellate courts and CJP are there to take care of trial court errors and misconduct, and judicial independence requires tha6 judges not "fear the mob" and not face removal for one unpopular decision.

A Call to Action: Threats to Judicial Independence Risk Fair & Impartial Justice, Judge and Michael Kronlund
Says 2/3 of SLS graduating class (but also says recent grads) penned a letter to Dauber to drop recall effort, calling it a threat to judicial independence, a "cornerstone of due process"

Curiel

ABOTA defends federal district court judge against unfair attacks . . . ,

ABOTA

National ABOTA President's OP-Ed from responds that it has a history of defending judges who can't defend themselves and emphasizes threat to judicial independence

Professors

AALS Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities, Washburn University School of Law

(Assoc. Amer. Law Schools says) American Law Profs as members of 2 professions and should comply with the requirements and standards of each. Law professors who are lawyers are subject to the laws of professional ethics in force in the relevant jurisdictions. **A law professor occupies a unique role as a bridge between the bar and students preparing to become members of the bar.** At a minimum, a law professor should adhere to the Code or RPC of the state bars to which the law professor may belong. (references AAUP (Am Assoc of Univ Professors)) Statement on Professional Ethics "As members of their community, professors have the rights and obligations of other citizens. They should measure the urgency of those obligations in light of their responsibilities to their subject, to their students, to their profession, and to their institution."

Papering

People v. Superior Court (2016) 1 Cal.App.5th 892

4th/Div 3 divided panel upheld blanket papering practice against separation of powers challenge. Reluctantly relied on *Solsberg* (dissent distinguished) which some consider to be questionable precedent. Only SCt can fix.

(Give Bob (and Todd?) end time when we see when Act 1 ends so they can be ready)

7:35 to 7:55 p.m.: Moderation 1

Questions thus far show us what legal professionals think they should do when a judges decision disappoints, and possible influences on those legal professionals. Some of you might find some of the answers scary indeed. The top answer was cry, not quite so scary I guess, but only 1 respondent said suck it up and everyone in between wanted to go after that bad judge, one way or another. Papering, tweeting, press conference. No one said they would writ, or appeal, a disappointing decision.

Did you notice that? Very reactionary respondents. But that may be the world we live in today. The email I included in your materials encouraged readers to "pile on the outrage" over the Persky sentence when picketing CJP, that "they will have no choice but to listen." Excellent.

Is there a problem with this? That is what I want to talk about with all of you for the next 20 minutes or so.
After the second round of the Feud we will talk about what--if anything--do those of us who pride ourselves on our civil, ethical, and professional behavior do about it? Tough to put the genie back in the bottle; maybe instead we should fight harder to keep it contained in the first place? Keep our dirty laundry to ourselves, so to speak?

But before we talk about some specifics, let me tell you what Team 1 decided this production was NOT about. It is not about judicial independence per se. I think most if not all of us in this room are aware of the concept of judicial independence as a

cornerstone of due process, and agree judges shouldn't be governed by the tide of public opinion, even when it threatens to swallow up everything we've ever worked for.

The question team 1 wanted to ask is what is our professional and ethical duty, all of us, no matter what corner of the legal profession we fill, to preserve that independence. Do we even have a duty? Or is it all about self interest, what works best for your client, for you personally and any career advancement plans you have, or career retention plans? Is our duty to the system itself, to keep it from being taken over and micromanaged by another branch of government that DOES answer directly to the public and is constantly reacting to the tide of public opinion?

You know what I am talking about, CJP is under audit and being picketed by anti-Persky activists, the law has already been amended to "fix" individualized sentencing in sexual assault cases. The list goes on. And all of this started and egged on by legal professionals such as ourselves. Is that a problem?

While you think about it, I'll toss out a few examples from the program and the written materials to give us some fuel for the fire:

Stacy says when a judges decision disappoints she is going to call a press conference, why stick with a 140 character tweet?

MD prosecutor Mosby called a press conference after the 3rd acquittal in her case and alleged a police conspiracy; in the meantime a GW law professor has filed a MD Bar complaint against her, alleging among other things a violation of MD's trial publicity rule, which is very much like our own RPC 5-120, which we can talk about later if you'd like

Persky Prosecutor goes to the legislature and ask them to protect the victim ("we all need to try to protect the next Emily Doe against the next Brock Turner. It's on us.")

(Unstated point is that judge didn't, proper?)

U MD Prof of Law described as supportive of prosecution in Freddie Gray case opined the judge hearing the case against the officers is applying too high a standard, one he

learned working Fed civil rights cases ("When you work for DOJ your standards of prosecution are exceedingly high" hence the judge could be looking for something more persuasive "to meet the burden of proof than is ordinarily required in state prosecutions"!!) (isn't reas doubt always standard??)

Another law professor, with a PhD in sociology I learned in my research, that she picked up after she clerked for J. Reinhardt, is all over the press calling for recall of a Santa Clara judge, characterizing the case as a rape case with an illegal sentence where defendant's characteristics should not have been considered. Given that state and fed cts are required to consider defendant's characteristics when imposing sentence, is her statement a problem when she is teaching up and coming lawyers the law??

(she says she is "expecting a handful of candidates concerned with the fair adjudication of cases involving female victims" to run to fill Persky's seat of recalled; how she is "keeping the heat on the judge" by conducting a full review of his docket).

*Doesn't have to be criminal -- Curiel case, discovery order in a civil case the litigant didn't like. The lawyers were silent, but didn't writ or otherwise challenge the ruling. All of these get national press.\

What do you think? Appropriate reactions to adverse rulings? Influences from q include (8) their colleagues; (7) their mothers; (6) the State Bar; (5) their clients; (4) their supervisors; (3) their spouses/S.O.s; (2) Judges, and (1) their financial advisors;

<u>ADDL:</u>

Law professors and law students:

Daubert at SLS, GW professor in Mosby case, Chemerinsky OCRegister on Persky; Sierra College Professor leading charge for CJP audit; UMD professor that calls standards too high:

AALS Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities, Washburn University School of Law

(Assoc. Amer. Law Schools says) American Law Profs as members of 2 professions and should comply with the requirements and standards of each. Law professors who are lawyers are subject to the laws of professional ethics in force in the relevant jurisdictions. **A law professor occupies a unique role as a bridge between the bar and students preparing to become members of the bar.** At a minimum, a law professor should adhere to the Code or RPC of the state bars to which the law professor may belong. (references AAUP (Am Assoc of Univ Professors)) Statement on Professional Ethics "As members of their community, professors have the rights and obligations of other citizens. They should measure the urgency of those obligations in light of their responsibilities to their subject, to their students, to their profession, and to their institution."

Research on Daubery shows she is anti-fraternity and says wants judges fair to female victims -- males OK in her class? Crim pro/sentencings being taught adequately?

Chem mischaracterizes case in OC Reg., same q?

Keep conversation on propriety of reactions and influences

(We're going to get to whose job it is to do something about it -- to stick up for the judges, and the rulings, if not for the judges sake than maybe for the sake of justice and the functioning of the justice system??)

At end:

Now we should probably wrap up and get back to the Feud!!

8:15 to 8:35 p.m. max: Moderation 2

[How do you want your judges to be and if they do as you want who will defend them when they come under fire for it? What if they don't do what you want, do you owe it to our system of justice to make sure proper exercise of discretion is defended, explained, upheld?]

Now we get to whose job it is to do something about it, whether there is a duty to act, if you will, or at least refrain from acting in a manner that exposes the system we all operate in, the justice system, to criticism and interference from those who frankly don't always understand it.

We just asked judges (q #4) who should defend your discretionary decision-making and look at the answers we got: (6) other trial judges; (5) the press/pundits; (4) the parties; (3) law professors; (2) lawyers; (1) appellate courts
These poor judges will take help from almost anyone
Appellate courts #1 answer as to who defends judges decisions, but some of the biggest press comes from decisions that weren't even appealed or writ, in the case of unappealable orders.
Because arguably they weren't an abuse of discretion. Or they can't be appealed OR writ, like the Baltimore acquittals in the Freddy Gray case. Prosecutor dropped charges

Other trial judges: could judges do more???
CA Code of Judicial Ethics, Canons 1, 2, and 3

3B(9) -- no pending decisions, this keeps us from commenting on Curiel's discovery decisions in the civil (Trump) case for sure, but what about when time to

appeal has run and nothing happened (Persky)? Or when acquittal means no appeal (Baltimore)?

Judging Justice Ginsburg, S.F. Daily Journal

When is it time to speak up despite any appearance of impartiality? (FF q says other judges will defend discretionary decision-making, but will they?)

We asked what people wanted in a judge and although "nice, obedient, and afraid" made the list, smart and funny and unemotional did not. Can anyone think of anything else that should have made the list? Is fear of the mod going to affect the kind of judges we get? (Persky's recusal in second sex case not due to mere appearance of impropriety (which is what he cited) from Turner case itself; he had a contact while on a family vacation that was problematic for him -- threats. They are getting daily threats at SC Courthouse.)

Doesn't everyone that knows better just need to knock it off? Can we help by behaving ourselves and encouraging others to do the same??

Don't judge Persky sentence in a vacuum, S.F. Daily Journal

Career public defender says don't forget probation = prison exposure if any issues, preponderance standard, so why are all the anti lock-em-up liberals jumping on the "toughen up sex crime sentences" bandwagon??

Blame the law, not the judge, S.F. Daily Journal

"To ignore the probationary sentences offered every day by the DA's office in sex cases throughout the state misleads the public about the way we do business in the criminal justice system and how out colleagues who work in the trenches perceive such cases."

<u>Defense</u>

ABOTA letters, 46 law professors, most of this is reported in the DJ or goes nowhere. The few with a platform (Chem) get it wrong.

Is the key just to dial it back in the first place? Since you can't put the genie back in the bottle? Or do you owe it to your clients to get press when you can?? To get change by outrage? But what about the long term damage to the perceived (and actual) integrity of the system??

At end, 8:35 p.m.:

ELENA

Alright, before we wrap up we need to award the grand prize, the brand new car, as well as a surprise consolation gift (slide) which will go to one of the teams that did not get to compete for the car tonight! For the consolation prize, you all have a chance to answer one more question:

We asked 100 people eating at IHOP: Name something you find in a big law firm.

Let's start with team 8 and go backwards: And let's get our host, Dawson Harvey (get it? FF past and present?) up here to help us out while you all think for a minute

(Jill comes up to Jeopardy music, I go get notes and prizes ready, keep track of highest for this question wins consolation prize)

(Jill does her bit with teams 8-1
and DQs team 1)

(Todd comes up and me with prize to give him to award and tell him Team number too -- Dillon will signal too -- NOT one of 3 teams who came up)

TODD says: This leaves the BRAND NEW CAR

(I get car and winner # while Bob plays graphic)

(Jill runs up front; I tell her number and give her car)
(She runs up to award, while Bob plays that's all folks graphic)

I THEN say "As you can see, that's all folks, so Team 1 come on down and take a bow!

Thanks to our studio audience for coming out tonight to play Kennedy Feud!"

ALL dance to FF music, make sure Bob has long song on!

32 Hofstra L. Rev. 1245

Hofstra Law Review
Summer 2004

Legal Ethics Conference: "Judging Judges' Ethics"
Articles

THE LINE BETWEEN LEGAL ERROR AND JUDICIAL MISCONDUCT: BALANCING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Cynthia Gray [a1]

Most of the complaints filed with state judicial conduct commissions-- generally more than ninety percent--are dismissed every year. [1] Some dismissed complaints do not allege a violation of the code of judicial conduct. For example, litigants sometimes complain that a judge did not return telephone calls because they do not understand that a judge is required to avoid such ex parte communications. Others are dismissed because the evidence does not support the complaint. For example, a Texas prison inmate alleged that the judge who had presided in his trial had been prejudiced against him because they had once been married; the State Commission on Judicial Conduct dismissed his complaint after its investigation revealed that the judge had never been married to the complainant. [2]

Most of the complaints that are dismissed every year are dismissed as beyond the jurisdiction of the commissions because, in effect, the complainants are asking the commission to act as an appellate court and review the merits of a judge's decision, claiming that a judge made an incorrect finding of fact, misapplied the law, or abused his or her discretion. Correcting errors is the role of the appellate courts, however, and a commission cannot vacate an order or otherwise provide relief for ***1246** a litigant who is dissatisfied with a judge's decision. In its annual report, the Kansas Commission on Judicial Qualifications explains:

> Appealable matters constitute the majority of the [complaints that are not investigated] and arise from a public misconception of the Commission's function. The Commission does not function as an appellate court. Examples of appealable matters which are outside the Commission's jurisdiction include: matters involving the exercise of judicial discretion, particularly in domestic cases; disagreements with the judge's application of the law; evidentiary or procedural matters, particularly in criminal cases; and allegations of abuse of discretion in sentencing. [3]

On the other hand, the code of judicial conduct does require a judge to "respect and comply with the law," [4] to "be faithful to the law and maintain professional competence in it," [5] and to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." [6] Moreover, it would be incongruous if the principle "ignorance of the law is no excuse" applies to everyone but those charged with interpreting and applying the law to others. Thus, while mere legal error does not constitute misconduct, "[j]udicial conduct creating the need for disciplinary action can grow from the same root as judicial conduct creating potential appellate review . . . ." [7] This

article will review both cases in which a finding of misconduct was based on legal error and cases in which legal error was not sanctioned to describe the "something more" that transforms legal error into judicial misconduct.

Rationale

Part of the justification for the "mere legal error" doctrine is that making mistakes is part of being human and is inevitable in the context in which most judicial decision-making takes place. It is not unethical to ***1247** be imperfect, and it would be unfair to sanction a judge for not being infallible while making hundreds of decisions often under pressure.

> [A]ll judges make legal errors. Sometimes this is because the applicable legal principles are unclear. Other times the principles are clear, but whether they apply to a particular situation may not be. Whether a judge has made a legal error is frequently a question on which disinterested, legally trained people can reasonably disagree. And whether legal error has been committed is always a question that is determined after the fact, free from the exigencies present when the particular decision in question was made. [8]

In addition, if every error of law or abuse of discretion subjected a judge to discipline as well as reversal, the independence of the judiciary would be threatened.

> [J]udges must be able to rule in accordance with the law which they believe applies to the case before them, free from extraneous considerations of punishment or reward. This is the central value of judicial independence. That value is threatened when a judge confronted with a choice of how to rule--and judges are confronted with scores of such choices every day--must ask not "which is the best choice under the law as I understand it," but "which is the choice least likely to result in judicial discipline?" [9]

Moreover, the authority to interpret and construe constitutional provisions and statutes resides in a state's trial and appellate court system and in judges chosen by whatever method the state constitution dictates. The conduct commission members are not chosen the same ways judges are; many are not judges, and some are not lawyers. A problem would be created if the commission's legal interpretation differed from that of the appellate courts, although that problem is ameliorated by the possibility of supreme court review of judicial discipline cases in most states. Furthermore, judicial conduct commission proceedings are not the ideal forum for debating whether a judge made an erroneous decision as the parties in the underlying proceeding would not necessarily participate, and the commission does not have the authority to remedy an error by vacating the judge's order.

The appellate and discipline systems have different goals, however, and accomplishing both objectives in some cases requires both appellate ***1248** review and judicial discipline. [10] Appellate review "seeks to correct past prejudice to a particular party" while judicial discipline "seeks to prevent potential prejudice to future litigants and the judiciary in general." [11] "[A]n individual defendant's vindication of personal rights does not necessarily protect the public from a judge who repeatedly and grossly abuses his judicial power." [12] Moreover, the discipline system's goal of preventing potential prejudice to the judicial system itself cannot depend on "a party's decision in litigation to expend the time and money associated with pursuing a question of judicial conduct that may be examined on review." [13] The possibility of an appellate remedy for a particular judicial act, therefore, does not automatically and necessarily divest the judicial discipline authority of jurisdiction to review the same conduct.

Some courts have even questioned whether the invocation of judicial independence in judicial disciplinary proceedings misapplies the concept because judicial independence "does not refer to independence from judicial disciplinary bodies (or from higher courts)." [14]

> In the traditional sense, the concept of an independent judiciary refers to the need for a separation between the judicial branch and the legislative and executive branches. . . . Judicial independence requires a judge to commit to following the constitution, the statutes, common law principles, and precedent without intrusion from or intruding upon other branches of government. [15] Even a federal court suggested that the constitutional measures meant to protect judicial independence were not intended to insulate individual judges from accountability to "the world as a whole (including the judicial branch itself)," but "to safeguard the branch's independence from its two competitors." [16]

The extensive involvement of other judges on the conduct commissions and in the review of judicial discipline cases ensures that the perspective of the judiciary and deference to its independence is ***1249** reflected in the decision whether to find misconduct based on legal error. [17] Finally, judicial discipline for legal error does not always or even often result in removal but may simply lead to a reprimand, censure, or suspension.

Appealable Demeanor

Intemperate remarks can result in reversal on appeal, and citing the same concerns with judicial independence underlying the "mere legal error" rule, judges have argued that their in-court statements are entitled to deference and should not subject them to sanction. [18] Courts and conduct commissions generally reject that argument, however, and intemperate remarks can lead not only to reversal but to a finding that the judge violated the code of judicial conduct requirement that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity." [19]

In In re Hammermaster, [20] the Supreme Court of Washington sanctioned a judge for, among other misconduct, telling 12 defendants he would either impose an indefinite jail sentence or life imprisonment if they did not pay the fines and costs imposed. The judge acknowledged that he knew the law did not allow for life imprisonment for failure to ***1250** pay fines and that he had no authority as a municipal court judge to impose such sentences. He claimed that the remarks were a "technique of obvious exaggeration" to alert the defendants to the serious consequences of their actions and defended his conduct "on grounds that a judge is entitled to latitude in dealing with defendants and that his statements were a reasonable exercise of judicial independence." [21]

The court agreed that "a judge must have latitude when speaking with defendants," but concluded that "using threats which exceed judicial authority is unacceptable, even if the judge believes such threats are the only way to coerce compliance." [22] Rejecting the judge's argument that his treatment of the defendants was an exercise of judicial independence, the court held, "[j]udicial independence does not equate to unbridled discretion to bully and threaten, to disregard the requirements of the law, or to ignore the constitutional rights of defendants." [23]

A federal judge argued that the principles of judicial independence incorporated in the United States Constitution barred any sanction for "'anything to do with anything that happened when the judge . . . was acting and deciding cases or in

any phase of the decisional function,"' including "'anything that the judge does verbally or physically in the course of adjudication."' [24] This exemption included, according to his counsel, racist disparagement of or even punching attorneys appearing before him. [25] The United States Court of Appeals for the District of Columbia Circuit rejected that argument. The court, assuming arguendo that disciplinary procedures may not constitutionally be used as a substitute for appeal, [26] stated that the judge's "theory plainly goes well beyond judicial acts realistically susceptible of correction through the avenues of appeal, mandamus, etc." [27] Even when those avenues are available, the court stated, "we are all at a loss to see why those should be the only remedies, why the Constitution, in the name of 'judicial independence,' can be seen as condemning the judiciary to silence in the ***1251** face of such conduct." [28] The court concluded, "we see nothing in the Constitution requiring us to view the individual Article III judge as an absolute monarch, restrained only by the risk of appeal, mandamus and like writs, the criminal law, or impeachment itself." [29]

In In re Van Voorhis, [30] the California Commission on Judicial Performance emphasized that its finding of misconduct was based on the judge's treatment of counsel when he ruled that certain evidence should be excluded, not on whether the ruling was correct. [31] A deputy district attorney had attempted to have a police officer testify regarding the horizontal gaze nystagmus test administered to drivers stopped for driving while intoxicated, but the judge rejected her attempt, claiming that expert testimony was necessary. With the jury present and in a condescending and "somewhat hostile tone," the judge engaged in a critique of the prosecutor that was disparaging, mocking, and sarcastic. [32]

***1252** The commission stated that even if it accepted the judge's explanation that he was concerned that the defendant receive a fair trial, that concern would justify only his ruling, not his deprecation of the prosecutor's motives, his ridiculing of her perception, or his prejudicing of her case. The commission concluded, "It is clear that . . . Judge Van Voohis lost his temper and made comments for the corrupt purpose of venting his anger or frustration." [33]

A judge's comments during sentencing, however, are one type of in-court statement that commissions and courts are hesitant to subject to discipline, a reluctance based on concern that sanctions would discourage judges from articulating the bases for their sentencing decisions. [34]

In In re Lichtenstein, [35] the Supreme Court of Colorado rejected the recommendation of the Commission on Judicial Discipline that a judge be publicly reprimanded for his comments in the sentencing of a man who had pled guilty to murdering his wife. Explaining why, for second degree murder, he was imposing a suspended sentence of four years in prison plus one year parole rather than the presumptive sentence of eight to twelve years in prison, the judge referred to "highly provoking acts on the part of the victim." [36] The judge's comments as well as the sentence generated extensive publicity. On appeal, the court overturned the ***1253** judge's sentence as an illegal mix of incarceration and probation and remanded the case for re-sentencing. [37]

In the disciplinary proceedings, however, the court concluded no misconduct was evident. The court noted that a statute required the judge to make specific findings on the record detailing the extraordinary circumstances justifying a sentence outside the presumptive range. [38] The court concluded:

> Although the sentencing comments contain some phraseology which, when read in isolation, might have offended the sensibilities of others, the full context of the sentencing hearing indicates that the choice of words was no more than an awkwardly executed effort to place on record the confused and highly emotional state of the defendant at the time of the killing, which, in the judge's opinion, constituted a mitigating circumstance justifying a sentence below the presumptive range. The judge's

> comments were not intended to be disrespectful of the law, the victim, or anyone else; nor do they reasonably lend themselves to such a connotation in the full context of the hearing. [39]

Similarly, the Supreme Court of Michigan rejected the recommendation of the Commission on Judicial Tenure that a judge be sanctioned for improper remarks made during a sentencing for rape. [40] The defendant, an attorney, had orally and digitally penetrated a woman he was representing in divorce proceedings. Sentencing guidelines required the judge to impose a prison term of 10 to 25 years or provide adequate justification for deviating downward; the judge imposed concurrent sentences of 18 months to 10 years for each of the three counts.

The court noted that two of the 12 reasons the judge gave to justify the downward deviation became the focus of national media attention. [41] The judge had identified as mitigating factors "evidence that the Defendant helped the victim up off the floor after the occurrence" and the victim's statement to a spouse-abuse agency that the sex had not been forced but that her resistance had been worn down by the defendant's persistent requests. The court noted that the judge also used language that had been ***1254** interpreted to mean that a lesser sentence was appropriate because the victim had asked for it. [42]

The court emphasized that "the justification for departure--the act of judicial discretion--is not at issue in this case." [43] The court did state that a judge is not immune from discipline for the manner in which a decision is articulated but continued "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline." [44] Although affirming that it was committed to eradicating sexual stereotypes, the court stated it could not "ignore the cost of censoring inept expressions of opinion." [45]

Noting that "[t]he rationale for a severe sentence would inevitably have a negative effect on those who disagree with the verdict, and 'sympathetic' remarks would have a negative effect on those who believed the verdict was correct," the court concluded that "honest explanation of the rationale for tailoring sentences to the offender and the offense" would be discouraged if misconduct were defined from "the perspective of the person most sensitive to such remarks." [46] When a judge's comment during sentencing was based on knowledge acquired during a proceeding, the court held, the comment is misconduct only if, from an objective perspective, it "displays an unfavorable predisposition indicating an inability to impartially determine the facts or when in combination with other conduct . . . it is clearly prejudicial to the fair administration of justice." [47]

Using that objective standard, the court found that the judge's attempt to explain his view of the defendant's lack of malevolent purpose did not constitute misconduct. [48] The court emphasized that the judge did not inject ***1255** extraneous matters into the proceedings, make explicitly demeaning remarks, or use abusive language or an abusive manner. [49]

In contrast, accepting the presentment of the Advisory Committee on Judicial Conduct, the Supreme Court of New Jersey publicly reprimanded a judge for making statements in a sentencing proceeding that created the perception of a lack of impartiality. [50] The defendant had pled guilty to second degree sexual assault arising from her relationship with a minor who at the time was her student and 13 years old. Pursuant to a plea agreement, the former teacher had agreed to be sentenced to three years incarceration; the judge sentenced her to probation. The appellate division had reversed the sentence because the judge's emphasis on the victim's harm was an incorrect basis for a non-curatorial sentence.

During sentencing, the judge made several statements that attracted nation-wide media attention. For example, he suggested, "Maybe it was a way of [the victim] to, once this did happen, to satisfy his sexual needs. At 13, if you think back, people mature at different ages. We hear of newspapers and t.v. reports over the last several months of nine-year-olds admitting having sex." [51]

The committee found that the judge's statements expressed stereotypical views regarding the sexual nature of young boys, noting that the views were "problematic and suspect" and "fundamentally inconsistent with the meaning and policy of the law that criminalizes the sexual activities between an adult and a minor, boy or girl." [52] The committee concluded:

> The remarks of Respondent denote more than an honest mistake or inadvertent legal error. They suggest that, as a judge, Respondent was not simply mistaken about the law of sexual assault involving a minor boy. Respondent's remarks imply a bias, that is, a preconception or predetermined point of view about the sexuality of minors that could impugn the impartiality and open-mindedness necessary to make correct and sound determinations in the application of the law. [53] ***1256** Noting that a judge "may comment on the law and even express disapproval of the law, as long as his or her fairness and impartiality are not compromised," the committee concluded that the judge's "remarks, reasonably understood, constituted the expression of a bias. The reasonable interpretation, public perception and common understanding of those remarks would be indicative of a bias and lack of impartiality." [54]

Failure to Exercise Discretion

If a judge fails to exercise judicial discretion, the "mere legal error" rule is not a defense to a charge of misconduct based on the resulting decision. Such a decision is not entitled to the protection of judicial independence principles. Thus, although judicial decisions regarding findings of guilt, sentencing, and child custody are classic examples of decisions usually exempt from review by conduct commissions, judges are considered to have waived that exemption if their decisions were based on the flip of a coin or similar resort to fate rather than an exercise of judgment. [55]

For example, particularly given the compelling arguments on both sides, the Michigan Judicial Tenure Commission would certainly have dismissed a complaint about a judge's decision that children involved in a custody dispute would spend Christmas Eve with their father rather than their maternal grandparents-- except that the judge had resolved the ***1257** question by flipping a coin. [56] Another judge, who had taken a straw poll of the courtroom audience regarding the guilt of a defendant on a charge of battery--asking "If you think I ought to find him not guilty, will you stand up?"--argued that his conduct was not sanctionable because his verdict was not based on the audience vote but on the evidence presented at trial and that he only called for an audience vote to "involve the public in the judicial process." [57] However, the Supreme Court of Louisiana held:

> Whether or not Judge Best actually based his verdict on the audience's vote does not determine whether or not his conduct is sanctionable. The mere fact that he asked the courtroom audience to vote on the guilt of the defendant gave the impression that Judge Best based his verdict on something other than the evidence presented at trial. This type of behavior destroys the credibility of the judiciary and undermines public confidence in the judicial process. [58]

Sentencing decisions reflecting pre-judgment also illustrate an abdication of discretion that makes a judicial decision vulnerable to sanction even if the sentence is otherwise legal. This exception includes both a policy of imposing the same sentence on all persons convicted of a particular offense [59] and a policy of failing to consider sentencing options ***1258** allowed by law. [60] As the New York State Commission on Judicial Conduct stated, "Judicial discretion, which is at the heart of a judge's powers, is nullified when a judge imposes a 'policy' that will dictate sentences in future cases." [61] Pre-determined sentences may also suggest that the judge is acting in bad faith for political reasons or to pander to the public rather than making an independent determination. [62]

Imposing a sentence to teach a lesson to someone other than the defendant also constitutes judicial misconduct rather than an abuse of discretion not subject to sanction. [63] For example, at issue in In re Hill was a city judge's order providing that "all fines are $1 plus $21 court costs." [64] The order was issued ten days after the mayor had notified the city's health plan that the city would no longer pay premiums for the judge. Before the judge lifted the order, nineteen cases were disposed of with $1 fines--including charges for assault, assault on a police officer, resisting arrest, disturbance of the peace, stealing under $15, and various traffic violations. The Commission on Retirement, Removal and Discipline charged that the judge's orders were an "effort to use Respondent's office for his private gain," were "unfaithful and disrespectful to the law," and "excluded judicial discretion," concluding that the judge ordered the blanket reduction in fines to compel the ***1259** payment of his health insurance. [65] The Supreme Court of Missouri agreed that the judge should be sanctioned. [66]

Clear Legal Error

In most cases in which a state's highest court applied the mere legal error rule to reject a conduct commission's recommendation of discipline, the weakness in the commission's case arose from the unsettled nature of the law, at least at the time the judge made the challenged decision. Thus, an appellate court's reversal of a judge's decision alone is not sufficient proof that the judge committed a legal error justifying sanction.

For example, on direct appeal, the Supreme Court of Alaska had reversed a trial judge who, in an ex parte proceeding, had ordered the complaining witness in an assault case imprisoned to ensure that she would appear to testify the next day and would be sober. [67] In contrast, when it considered the Commission on Judicial Conduct recommendation that the judge be privately reprimanded for imprisoning the intoxicated witness, the court held that the judge's legal errors, which violated the rights of the witness and defendant, did not constitute ethical misconduct. [68] The court emphasized that the judge was faced with "a unique situation for which there was no available legal template." [69] Noting that, although it had overturned the judge's decision in the underlying criminal case, the court of appeals had unanimously ***1260** upheld it, the court stated that "reasonable judges could and did differ over whether the ex parte proceedings violated [the defendant's] rights [underscoring] the difficulty and uncertainty of the situation with which [the judge] was presented." [70] The court emphasized that the judge had "committed a single deprivation of an individual's constitutional rights, motivated by good faith concerns for orderly trial proceedings and the affected individual's well-being." [71]

The Maine Supreme Judicial Court adopted a similar objective standard for considering whether legal error constitutes judicial conduct in In re Benoit. [72]

> The reasonable judge of our standard must be reasonable both in prudently exercising his judicial powers and in maintaining his professional competence. But the standard must be further restricted

> to recognize that every error of law, even one that such a reasonable judge might avoid making, is not necessarily deserving of disciplinary sanction. A judge ought not be sanctioned . . . for an error of law that a reasonable judge would not have considered obviously wrong in the circumstances or for an error of law that is de minimis. [73]

The court held that a judicial decision constitutes a violation "if a reasonably prudent and competent judge would consider that conduct obviously and seriously wrong in all the circumstances." [74] On the other hand, the court stated, an erroneous decision is not misconduct if it was not obviously wrong or there was confusion or a question about its legality. [75]

***1261** In In re Quirk, [76] the Supreme Court of Louisiana held that a judge's legal ruling may be found to have violated the code of judicial conduct only if the action is contrary to clear and determined law about which there is no confusion or question as to its interpretation and the legal error was egregious, made in bad faith, or made as part of a pattern or practice of legal error. [77] Applying that standard to the case before it, the court dismissed the recommendation of the Judiciary Commission that a judge be sanctioned for sentencing hundreds of defendants to attend church once a week for a year as a condition of probation. [78] Rejecting the commission finding that the judge's church sentences were "clearly" unconstitutional, the court noted that there were cases from other jurisdictions that lent support to both the judge's and the commission's interpretations of the establishment clause. [79] The court concluded that a finding of judicial misconduct where the law is "not clear, is 'rife with confusion' and is subject to varying interpretations, and where no court in a jurisdiction binding on Judge Quirk has spoken directly on the issue, would strike to the very heart" of the direction in Canon 1 of the code of judicial conduct that a judge "must be protected in the exercise of judicial independence." [80]

In New York, the standard provides that discipline is inappropriate if the correctness of the judge's decision is "sufficiently debatable." Dismissing a State Commission on Judicial Conduct finding that a judge had engaged in misconduct by committing 16 defendants to jail without bail, the New York Court of Appeals held that the commission's interpretation of the relevant statute was not clearly erroneous, but that an ambiguity in the statute provided some support for the judge's position that he had discretion to determine whether a defendant should ***1262** be granted bail. [81] The court concluded that the ambiguity "cannot and need not be resolved" in judicial discipline proceedings but must "await a proper case and the proper parties," and the ambiguity precluded the judge's reading of the statute one way from constituting misconduct. [82] The Supreme Court of Indiana also adopted a "sufficiently debatable" standard. [83]

The Supreme Court of Illinois held that the Courts Commission exceeded its constitutional authority when it applied "its own independent interpretation and construction" of a statute to evaluate a judge's conduct. [84] Thus, the court overturned a commission decision to suspend a judge for ordering male defendants to obtain haircuts as part of their sentences and ordering persons placed on probation to carry a card identifying them as probationers. [85] The court noted that at the time of the judge's actions, no appellate court had interpreted the phrase "in addition to other conditions" in the relevant statute, although one of the judge's orders regarding a haircut had subsequently been reversed. [86] The court did hold that "where the law is clear on its face, a judge who repeatedly imposes punishment not provided for by law is subject to discipline." [87]

Several tests for determining when legal error constitutes judicial misconduct have been adopted in California. In one case, the Supreme Court of California held that a judge's view that he had discretion to curtail a deputy district attorney's

cross-examination had discretion to do so "had at least enough merit to prevent the holding of it from ***1263** constituting misconduct." [88] The California Commission on Judicial Performance dismissed formal charges it had brought against an appellate judge for failing to follow the law after finding that the judge's argument was not "so far-fetched as to be untenable." [89]

Taking a different approach in Oberholzer v. Commission on Judicial Performance, [90] the court declined to debate whether a case in which a judge had dismissed criminal charges when the prosecution refused to proceed was distinguishable from a previous case in which his dismissal under similar circumstances had been reversed. Instead, the court focused on whether there were "additional factors that demonstrate more than legal error, alone." [91] The court stated that the critical inquiry was whether the judge's action "clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty." [92]

Pattern of Legal Error

Although there are cases in which misconduct has been found based on one erroneous decision, [93] most cases in which judicial error was elevated to the level of judicial misconduct involved more than one example of legal error, and a pattern is one of the identified exceptions to the "mere legal error" rule. Judges have been sanctioned for patterns of failing to advise defendants of their rights (both statutory and constitutional) during criminal proceedings; [94] imposing sentences in ***1264** excess of statutory authority; [95] accepting guilty pleas using a form that did not comply with statutory requirements; [96] holding trials in absentia; [97] violating procedural requirements when conducting arraignments; [98] disregard of and indifference to fact or law in criminal and juvenile cases; [99] illegally incarcerating individuals in non-criminal matters to satisfy a civil fine; [100] accepting guilty pleas without obtaining proper written plea statements; [101] a practice of stating, for the record, that defendants had waived their rights to have a speedy preliminary examination or timely trial without obtaining the defendants' personal waivers of these rights; [102] requiring pro se defendants who requested jury trials to answer an in-court "jury trial roll call" once a week and to discuss plea bargains with the prosecutor; [103] and failing to advise ***1265** litigants in family court cases of their statutory rights to counsel, a hearing, and the assistance of counsel. [104] Of course, because those cases involved more than one instance of legal error, whether a single example of the same error would be considered egregious enough to justify sanction is not clear. [105] Moreover, none of the cases discuss how many errors are required for a finding of a pattern.

Furthermore, the Supreme Court of Louisiana held that judicial misconduct can be established by a pattern of repeated legal error even if the errors are not necessarily the same. [106] The court found such a pattern in In re Fuselier. [107] The pattern in that case involved three distinct types of legal error--abuse of the contempt power, conducting arraignments and accepting guilty pleas with no prosecutor present, and establishing a worthless checks program that did not meet statutory requirements. The court stated that the errors were not egregious or made in bad faith but that together, they were part of the same pattern or practice of failing to follow and apply the law. [108]

Decisions Made in Bad Faith

The presence of bad faith can render an exercise of legal judgment judicial misconduct. "Bad faith" in this context means "acts within the lawful power of a judge which nevertheless are committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties." [109] Even just a single error can lead to a finding of misconduct if the judge was acting in bad faith or intentionally failed to follow the law. [110]

For example, if a judge acts out of pique or to exact revenge, the judge's decision loses the protection of the "mere legal error" rule. Thus, a judge's sentence--usually unreviewable by a conduct commission -- ***1266** becomes the basis for a sanction if a judge imposes an unusually severe sentence on a defendant who refused the standard plea bargain [111] or demanded a jury trial [112] or if a judge imposed a higher than usual traffic fine to retaliate against a former employer. [113]

Similarly, a judge's bail decision becomes reviewable in discipline proceedings if the judge acts out of bias or revenge. In In re King, [114] the Massachusetts Commission on Judicial Conduct found that Judge Paul H. King, brother of Governor Edward J. King, had set unusually high bail for four black defendants shortly after learning that large numbers of black voters in Boston voted for his brother's opponent in the 1982 gubernatorial primary election, announcing to a clerk "[t]hat's what blacks get for voting against my brother." [115]

The judge argued that the commission could not consider his bail decisions because they were based on the exercise of his legal judgment and reviewable on appeal. Acknowledging that "[t]he Judge is correct that, generally, judges are immune from sanctions based solely on appealable errors of law or abuses of discretion," the court held:

> In this case, the implication of the Judge's argument is that a judge can make a single judicial decision for expressly racist and vindictive reasons and, so long as he does not make a habit of it, neither the Commission nor this court (outside of the usual avenues of appeal) can respond to that action. That is an implication that we will not countenance. It may be that the defendants in these cases had valid grounds on which to challenge the Judge's decisions as to the amount of bail. It does not follow, however, that there was no judicial misconduct in the Judge's setting the amount of their bail. [116]

***1267** Other bad faith abuses of the bail power have also led to discipline. [117] The New York State Commission on Judicial Conduct sanctioned a judge for misusing bail to attempt to coerce guilty pleas in three cases. [118] For example, in one case, when a defense attorney in one case declined the court's plea offer, the judge set bail at $500, although the prosecution was silent on bail. When the attorney asked why the judge was setting bail, she replied, "Because the way I see it is because he won't plea. That's why." [119] The commission found that the judge's "statements during the proceedings convey the explicit message that she was using bail as a coercive tactic when defendants appeared reluctant to accept the plea that was offered." [120]

***1268** An intentional failure to follow the law, even with a benign motive, constitutes bad faith and consequently judicial misconduct. In In re LaBelle, [121] the Court of Appeals of New York sanctioned a judge for failing to set bail for defendants in twenty-four cases although he knew that the law required that bail be set. Nine of those cases involved defendants who were homeless and in many cases suffering from the effects of drug or alcohol abuse, and the judge indicated that he did not set bail because, based on his knowledge of the defendants and in some cases pursuant to their explicit requests, he believed that they preferred to remain in jail and were more comfortable, safer, and better cared for there than if they were returned to the streets. Conceding it could not "find fault with these concerns," the court

concluded that "they do not justify petitioner's failure to abide by the statutory requirement that he at least set bail, if only in a nominal amount." [122]

Similarly, in In re Duckman, the judge explained that he had dismissed cases "in the interests of justice, using the guise of facial insufficiency" to dispose of a case when he "thought it was right to do it." [123] However, the judge had not given the prosecution notice, an opportunity to be heard, or an opportunity to redraft charges and had not required written motions, or, in the case of adjournments in contemplation of dismissal, the consent of the prosecutor.

The Court of Appeals of New York concluded that what was significant was both that the judge had dismissed the cases in knowing disregard of the law and the abusive, intemperate behavior he manifested while dismissing the cases. [124] The court emphasized:

> This matter does not involve "second-guessing" the adjudicative work of Judges, nor does it open a new avenue for Commission intrusion into that work . . . . Here the issue is not whether petitioner's decisions were right or wrong on the merits, but rather repeated, knowing disregard of the law to reach a result and courtroom conduct proscribed by the rules governing judicial behavior. [125] ***1269** The interesting feature of the Duckman case was the question about judicial independence raised by the way Judge Duckman came to the commission's attention and his ultimate removal from office. As the court described, "[t]he investigation was triggered not by appeals or complaints of wronged litigants or lawyers, but by a firestorm of public criticism generated by a separate tragedy." [126] Three weeks after the judge had released on bail a defendant charged with stalking his former girlfriend, the defendant had located the former girlfriend, shot her, and then shot himself. The incident had produced "lurid newspaper coverage" and calls for the judge's removal by political leaders. [127] However, as the court noted, the commission had found that the judge's bail decision was "a proper exercise of judicial discretion, not a basis for discipline" and dismissed the complaints against him arising from that case, instead proceeding on other conduct that came to light. [128]

The court acknowledged its concern with the threat to judicial independence "posed by unwarranted criticism or the targeting of Judges" and noted that "[j]udges must remain free to render unpopular decisions that they believe are required by law." [129] However, the court concluded:

> Valid and vital though these concerns surely are, the difficult issue that confronts us in this matter is how to sanction the serious misconduct--now fully documented before us--that the firestorm has exposed. . . . We are satisfied that in this particular case removal, rather than censure, does not imperil the independence of the judiciary. Indeed, on the merits of this case, the judiciary, the Bar, and the public are better served when an established course of misconduct is appropriately redressed and an unfit incumbent is removed from the Bench. [130]

Even the two dissenting judges did not claim that the judge should not be sanctioned at all, but argued censure was sufficient. The dissents argued that a removal implied

> that Judges whose rulings displease the political powers that be may be subjected to a modern-day witch hunt in which their records are combed for indiscretions, their peccadillos strung together to

make out ***1270** a "substantial record" of misconduct and their judicial "sins" punished with the ultimate sanction of removal from office. [131]

Egregious Legal Errors

"Egregious" legal errors have been identified as a type of error that justifies disciplinary as well as appellate review. [132] "Egregious" implies something different than bad faith or a pattern of error as those are listed as separate grounds for departing from the mere legal error rule. Although "egregious" is a subjective term, the most obvious example of an egregious error is a denial of constitutional rights.

The Supreme Court of Louisiana adopted egregious legal error as one of the exceptions to its general rule that legal error is not sanctionable, stating that even a single instance of serious legal error, particularly one involving the denial to individuals of their basic or fundamental rights, may amount to judicial misconduct. [133] The court found egregious legal error in In re Aucoin. [134] In that case, the court held that a disciplinary penalty was appropriate for a judge who had, among other misconduct, ordered "instanter trials" in criminal neglect of family cases immediately after the defendants pleaded not guilty. Agreeing with the Judiciary Commission finding that the judge's misconduct constituted egregious legal error, the court concluded that the judge had "failed to comply with the law and disregarded the right of the accused to present a defense, as well as the basic tenets of due process." [135] (Of course, as Aucoin involved eighteen cases, it might also fall within the pattern of legal error exception.)

There are judicial discipline decisions in which legal error in one or two criminal cases was egregious enough to justify discipline (although the term "egregious" was not necessarily used). Those errors included finding a defendant guilty without a guilty plea or trial, [136] revoking a ***1271** defendant's probation without the defendant's attorney being present, [137] accepting a defendant's guilty plea without an attorney present and adjudicating a criminal matter for which there was no formal case opened, [138] sentencing a defendant under the wrong statute, [139] failing to follow proper procedures when a defendant failed to pay a fine, [140] refusing to allow a self-represented defendant to cross-examine a police officer in a trial on a speeding ticket, [141] knowingly convicting a defendant of an offense that had not been charged and was not a lesser included offense, [142] refusing to set appeal bonds for misdemeanor defendants when clearly obligated by law to do so, [143] issuing bench warrants for the arrests of misdemeanor defendants when their attorneys had been late even though the defendants themselves had been in court, [144] forcing a defendant to enter a plea of guilty in the absence of his counsel, [145] ***1272** using the criminal process to collect a civil debt, [146] and detaining a juvenile for nearly six weeks before he had the assistance of counsel and without taking any evidence, [147] and twice convicting a defendant in the defendant's absence and without a guilty plea. [148]

Findings of judicial misconduct have also been made where a judge conducted a single civil case in a manner that departed completely from the usual procedures required by the adversary system. For example, the Supreme Court of Louisiana found that a judge had committed an egregious legal error by rendering a default judgment against a defendant in a small claims case without serving the defendant with notice, convening a hearing, or receiving competent evidence from the plaintiff to make a prima facie case. [149]

Similarly, the California Commission on Judicial Performance sanctioned a judge for denying due process in a civil trial. [150] Without stating that he was going to follow an alternative procedure nor offering the parties a traditional trial if they wanted one, the judge simply asked the parties to tell him what the case was about. After the plaintiff spoke, the defendant's attorney gave a version of his opening statement, and the defendant made a statement. The judge then alternated asking the parties questions; no one was placed under oath. After questioning the plaintiff and the defendant, the judge asked if either of them had anything else to add and told them that he was taking the case under submission. He asked the defendant's attorney to prepare a statement of decision and judgment and subsequently signed the document prepared in favor of the defendant.

The judge conceded that he was wrong to conduct the trial the way he did but argued that this was merely legal error, not ethical misconduct, and thus not a ground for discipline. Rejecting that argument, the commission noted that "[n]o legal question was presented ***1273** to the parties or briefed. Rather, [the judge] proceeded as he was wont, apparently focused on his vision of efficiency with little regard for the values that underlie the usual procedures for presenting evidence and cross-examining witnesses." [151] The commission noted the masters' finding that "no judge, much less a judge with [his] experience and intelligence, would reasonably believe that in proceeding in this truncated way that he was affording the parties the trial they were entitled to." [152]

A "parody of legal procedure" conducted by a state judge led the United States Court of Appeals for the Seventh Circuit to refer the judge to the Illinois Judicial Inquiry Board after vacating an injunction entered by the judge (the case had been removed to federal court). [153] The court found that the state court injunctive proceeding had "violated so many rules of Illinois law--not to mention the due process clause of the fourteenth amendment--that it is not worth reciting them." [154] As part of an FBI undercover investigation into the use of video poker machines for illegal gambling, Bonds Robinson, a special agent of the Illinois Liquor Control Commission, was soliciting bribes from Thomas Venezia, who ran a vending and amusement business. Venezia filed a petition requesting injunctive relief that was heard by Judge James Radcliffe.

Judge Radcliffe permitted Venezia's attorney, Amiel Cueto, to ask Robinson questions about the confidential FBI investigation. Without making any findings of fact or conclusions of law, the judge then enjoined Robinson from extorting bribes from Venezia or unlawfully seizing his video poker machines even though Robinson had not been served with summons or a copy of the petition and had not been given an opportunity to consult with an attorney, present witnesses, ask questions, or say anything in his own behalf. Venezia and his company were eventually convicted of racketeering, illegal gambling, and conspiracy arising out of the operation of the illegal gambling business, while Cueto was eventually convicted of conspiracy to defraud the United States and obstruction of justice for his conduct throughout the investigation of Venezia, including the petition filed against Robinson. [155]

***1274** Based on a stipulation of facts and joint recommendation by the Judicial Inquiry Board and Judge Radcliffe, the Illinois Courts Commission suspended him for three months without pay for the way he conducted the proceedings. [156] Even though it noted there was no evidence that the judge had an improper motive, the commission concluded that "even the most broad assessment of respondent's failure to observe basic due process in conducting the hearing, causes us to conclude his conduct undermined confidence in the integrity and impartiality of the judiciary." The commission also stated that "while the conduct was confined to a single hearing in a single case," it "was egregious and deserving of discipline." [157] The court, however, reassured "busy and dedicated trial judges" that they did not need to fear disciplinary review of their decisions.

> This is not a case of a judge having a bad day or committing errors in judgment, or issuing an ex parte temporary restraining order later determined to have been improvidently granted. This is not a

> case where appellate review would have sufficed or been the more appropriate procedure to address respondent's conduct. This is a case where even though Robinson was made a party to the litigation and was present in respondent's court, Robinson was stripped of the right to notice and his right to be heard. Applicable law was totally ignored. [158]

One member of the commission dissented, arguing that the matter was completely outside the commission's jurisdiction. The dissent stated, "What Judge Radcliffe lacked was the prescience to divine that Robinson, in fact, was a legitimate federal mole wearing a wire, attempting to obtain evidence against Cueto and Venezia." [159]

What the dissent overlooks is that the judge did not need prescience to know what procedures should be followed and that in an adversarial system the due process procedures the judge ignored are designed to protect litigants from a judge's lack of infallibility. The dissent's argument displays an error inherent in an automatic, unquestioning application of the "mere legal error" doctrine. A decision in a single case--entering an ex parte order that awarded a father temporary custody of a minor child without a petition being filed, evidence being taken, or an official court file being established--led to sanction for a ***1275** Mississippi judge. [160] The judge's actions violated several statutes, and her order was eventually vacated by a different judge. The court noted it was convinced that the judge's actions were not taken in bad faith but emphasized that through her actions, the proper parent was deprived of the custody of a minor child for two and one-half months and had to incur attorneys fees in excess of $13,000 to have custody restored. Stressing that the exercise of judicial discretion is a very appropriate duty of a judge, the court stated it was not implying by its decision to sanction the judge

> that our learned judges are subjecting themselves to judicial performance complaints in exercising judicial discretion, or even when there is a subsequent determination on appellate review that there has been an abuse of judicial discretion. Judicial complaints are not the appropriate vehicle to test a possible abuse of judicial discretion. This case is not about abuse of judicial discretion. This case is about clear violations of our judicial canons and our statutes. [161]

Contempt

Although courts and commissions are generally reluctant to second-guess a judge's decision to control the courtroom through use of the contempt power, [162] failure to adhere to proper procedures when exercising the contempt power is cognizable in the judicial discipline process given the liberty interests at stake. [163]

***1276** For example, the Supreme Court of Florida sanctioned a judge for abuse of the contempt power in In re Perry. [164] After the judge had cautioned six defendants with suspended licenses not to drive, they were arrested when they drove away from the courthouse and were brought back to the judge, who was waiting to hold them in contempt of court for driving with a suspended license. One of the defendants was unable to post bond (which the judge had set at $20,000) and, as a result, was incarcerated for twenty-six days.

The court held that it was clear that the judge had failed to follow the statutory procedures for indirect criminal contempt, emphasizing that it did not condone the defendants' conduct. [165] The court rejected the judge's contention that his alleged transgressions were nothing more than errors of law that should not be subject to disciplinary proceedings. Acknowledging that "one of the most important and essential powers of a court is the authority to protect itself against

those who disregard its dignity and authority or disobey its orders," the court concluded that the contempt power is "a very awesome power" and "one that should never be abused." [166]

> [B]ecause trial judges exercise their power of criminal contempt to punish, it is extremely important that they protect an offender's due process rights, particularly when the punishment results in the ***1277** imprisonment of the offender. As such, it is critical that the exercise of this contempt power never be used by a judge in a fit of anger, in an arbitrary manner, or for the judge's own sense of justice. . . . It is also extremely important to recognize that this discretionary power of criminal contempt is not broad or unregulated. [167]

In another case involving abuse of the contempt power, the Supreme Court of Nevada held that the Commission on Judicial Discipline had not functioned as an appellate body when it concluded that a judge's long-standing abuse of the contempt power was sanctionable misconduct. [168] The court noted the commission's finding that the judge's contempt rulings on eight separate occasions resulted from his "inaccurate perception of his role as a judge, and from his unwillingness to tolerate actions by others which are not in harmony with his apparent belief that those who do not meet or respond to his demands and expectations are subject to imprisonment and punishment under the court's contempt power." [169]

The court also emphasized that the judge "was an experienced judge who continued to ignore binding precedent reversing his contempt rulings and emphasizing the importance of a district court's strict adherence to [statutory provisions governing contempt]." [170] Other cases involving abuse of the contempt power also note that the judge knew or should have known what the correct procedures were due to the judge's experience, training, or available reference works or checklists. [171] Thus, these cases do not involve hapless judges unfairly sanctioned for inadvertent legal errors attributable to human fallibility.

Provisions Defining the Difference

In addition to case law, efforts to describe the distinction between legal error and judicial misconduct can be found in state codes of judicial conduct and rules governing conduct commissions.

***1278** Some of the measures limit the application of the code of judicial conduct, which is the starting point for findings of judicial misconduct. For example, the Arizona Code of Judicial Conduct provides, in the commentary to Canon 1, that, "A judicial decision or administrative act later determined to be incorrect as a matter of law or as an abuse of discretion is not a violation of this code unless done repeatedly or intentionally." [172] Similarly, Commentary to Canon 1 of the Kentucky Code of Judicial Conduct states, "This Code is intended to apply to every aspect of judicial behavior except purely legal decisions made in good faith in the performance of judicial duties. Such decisions are subject to judicial review." [173] The reporter's notes to Canon 3B(2) of the Vermont Code of Judicial Conduct explain that, "This section, like Section 2A, is not intended to make a judge's error of law the basis for discipline. . . . To show lack of faithfulness to the law or lack of professional competence, a pattern of decisions willfully or blatantly ignoring or misstating established legal principles would be necessary." [174]

Other definitions of the distinction between judicial misconduct and judicial error depend on limits to the role of judicial conduct commissions. For example, a comment to Canon 1 of the Wisconsin Code of Judicial Conduct notes that the statute creating the Judicial Commission states that "[t]he commission may not function as an appellate court to

review the decisions of a court or judge or to exercise superintending or administrative control over determinations of courts or judges." The comment emphasizes that "[i]t is important to remember this concept as one interprets this chapter, particularly in light of the ***1279** practice of some groups or individuals to encourage dissatisfied litigants to file simultaneous appeals and judicial conduct complaints." [175]

Many states have a provision in their rules or enabling provisions, similar to that found in Rule 9B of the Arkansas Judicial Discipline and Disability Commission, that states, "[i]n the absence of fraud, corrupt motive or bad faith, the Commission shall not take action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he understands it. Claims of error shall be considered only in appeals from court proceedings." [176]

*1280 Conclusion

The primary responsibility for protecting judicial independence from the threat of unacceptable discipline lies with the judicial conduct commissions as they screen complaints received about a judge's decision, dismissing those that are more properly left to the appellate authorities. The case law does not support any suggestion that judges should fear scrutiny by the judicial conduct commissions when they are faced with making an unpopular decision or one in an unsettled area of the law. To avoid sanction for legal error, judges do not have to worry about avoiding mere oversights or misreadings of the law but only need to comply with clear due process requirements and avoid bullying and patently unfair conduct. That the possibility of discipline for legal error may induce those types of second thoughts before judicial decision-making is not a threat to judicial independence.

The commissions' vigilance in dismissing the many complaints outside their jurisdiction results in very few state supreme court decisions rejecting sanction recommendations based on the "mere legal error" rule, and the rule is usually announced in the course of a decision in which an exception to the rule is applied to allow for sanction. The rule allows for the protection of judicial independence while the many exceptions allow the commissions and reviewing courts to hold judges accountable for decisions that are clearly contrary to law, that were reached without following the procedures that confer legitimacy and credence upon judicial actions, that represent an exercise of discretion motivated by bad faith, or that reflect repeated legal error that cannot be attributed to an honest mistake.

Footnotes

a1 Director of the Center for Judicial Ethics of the American Judicature Society.

1 Each of the fifty states and the District of Columbia has established a judicial conduct organization charged with investigating complaints against judicial officers. In most states, the judicial conduct organization has been established by a provision in the state constitution; in the other states, the judicial conduct organization has been established by a court rule or by statute. Depending on the state, the judicial conduct organization is called a commission, board, council, court, or committee, and is described by terms such as inquiry, discipline, qualifications, disability, performance, review, tenure, retirement, removal, responsibility, standards, advisory, fitness, investigation, or supervisory. This paper will use the general term "judicial conduct commission" to describe all fifty-one organizations.

2 Annual Report of the Tex. State Comm'n on Judicial Conduct (1999).

3 Annual Report of the Kan. Comm'n on Judicial Qualifications.

4 Model Code of Judicial Conduct Canon 2A (1990). The American Bar Association adopted the Model Code of Judicial Conduct in 1972 and revised it in 1990. Forty-nine states, the U.S. Judicial Conference, and the District of Columbia have adopted codes based on (but not identical to) either the 1972 or 1990 model codes. (Montana has rules of conduct for judges, but they are not based on either model code.)

5 Model Code of Judicial Conduct Canon 3B(2).

6 Id. at Canon 3B(7).

7 In re Laster, 274 N.W.2d 742, 745 (Mich. 1979) (public reprimand for judge who granted large number of bond remissions originally ordered forfeited by other judges). See also In re Lichtenstein, 685 P.2d 204, 209 (Colo. 1984).

8 In re Curda, 49 P.3d 255, 261 (Alaska 2002).

9 Id.

10 In re Schenck, 870 P.2d 185 (Or. 1993).

11 Laster, 274 N.W.2d at 745. See also In re Lichtenstein, 685 P.2d 204, 209 (Colo. 1984).

12 Harrod v. Ill. Courts Comm'n, 372 N.E.2d 53, 65 (Ill. 1977).

13 Schenck, 870 P.2d at 195 (rejecting judge's argument that his denial of a motion to disqualify was challengeable on mandamus or on appeal, but not sanctionable under the code of judicial conduct).

14 In re Hammermaster, 985 P.2d 924, 936 (Wash. 1999).

15 Id at 935.

16 McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders, 264 F.3d 52, 65 (D.C. Cir. 2001).

17 To ameliorate concerns that the very nature of judicial discipline for legal error involves viewing a judge's "actions in the cool light of after-the-fact reflection by way perhaps of second-guessing her judicial actions taken in what she perceived to be an emergency situation," the Supreme Court of Mississippi noted that a sitting chancellor had presided over the fact-finding hearing of the Commission on Judicial Performance, that the Commission meeting to consider the case was presided over by a sitting circuit judge, and two county court judges, a chancellor, and one other circuit judge were also present and unanimously voted to find misconduct. See Miss. Comm'n on Judicial Performance v. Perdue, 853 So. 2d 85, 97 (Miss. 2003).

18 In In re Seraphim, 294 N.W.2d 485 (Wis. 1980), the Supreme Court of Wisconsin rejected the contrary argument and stated, "The fact that none of the cases over which respondent presided were reversed by this court because of judicial misconduct does not mean that no misconduct occurred or that this court

condoned that which did occur. It means only that this court found no judicial misconduct that had so seriously affected the trial as to warrant reversal." Id. at 500.

19 Model Code of Judicial Conduct Canon 3B(4) (1990). See, e.g., In re Jenkins, 503 N.W.2d 425 (Iowa 1993) (public reprimand for ten separate instances of intemperate behavior; the Supreme Court of Iowa had previously twice admonished the judge in its opinions on appeal from his decisions and had once reversed him because of his intemperate actions); In re O'Dea, 622 A.2d 507 (Vt. 1993) (rejecting judge's argument that Judicial Conduct Board was reviewing judicial decision-making by considering the charge that he denied a litigant her hearing rights and concluding that Board findings went to a lack of the attributes such as patience and courtesy, not incorrect judicial decision-making).

20 985 P.2d 924 (Wash. 1999) (censure and six-month suspension without pay).

21 Id. at 935.

22 Id.

23 Id. at 936.

24 McBryde, 264 F.3d at 67.

25 See id.

26 Complaints against federal judges are filed under the Judicial Conduct and Disability Act of 1980. See 28 U.S.C. §372(c).

27 McBryde, 264 F.3d at 68.

28 Id. The court described one instance in which the judge had ordered a lawyer to attend a reading comprehension course when she failed to have her client attend a settlement conference as required by the judge's standard pretrial order. The court noted:
Appeal is a most improbable avenue of redress for someone like the hapless counsel bludgeoned into taking reading comprehension courses and into filing demeaning affidavits, all completely marginal to the case on which she was working. Possibly she could have secured review by defying his orders, risking contempt and prison.
Id. at 67-68.

29 Id.

30 Van Voorhis, Decision and Order (Cal. Comm'n on Judicial Performance Feb. 27, 2003) (removal for eleven instances of improper courtroom demeanor), available at http://cjp.ca.gov/pubdisc.htm, petition for review denied, available at http://www.courtinfo.ca.gov/courts/supreme/.

31 The masters had found that the prosecutor's attempt to have a police officer describe the horizontal gaze nystagmus test was reasonable. The incident before Judge Van Voorhis took place in 1999, and in 1995, the California Court of Appeals had held that the gaze nystagmus test was admissible as a basis for an officer's opinion that a defendant was driving under influence of alcohol without

requiring expert testimony. See People v. Joehnk, 42 Cal. Rptr. 2d 6 (Cal. Ct. App. 1995).

32 Van Voorhis. The judge began by asking, "Now we have opened the door to something that really you have no intention of completing. Do we leave the jury with these half-truths?" The judge disparaged the prosecutor's case by noting that although the officer had seen "a person demonstrate some sort of symptom," that did not necessarily connect it to alcohol, continuing "probably everybody she has ever arrested has a smaller finger on the end of their hand. That doesn't mean that everybody with a small finger is a drunk." When the prosecutor attempted to move the proceedings along, the judge responded, "That really doesn't solve the problem completely because you went down a road that you could not complete and now this jury has heard about gaze nystagmus, and they are supposed to wonder what it all means." After the prosecutor asked to approach the bench, the judge, "with a smirk on his face," replied in a condescending and mocking tone, "And what would you tell me up here?" The prosecutor replied that she had questions for the court, and the judge told her "ask me now." The judge then conducted a lengthy colloquy critical of the prosecutor in which he questioned the prosecutor's motives for seeking to introduce the evidence, ridiculed her perspective, and threatened to declare a mistrial if she continued. The masters found that the judge's last comments in the colloquy were made in a "sing-song, sarcastic, and very condescending tone of voice." The commission adopted the masters' finding that the "judge's statements here could not have been meant for any purpose other than to deliberately ridicule [the deputy district attorney] and prejudice her case in front of the jury" and, therefore, the judge made his comments "for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties)."

33 Id at 12.

34 See, e.g., Cahill, Majority Decision of Commission Dismissing Charges (Md. Comm'n on Judicial Disabilities 1996) (finding that nothing a judge had said during the sentencing of a husband for the murder of his wife rose to the level of sanctionable conduct); Statement of the Supreme Court of New Hampshire Committee on Judicial Conduct Relating to Complaints Against Judge William J. O'Neil (December 22, 1993) (finding judge's remarks at a sentencing hearing for a man charged with assaulting his estranged wife did not reflect gender bias).

35 685 P.2d 204 (Colo. 1984).

36 Id. at 206. The judge stated:
The Court finds that his mental state, his mental and emotional condition, combined with the sudden heat of passion caused by a series of highly provoking acts on the part of the victim of leaving him without any warning; in fact, based on the testimony that the Court has heard, in a sense deceiving him as to her intentions by being extremely loving and caring up to and through the morning that she left the family home with the full intention of obtaining a divorce and proceeding with a separation from him without even giving him any knowledge of her whereabouts or that of their son, the Court finds that this affected the Defendant sufficiently so that it excited an irresistible passion as it would in any reasonable person under the circumstances and, consequently, would warrant a sentence under the extraordinary mitigating terms of the statute.

Id.

37 See People v. District Court of the City & County of Denver, 673 P.2d 991 (Colo. 1983).

38 See Colo. Rev. Stat. §18-1-105(7) (1983) (repealed).

39 Lichtenstein, 685 P.2d at 209.

40 See In re Hocking, 546 N.W.2d 234 (Mich. 1996). The court did suspend the judge for three days without pay for intemperate and abusive conduct toward an attorney.

41 See id. at 239.

42 In addressing what he felt was the defendant's lack of culpability, as compared to other offenses and offenders, the judge had stated:
The fact that the victim agreed to the Defendant's 2:00 a.m., Sunday morning visit is a mitigating circumstance, again with regard to the presence of an evil state of mind on behalf of the Defendant. This is not a perfect world, but as common sense tells me that when a man calls a woman at 2:00 a.m. and says he wants to come over and talk and he's--that's accepted, a reasonable person, whether you want to shake your head or not, Ms. Maas [the prosecuting attorney], I haven't been living in a shell. A reasonable person understands that means certain things. They may be wrong.
Id.

43 Id.

44 Id. at 240.

45 Id.

46 Id.

47 Id. (citations omitted).

48 See id.

49 See id. at 241.

50 See Gaeta, Order, (N.J. Sup. Ct. May 7, 2003). The judge had waived his right to a hearing and consented to the reprimand. Unfortunately, the court's order does not describe the conduct, but a copy of the Committee's presentment is available at http:// www.judiciary.state.nj.us/pressrel/gaeta.pdf.

51 Gaeta, No. ACJC 2002-171, Presentment at 5-6 (N.J. Sup. Ct. Advisory Comm. on Judicial Conduct).

52 Id. at 9.

53 Id. at 10.

54 Id. at 11. However, the committee found that the judge's remarks did not reflect any underlying bias and that he was fully capable of avoiding any repetition of his conduct. See also Litynski (Minn. Board on Judicial Standards June 26,

1991) (public reprimand for inappropriately injecting personal, religious, and philosophical beliefs in the sentencing of a defendant on a charge of animal abandonment; according to a newspaper account, in fining the defendant $1 for abandoning five puppies in a trash bin in freezing weather, the judge stated, "God ordained the killing of animals. He himself killed animals to provide skins for Adam and Eve after they sinned. [Animal rights activists] are not concerned about the millions of unborn babies that are slaughtered each year, many of whom, like these puppies are tossed into dumpsters after being killed.")

55 See In re Daniels, 340 So. 2d 301 (La. 1976) (censure for giving the appearance of deciding the guilt or innocence of various defendants by flipping a coin); Turco, Stipulation (Wash. Comm'n on Judicial Conduct Oct. 2, 1992) (censure for a judge who had tossed a coin to decide a traffic infraction and entered a finding against the defendant when the defendant lost the coin toss). See also DeRose, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 13, 1979) (admonition for judge who had dismissed a case based on his decision, made in advance, to dismiss the first case to come before him upon his ascending the bench), available at http:// www.scjc.state.ny.us/determinations/d/de_rose.htm; Aaron (Cal. Comm'n on Judicial Performance July 8, 2002) (censure with agreement to resign for, among other misconduct, on numerous occasions, remanding defendants based on his "smell test" of the defendants' hair and/or his examination of their eyes), available at http://cjp.ca.gov/pubdisc.htm.

56 See In re Brown, 662 N.W.2d 733 (Mich. 2003) (censure for this and other misconduct). The judge was assigned to a divorce case in which one of the issues was the custody of two minor children. After the mother moved out of the state, custody was temporarily awarded to the maternal grandparents. On December 14, 2001, the maternal grandparents and the father, both with counsel, appeared before the judge for an evidentiary hearing to determine if the house purchased by the father was a suitable residence for the children and to confirm that the father had begun working a day shift so he could care for them. During the hearing, the attorney for the grandparents raised the issue of where the children would spend the Christmas holidays. The judge encouraged the parties to resolve the matter themselves, but when they were unable to agree, she told the parties it was nothing more than a coin flip. Although the grandparents' attorney and the father protested, the judge produced a coin, allowed the father to call heads or tails, and flipped it. The father called heads, which is the side of the coin that ended face up after the flip, and the judge ordered that the children would spend Christmas Eve with the father. See id.

57 In re Best, 719 So. 2d 432, 435 (La. 1998).

58 Id. at 435-36 (censure for this and other misconduct).

59 See Velasquez, Decision and Order (Cal. Comm'n on Judicial Performance Apr. 16, 1997) (censure for, among other misconduct, making it known publicly what specific sentences he would impose on DUI offenders); Tracy, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001) (publicly announcing and following a policy concerning the sentence he would impose in certain types of drunk-driving cases), available at http:// www.scjc.state.ny.us/determinations/t/tracy,_edward.htm.

60 See In re Whitney, 922 P.2d 868 (Cal. 1996) (censure for, among other misconduct, as a matter of routine practice, failing to consider probation or concurrent sentencing for defendants pleading guilty or no contest at arraignment).

61 Tracy, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001) available at www.scjc.state.ny.us/determinations/t/tracy,_edward.htm.

62 See Velasquez, Decision and Order Imposing Public Censure (Cal. Comm'n on Judicial Performance Apr. 16, 1997) (noting judge's policy for sentencing persons convicted of DUI had been adopted out of political considerations arising from the judge's dispute with other judges); Tracy, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001) (noting the expression of "a blanket 'policy' against drunk drivers may pander to popular sentiment that all such defendants should be treated harshly"), available at http://www.scjc.state.ny.us/Determinations/T/tracy,_edward.htm.

63 See, e.g, In re Justin, 577 N.W.2d 71 (Mich. 1998) (censure for judge who had assessed fines, fees, and costs in ordinance cases involving the City of Jackson in a way that reduced the city's revenues following a dispute involving pension benefits for court employees); Warnke, Hanna, Moseley, Evans (Tex. State Comm'n on Judicial Conduct June 25, 1996) (public admonitions for four judges who reduced virtually all traffic fines in their courts to $1 plus court costs to send a message to the county commissioners regarding the impropriety of treating courts as revenue-generating agencies).

64 In re Hill, 8 S.W.2d 578 (Mo. 2000).

65 Id. at 583.

66 Id. at 584 (suspension until the end of term for this and other misconduct). The court found that none of the judge's asserted justifications for the orders--"reducing his caseload, better controlling his docket, avoiding congestion in the courts, exercising his discretion over fine schedules and prisoner releases, and responding to public and aldermanic complaints about the amount of fines"--had any support in the record.

67 See Raphael v. State, 994 P.2d 1004 (Alaska 2000). I.W. had been subpoenaed to testify in the criminal trial of Wilfred Raphael, her former domestic companion who had been indicted for a series of serious attacks upon her. When she arrived in court on the day she was scheduled to give testimony, she was intoxicated. In an ex parte meeting, the assistant district attorney expressed concern to the judge that I.W. would either fail to appear a second time or would not be able to stay sober. After a brief hearing, the judge imprisoned I.W. for contempt. In reversing the defendant's conviction, the court concluded that the judge violated I.W.'s right to notice and a meaningful hearing by giving her no advance notice that she stood accused of contempt and questioning her while she was intoxicated. The court also held that the judge violated Raphael's due process rights and right to be present at every stage of his trial by holding the hearing ex parte and allowing the impression that I.W.'s freedom and continued custody of her children was contingent upon the nature of her testimony against him. Id.

68 See In re Curda, 49 P.3d 255 (Alaska 2002).

69 Id. at 261.

70 Id.

71 Id. The court stated that it was aware of "'no contested American case approving the disciplining of a judge for a single incident of good faith legal error when the judge acted without animus.'" Id. (quoting the judge's argument). That claim overlooks numerous cases. See discussion infra notes 132-61. Moreover, the commission in Curda was requesting a private reprimand, and it is quite possible that commissions in other states have privately reprimanded judges for single incidents of good faith legal error, but the court would not be aware of such actions.

72 487 A.2d 1158 (Me. 1985).

73 Id. at 1163.

74 Id.

75 In the case before it, the court held that the judge's decision to incarcerate a creditor was not obviously wrong, although it was judicial error, because there was confusion as to the remedies that were available to a judgment creditor. Id. at 1168-69. Similarly, the court concluded that the judge's decision to deny defendants' motions for stay of sentence pending appeal was not misconduct because there was some question whether anyone other than a superior court judge could stay the execution of a district court fine pending appeal. Id. at 1170.

76 705 So. 2d 172 (La. 1997).

77 See id. at 181.

78 See id.

79 Id.

80 Id. at 183. The court did acknowledge, in a footnote, that there was a decision from the Louisiana first circuit court of appeal that making church attendance a condition of probation violated the state and federal constitutions. See State v. Morgan, 459 So.2d 6 (La. Ct. App. 1984). Noting the judge's court was within the jurisdiction of the third circuit court of appeal, the court concluded, "although a trial court's decision may constitute legal error under the jurisprudence of the first circuit, this is irrelevant from the viewpoint of the trial judge, for it may not constitute legal error in the third circuit should the third circuit choose an interpretation different from its sister circuit." Quirk, 705 So. 2d at 181 n.17.
At least three times since the decision in Quirk, the court has found that standard to have been met and sanctioned a judge for legal error. See discussion of In re Aucoin, 767 So. 2d 30 (La. 2000) infra notes 134-35; In re Fuselier, 837 So. 2d 1257 (La. 2003) infra notes 107-08; In re Landry, 789 So. 2d 1271 (La. 2001) infra note 149.

81 See In re LaBelle, 591 N.E.2d 1156, 1161 (N.Y. 1992). The judge believed that the defendants were in need of a psychiatric examination to determine their fitness

to proceed, their behavior indicated that they could not be relied upon to attend such an examination, and there was no responsible person who could ensure that the defendants would attend. The judge had argued that he had discretion to confine a defendant without bail, either in jail or in a hospital, pending a psychiatric report. See id.

82 Id.

83 See In re Spencer, 798 N.E.2d 175, 183 (Ind. 2003).

84 Harrod v. Ill. Courts Comm'n, 372 N.E.2d 53, 66 (Ill. 1977).

85 The court issued a writ of mandamus against the members of the Courts Commission directing them to expunge the suspension order against the judge from their records "regardless of whether he believes the form of punishment will have a beneficial corrective influence." Id. at 65. See also State Comm'n on Judicial Conduct v. Gist, No. 3-88-252-CV, 1990 Tex. App. LEXIS 2729 (Tex. App. Ct. 1990) (voiding the public reprimand of a judge by the Texas Commission on Judicial Conduct for a sentencing practice involving back-dating because the legality of the sentencing practice had not yet been decided by the court of criminal appeals).

86 Harrod, 372 N.E.2d at 66. See People v. Dunn, 356 N.E.2d 1137 (Ill. App. Ct. 1976).

87 Harrod, 372 N.E. at 65.

88 Kennick v. Comm'n on Judicial Performance, 787 P.2d 591, 604 (Cal. 1990).

89 Kline, Decision and Order of Dismissal (Cal. Comm'n on Judicial Performance, Aug. 19, 1999) available at http://cjp.ca.gov./pubdisc.htm. In a dissent, the judge had refused to follow state supreme court precedent, arguing he could do so under an exception to the stare decisis principle.

90 975 P.2d 663 (Cal. 1999).

91 Id. at 680.

92 Id. (citations omitted). A concurring opinion disagreed with this approach, stating "[w]hen, as here, the Commission has no extrinsic evidence of bad faith or improper motive--no evidence, that is, apart from the nature of the ruling itself--the Commission generally should not pursue an investigation into, or impose discipline for, a legal ruling that has reasonably arguable merit." Id. at 682. (Werdegar, J. concurring).

93 See discussion infra notes 132-61.

94 See, e.g., Shannon, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001) (admonition for, among other misconduct, failing to advise defendants of right to assigned counsel and failing to assign counsel to eligible defendants charged with non-vehicle and traffic infractions as required by statute), available at http:// www.scjc.state.ny.us/determinations/s/shannon.htm; Henne, Decision and Order Imposing Public Censure (Cal. Comm'n on Judicial Performance Oct. 13, 1999) (censure for, among other misconduct, reinstating

and modifying the terms of probation for two defendants without advising probationers that they had the constitutional right in probation revocation proceedings to an attorney, a hearing, and to subpoena and examine witnesses); Pemrick, Determination (N.Y. State Comm'n on Judicial Conduct Dec. 22, 1999) (failing to advise defendants of constitutional and statutory rights), available at http:// www.scjc.state.ny.us/determinations/p/pemrick.htm; Cox, Determination (N.Y. State Comm'n on Judicial Conduct Dec. 30, 2002) (admonition for a non-lawyer town court justice who, in 18 cases, had re-sentenced to jail defendants who had not paid fines without holding a re-sentencing hearing or advising the defendants of their right to apply for such a hearing as required by statute), available at http://www.scjc.state.ny.us/determinations/c/cox.htm; Bauer, Determination (N.Y. State Comm'n on Judicial Conduct Mar. 30, 2004) (removal for, in addition to other misconduct, failing to advise defendants of the right to counsel and to take affirmative action to effectuate that right), available at http://www.scjc.state.ny.us/determinations/b/bauer.htm.

95 See Comm'n on Judicial Performance v. Neal, 774 So. 2d 414 (Miss. 2000) (public reprimand for, among other misconduct, imposing fines and sentences in excess of statutory authority); Reid, Determination (N.Y. State Comm'n on Judicial Conduct May 17, 2002) (censure for, among other misconduct, in 16 cases after accepting guilty pleas, imposing fines that were $20 to $70 in excess of the statutorily authorized maximum fine for the specific convictions), available at http:// www.scjc.state.ny.us/determinations/r/reid.htm; Bauer, Determination (N.Y. State Comm'n on Judicial Conduct Mar. 30, 2004) (removal for, in addition to other misconduct, imposing illegal sentences in four cases), available at http://www.scjc.state.ny.us/determinations/b/bauer.htm.

96 See In re Hammermaster, 985 P.2d 924 (Wash. 1999); Reid, Stipulation, Agreement, and Order of Admonishment (Wash. State Comm'n on Judicial Conduct Oct. 5, 2001) (admonition for, among other misconduct, a pattern or practice of accepting guilty pleas using forms that did not contain space for listing the elements of the crime or the factual basis for the plea, as required by statute), available at http://www.cjc.state.wa.us.

97 See In re Hammermaster, 985 P.2d 924 (Wash. 1999) (censure and six-months suspension for this and other misconduct).

98 See In re Holien, 612 N.W.2d 789 (Iowa 2000) (removal for this and other misconduct).

99 See In re Scott, 386 N.E.2d 218 (Mass. 1979) (public reprimand).

100 See In re Benoit, 487 A.2d 1158, 1166 (Me. 1985) (censure and suspension for this and other misconduct).

101 See In re Michels, 75 P.3d 950 (Wash. 2003) (censure and 120-day suspension for this and other misconduct).

102 See Roeder (Cal. Comm'n on Judicial Performance Dec. 16, 2003), available at http://cjp.ca.gov./pubdisc.htm.

103 In re Walsh, 587 S.E.2d 356, 357 (S.C. 2003) (removal for this and other misconduct).

104 See In re Reeves, 469 N.E.2d 1321 (N.Y. 1984) (removal for this and other misconduct).

105 See discussion infra notes 132-61.

106 See generally In re Quirk, 705 So. 2d 172, 178 (La. 1997).

107 837 So. 2d 1257 (La. 2003).

108 See id. at 1268.

109 Cannon v. Comm'n on Judicial Qualifications, 537 P.2d 898, 909 (Cal. 1975).

110 See Comm'n on Judicial Performance v. Lewis, 830 So. 2d 1138 (Miss. 2002) (public reprimand for ordering a handgun that had been seized from a minor forfeited to the court even after charges against the minor were dismissed in violation of a statute; the court found that a specific intent to use the powers of the judicial office to accomplish a purpose that the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith and gives the Commission on Judicial Performance jurisdiction); Judicial Inquiry and Review Comm'n v. Lewis, 568 S.E.2d 687 (Va. 2002) (censure for enforcing an order that the judge knew had been stayed by another court).

111 See Ryan v. Comm'n on Judicial Performance, 754 P.2d 724 (Cal. 1988) (removal for this and other misconduct).

112 See In re Cox, 680 N.E.2d 528 (Ind. 1997) (30-day suspension without pay for this and other misconduct).

113 See Lindell-Cloud, Determination (N.Y. Comm'n on Judicial Conduct July 14, 1995) (censure), available at http:// www.scjc.state.ny.us/determinations/l/lindell-cloud.htm.

114 568 N.E.2d 588 (Mass. 1991).

115 Id. at 594 (censure for this and other misconduct).

116 Id.

117 See, e.g., In re Perry, 641 So. 2d 366 (Fla. 1994) (holding that bonds of $10,000 for a traffic offense and $5,000 for a contempt offense were arbitrary, unreasonable, and designed to punish the defendants rather than to assure their presence for trial; judge was reprimanded for this and other misconduct, see discussion infra notes 164-67); In re Yengo, 371 A.2d 41 (N.J. 1977) (removal for, among other misconduct, using bail as an arbitrary weapon for harassment of defendants); McKevitt, Determination (N.Y. Comm'n on Judicial Conduct Aug. 8, 1996) (censure for refusing to set bail because he had been required to get out of bed to conduct the arraignment), available at http://www.scjc.state.ny.us/determinations/m/mckevitt1.htm; Jutkofsky, Determination (N.Y. State Comm'n on Judicial Conduct Dec. 24, 1985) (removal for, among other misconduct, threatening defendants with high bail and jail for minor offenses, coercing guilty pleas from defendants who were often unrepresented and, on occasion, youthful), available at http:// www.scjc.state.ny.us/determinations/j/jutkofsky.htm; Ellis,

Determination (N.Y. State Comm'n on Judicial Conduct July 14, 1982) (removal for among other misconduct, in 23 cases, abusing the bail process by deliberately incarcerating certain defendants for indefinite periods of time in order to coerce them to plead guilty; deliberately failing to appoint counsel for indigent defendants), available at http://www.scjc.state.ny.us/determinations/e/ellis,_anthony_(2). htm; Bauer, Determination (N.Y. State Comm'n on Judicial Conduct Mar. 30, 2004) (removal for, in addition to other misconduct, coercing guilty pleas by setting exorbitant, punitive bail), available at http:// www.scjc.state.ny.us/determinations/b/bauer.htm; Disciplinary Counsel v. O'Neill, No. 2004-0809, 2004 Ohio LEXIS 1965, at *1 (Ohio Sept. 7, 2004) (suspending judge from practice of law for two years, with one year stayed conditionally, for, in addition to other misconduct, forcing pleas from defendants by threatening to revoke or actually revoking their bonds because the defendants wanted to exercise their rights to refuse an offered plea and go to trial).

118 Recant, Determination (New York State Commission on Judicial Conduct Nov. 19, 2001) (censure, pursuant to agreement, for this and other misconduct), available at http:// www.scjc.state.ny.us/determinations/r/recant.htm.

119 Id.

120 Id. In a second case, the judge denied the defense attorney's oral motion to dismiss the complaint for facial insufficiency and asked whether his client wanted time served, noting the defendant had a warrant on which she could keep him in, and asked him if he wanted to be heard on bail. When the defense attorney responded, "You would hold my client in?" the judge replied, "Not if he pleads to the disorderly conduct, I won't." When the defendant refused to plead guilty, the judge set $500 bail on the warrant and $1 bail on the instant matter. In a third case in which the judge earlier in the day had issued a bench warrant and ordered bail forfeited when the defendant was not in court on time, the judge advised the defense attorney that the defendant had two choices: to "acknowledge responsibility" for his crime or she was "likely to increase his bail." When the attorney informed the court that the defendant was unable to pay the mandatory fine, the judge replied, "If he wants to fight it, that's fine. I'm telling you now, I'm likely to set bail. I'm giving you a heads up." Id.

121 591 N.E.2d 1156 (N.Y. 1992) (censure).

122 Id. at 1162.

123 In re Duckman, 699 N.E.2d 872, 875 (N.Y. 1998).

124 See id. at 874.

125 Id. at 881 n.7.

126 Id. at 880.

127 Id. at 881 (Titone, J., dissenting).

128 Id. at 880.

129 Id.

130 Id. at 880-81.

131 Id. at 882-82 (Titone, J., dissenting). See also id. at 884-88 (Bellacosa, J., dissenting).

132 The term apparently did not originate from a case but from a treatise. See Jeffrey Shaman, et al., Judicial Conduct and Ethics, §2.02 (3d ed. 1995).

133 See Quirk, 705 So. 2d at 178.

134 767 So. 2d 30 (La. 2000).

135 Id. at 33. (censure for this and other misconduct).

136 See, e.g., Henne, Decision and Order Imposing Public Censure (Cal. Comm'n on Judicial Performance Oct. 13, 1999) (censure for this and other misconduct); Comm'n on Judicial Performance v. Wells, 794 So. 2d 1030 (Miss. 2001) (public reprimand for convicting a defendant based on affidavits alone); Hise, Determination (N.Y. State Comm'n on Judicial Conduct May 17, 2002) (relying on the defendant's incriminating statements at arraignment to convict an unrepresented defendant and impose a jail sentence without a trial and without the defendant changing his plea to guilty or waiving his guaranteed right to a trial), available at http:// www.scjc.state.ny.us/determinations/h/hise.htm.

137 See EnEarl, Findings of Fact, Conclusions of Law and Imposition of Discipline (Nev. Comm'n on Judicial Discipline Sept. 18, 2003) (public reprimand), available at http://www.judicial.state.nv.us/enearldecision.htm.

138 See Delgado (Tex. State Comm'n on Judicial Conduct Apr. 12, 2001) (admonition for this and other misconduct).

139 See Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000) (public reprimand and fine for, among other misconduct, sentencing defendant under wrong statute and doing nothing to correct error); Office of Disciplinary Counsel v. Karto, 760 N.E.2d 412 (Ohio 2002) (six-month suspension for, among other misconduct, relying on an outdated statute book, incorrectly sentencing a juvenile); Driver (Tex. State Comm'n on Judicial Conduct Dec. 17, 1999) (ordered payment of fines for violation of ordinances after authorization for penalties had been repealed).

140 See, e.g., Nichols, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001) (committing defendant to jail after defendant stated that he was unable to pay $100 fine for traffic infraction and failing to advise defendant of his right to be resentenced), available at http:// www.scjc.state.ny.us/determinations/n/nichols.htm; In re Hamel, 668 N.E.2d 390 (N.Y. 1996) (removal for two incidents in which the judge improperly jailed individuals for their purported failure to pay fines and restitution obligations that he had imposed); In re Roberts, 689 N.E.2d 911 (N.Y. 1997) (removal for, in addition to other misconduct, directing the arrest and summarily ordering an individual to eighty-nine days in jail, without affording constitutional and procedural safeguards for failure to pay a mandatory $90 surcharge following her guilty plea to theft of services for a $1.50 cab fare); Bartie (Tex. State Comm'n on Judicial Conduct June 28, 2000) (among other misconduct, failing to conduct indigency hearing before

committing defendant to jail to pay off fine, failing to offer the options of paying fine in installments or performing community service in lieu of jail).

141 See Henne, Decision and Order Imposing Public Censure (Cal. Comm'n on Judicial Performance Oct. 13, 1999).

142 See In re Brown, 527 S.E.2d 651 (N.C. 2000).

143 See In re Vaughn, 462 S.E.2d 728 (Ga. 1995) (removal for this and other misconduct).

144 See id.

145 See id.

146 See Comm'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001) (removal for this and other misconduct).

147 See In re Benoit, 487 A.2d 1158, 1167 (Me. 1985).

148 Bauer, Determination (N.Y. State Comm'n on Judicial Conduct Mar. 30, 2004) (removal for this and other misconduct), available at http:// www.scjc.state.ny.us/ determinations/b/bauer.htm.

149 See In re Landry, 789 So. 2d 1271 (La. 2001) (six-month suspension without pay). See also Williams, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001) (admonition for, among other misconduct, holding a summary proceeding on a landlord's petition for eviction and back rent and signing the judgment without a hearing on contested issues or according pro se defendants full opportunity to be heard), available at http:// www.scjc.state.ny.us/determinations/w/williams,_edward_(1).htm.

150 See Broadman, Decision and Order (Cal. Comm'n on Judicial Performance Feb. 26, 1999) (admonition for this and other misconduct), available at http:// www.cjp.ca.gov./pubdisc.htm.

151 Id. at 4.

152 Id.

153 Venezia v. Robinson, 16 F.3d 209, 210 (7th Cir. 1994).

154 Id.

155 See United States v. Cueto, 151 F.3d 620 (7th Cir. 1998).

156 See Radcliffe, Order (Ill. Cts. Comm'n Aug. 23, 2001).

157 Id.

158 Id.

159 Id.

160 See Miss. Comm'n on Judicial Performance v. Perdue, 853 So. 2d 85 (Miss. 2003) (thirty-day suspension without pay).

161 Id. at 97.

162 See, Hinton v. Judicial Retirement and Removal Comm'n, 854 S.W.2d 756 (Ky. 1993) (setting aside a finding of misconduct and holding that, in light of judge's duty and the discretion to control the courtroom, the proper remedy was by appeal and the judicial exercise of contempt power cannot be subject to disciplinary proceeding).

163 See, e.g., Cannon v. Comm'n on Judicial Qualifications 537 P.2d 898 (Cal. 1975) (removal for, among other misconduct, completely ignoring proper procedures in punishing for a contempt committed in the immediate presence of a court; court rejected judge's argument that the Commission was seeking to hold the judge accountable for erroneous judicial rulings); In re Jefferson, 753 So. 2d 181 (La. 2000) (removal for, among other misconduct, abuse of contempt authority by failing to follow any of the procedures for punishment of contempt and imposing a sentence that far exceeded the legally permissible punishment); Comm'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001) (removal for, among other misconduct, holding court clerk in contempt without following due process); Teresi, Determination (N.Y. State Comm'n on Judicial Conduct Feb. 8, 2001) (censure, pursuant to agreement, for, in addition to other misconduct, finding both parties in a divorce case guilty of contempt and sentencing them to jail based on the other party's unsworn statements, without holding hearing required by law), available at http:// www.scjc.state.ny.us/ determinations/t/teresi.htm; Recant, Determination (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001) (censure, pursuant to agreement, for, in addition to other misconduct, holding two defendants in custody without complying with summary contempt procedures and excluding two Legal Aid Society attorneys from the courtroom without complying with the requirements of a summary contempt), available at http:// www.scjc.state.ny.us/determinations/r/ recant.htm.

164 641 So. 2d 366 (Fla. 1994).

165 See id. at 368. Similarly, the Indiana Commission on Judicial Qualifications has disciplined several judges for issuing ex parte change of custody orders without meeting statutory requirements. See, e.g., Spencer (Ind. Comm'n on Judicial Qualifications Dec. 28, 1999) (granting ex parte petition for change of custody without notice to the custodial father and failing to communicate with the Florida judge who had assumed jurisdiction). In addition, in response to the substantial number of complaints it was receiving about judge's granting ex parte temporary child custody petitions, the Commission issued an advisory opinion reminding judges to be "as cautious with the rights of the opposing party as with scrutinizing the merits of the petition." Ind. Comm. on Judicial Qualifications, Advisory Opinion 1-01 at 3, available at http://www.in.gov/ judiciary/admin/judqual/opinions.html. In the opinion, the commission stated it did not intend "to curtail the proper exercise of broad judicial discretion" nor to substitute its "judgments for that of a judge who finds on some rational basis that circumstances warrant emergency relief." Id. at 2. The commission did state it hoped "to improve and promote the integrity of our judiciary, and to help promote the public's confidence in the judiciary, by alerting judges, and

lawyers, to the stringent and imposing ethical duties judicial officers undertake when considering whether to affect custodial rights ex parte." Id.

166 Perry, 641 So. 2d at 368-69.

167 Id.

168 Goldman v. Nev. Comm'n on Judicial Discipline, 830 P.2d 107 (Nev. 1992).

169 Id. at 133.

170 Id.

171 See Cannon v. Comm'n on Judicial Qualifications, 537 P.2d 898, 909 (Cal. 1975) (noting when disciplining judge for contempt that judge was an experienced judge, with more than nine years on the bench and had at hand reference works that dealt with proper contempt procedures); Perry, 641 So. 2d at 369 (noting that all judges in Florida receive training on the appropriate procedures for applying their contempt powers and are provided with a checklist to follow in holding a defendant in contempt).

172 Ariz. Code of Judicial Conduct Canon 1 cmt.; see also Cal. Code of Judicial Ethics Canon 1 ("A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this Code."); Mass. Code of Judicial Conduct, Canon 1A cmt. ("A judicial decision or action determined by an appellate court to be incorrect either as a matter of law or as an abuse of discretion is not a violation of this Code unless the decision or action is committed knowingly and in bad faith.").

173 Ky. Code of Judicial Conduct.

174 Vt. Code of Judicial Conduct; see also R.I. Code of Judicial Conduct, Canon 1 ("This Code... is intended to apply to every aspect of judicial behavior except purely legal decisions. Legal decisions made in the course of judicial duty are subject solely to judicial review. The provisions of this Code are to be construed and applied to further that objective."); W. Va. Code of Judicial Conduct, Canon 2A cmt. ("Errors in finding facts or in interpreting or applying law are not violations of this canon unless such judicial determinations involve bad faith or are done willfully or deliberately."); Wis. Code of Judicial Conduct, Supreme Court Rule 60.02 ("This chapter applies to every aspect of judicial behavior except purely legal decisions. Legal decisions made in the course of judicial duty on the record are subject solely to judicial review.").

175 Wis. Code of Judicial Conduct SCR 60.02 cmt; see also Rules of the Mich. Judicial Tenure Comm'n R. 9.203 ("The commission may not function as an appellate court to review the decisions of the court or to exercise superintending or administrative control of the courts, except as that review is incident to a complaint of judicial misconduct. An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct."); R.I. Code of Judicial Conduct Canon 1 cmt. ("The role of the judicial conduct organizations like the Commission on Judicial Tenure and Discipline... is not that of an appellate court. The commission shall not function as an appellate court to review the decisions

of a court or judge or to exercise superintending or administrative control over determinations of courts or judges.")

176

Ark. Judicial Discipline & Disability Comm'n Rules R. 9B; see also Rules of the Ariz. Comm'n on Judicial Conduct R. 7 ("The commission shall not take action against a judge for making erroneous findings of fact or conclusions of law in the absence of fraud, corrupt motive, or bad faith on the judge's part, unless such findings or conclusions constitute such an abuse of discretion as to otherwise violate one of the grounds for discipline described in these rules or the code."); Colo. Rules of Judicial Discipline R. 5 ("In the absence of fraud, corrupt motive, bad faith, or any of the above grounds, the commission shall not take action against a judge for making erroneous findings of fact or legal conclusions which are subject to appellate review."); Reg. of Conn. State Agencies § 51-51k-4(h) ("Although complaints regarding issues which are subject to appellate review are not within the jurisdiction of the [Judicial Review] Council, any complaint which contains allegations of prohibited conduct separate from issues which are subject to appellate review shall be investigated as to such prohibited conduct only."); Rules of Proc. of the Ct. of the Judicial of the State of Del. R. 3(b)(3) ("The Chief Justice may decline to refer to the Committee, and may dismiss, sua sponte, any complaint which, upon its face, is (1) frivolous, (2) lacking in good faith, (3) based upon a litigant's disagreement with the ruling of a judge, or (4) is properly a matter subject to appellate review."); Rules of the Ky. Judicial Retirement and Removal Comm'n R. 4.020(2) ("Any erroneous decision made in good faith shall not be subject to the jurisdiction of the Commission."); Mass. Statutes, Ch. 211C §2(4) ("In the absence of fraud, corrupt motive, bad faith, or clear indication that the judge's conduct violates the code of judicial conduct, the commission shall not take action against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it. Commission proceedings shall not be a substitute for an appeal."); Rules of the Minn. Bd. on Judicial Standards R. 4C ("In the absence of fraud, corrupt motive or bad faith, the board shall not take action against a judge for making findings of fact, reaching a legal conclusion or applying the law as understood by the judge. Claims of error shall be left to the appellate process."); Rules of the Miss. Comm'n on Judicial Performance R. 2 ("In the absence of fraud, corrupt motive, or bad faith, the Commission shall not consider allegations against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it."); Rules of the Nev. Comm'n on Judicial Discipline R. 9 ("In the absence of fraud or bad faith occurring in the commission of an act constituting a ground for discipline set forth in Rule 11, the commission must take no action against a judge for making findings of fact, reaching a legal conclusion, expressing views of law or policy in a judicial opinion, or otherwise declaring or applying the law in the course of official duties. The commission has no jurisdiction to review or to base charges upon differences of opinion between judges as to matters of law or policy, or as to other issues committed to judicial or administrative discretion. Claims of error must be left to the appellate process."); Rules of the N.H. Sup. Ct. R. 39(9) (The Committee on Judicial Conduct "shall not consider complaints against a judge or master or referee related to his rulings. Such matters should be left to the appellate process.").

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American Board of Trial Advocates

OP-ED

ABOTA defends federal district court judge against unfair attacks by a presidential candidate

Judge adheres to rules of judicial ethics and is unable to respond directly to attacks from presidential candidate

By Charles H. Baumberger
National President

DALLAS (June 6, 2016) — The American Board of Trial Advocates (ABOTA) is an organization dedicated to the preservation of a fair and impartial judiciary and the right to trial by jury. Recently, we have seen highly publicized attacks by presidential candidate Donald J. Trump, who is a litigant in a case pending before Judge Gonzalo Curiel in Federal District Court in California.

These attacks include charges that Judge Curiel, who was born in Indiana, cannot be fair because of his Mexican heritage. Mr. Trump also described the judge as a "hater" because he issued multiple rulings against him.

Mr. Trump is represented by highly capable attorneys who can invoke a legal process if Mr. Trump truly believes any judge is acting unfairly. The legal mechanism of recusal is available to all litigants if either a conflict exists or if there is a question of impartiality. The fact that his counsel have not elected to ask for the recusal of Judge Curiel demonstrates the political nature of Mr. Trump's public comments.

The judicial code of conduct prevents the judge from responding to such attacks, so Judge Curiel's silence on this matter demonstrates that he is following the rules.

ABOTA has a long history of responding to unfair attacks on judges who cannot respond for themselves and believes that political and special interest interference in the judicial system is contrary to the American concept of justice.

ABOTA views these attacks on the federal judge to be a threat to the independence of the judiciary, which in turn is a threat to the rule of law. An independent, fair and impartial judiciary is the bulwark against the whims, wishes and demands of the government and other special interests.

When attacks on a judge's impartiality because of his ethnic background come from a litigant who is a candidate for the highest office in the land, such attacks unfairly misrepresent to the broader public the truly independent role of judges. One could view these highly publicized attacks by an individual who may become the President of the United States as an attempt to influence the judge in his rulings and make the judge bend to his will due to the candidate's position of influence.

ABOTA stands for respect of our judicial system and the right of trial by jury as we believe such principles are fundamental to preserving our democracy. Our judicial system cannot function without the lawyers, the litigants and the courts treating each other with civility.

We have a very diverse country made up of women and men from every walk of life, from every ethnic group and from many different points of view. We have a federal judiciary selected from many of the best and brightest minds in the law and made up of individuals from many different cultural backgrounds who are overwhelmingly dedicated to being fair and impartial. It is a system upon which the public can have confidence in and accept the outcome of each case.

This should not be considered an endorsement for president of one candidate or another. ABOTA does not endorse political candidates nor does ABOTA become involved in political races. This commentary is limited to what ABOTA considers unfair attacks on the judiciary.

Charles H. Baumberger *is from Miami and is the national president of the American Board of Trial Advocates, an invitation only organization dedicated to defending the American civil justice system and elevating the standards of integrity, honor and courtesy in the legal profession. ABOTA members are represented equally between both plaintiff and defense lawyers and includes state and federal judges.*

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AMERICAN BOARD OF TRIAL ADVOCATES
San Francisco Chapter

LOST IN THE DEBATE:
THE THREAT TO JUDICIAL INDEPENDENCE

The judicial branch is prohibited from making comments about pending cases. Therefore, it is important for attorneys involved in the judicial system to provide their insight. The San Francisco Chapter of ABOTA is not a political organization. It does not comment on rulings in individual cases. It is part of a national organization of experienced civil trial lawyers representing plaintiff and defense interests who are dedicated to preservation of the right to trial by jury, guaranteed by the Seventh Amendment of the U.S. Constitution. Just as important to our Chapter is that its members are committed to the principle of advocacy through ethics, integrity and civility.

Recently, the media has devoted significant attention to public criticism of the sentence in the Brock Turner sexual assault case by Judge Aaron Persky. Some media accounts have reported on petitions to recall Judge Persky from the bench through the special election process.

While SF ABOTA respects and supports the public's First Amendment right to criticize and protest on items of public interest, including issues related to appropriate sentencing in sexual assault cases and equal treatment of individuals adjudicated of crimes, SF ABOTA strongly denounces efforts to recall any judge based solely on the unpopularity of a single decision.

Our judicial system has rules in place to review a trial judge's decision. When judicial errors occur they are dealt with in our system of justice through the appellate process. When a judge is alleged to have engaged in misconduct, or acted unethically, their actions are subject to an investigation by the Commission on Judicial Performance, and if warranted by the circumstances, the judge may be disciplined. If the misconduct is very serious or part of a repeated pattern, removal may be warranted.

SF ABOTA wishes to emphasize during this public debate that the preservation of an independent judiciary is an integral and essential component of our system of justice and the proper functioning of our democracy. The concept of judicial independence requires that judges make decisions by applying the law to the facts, without regard for the popularity or politics of the result. Judges should never be placed in a position where their decisions are influenced by which way the political winds blow, how the media will react or whether their decision is the most popular on any given day. This is not a new concept. It dates back to the foundation on which this country was built, and our Constitution.

Respectfully,

FRANK M. PITRE
President, SF Chapter of ABOTA

[The San Francisco Chapter of the American Board of Trial Advocates is composed of experienced plaintiff and defense trial lawyers practicing in the Greater San Francisco Bay Area.]

Law professor calls for disbarment of additional prosecutors in Freddie Gray case

John F. Banzhaf III, a public interest law professor at George Washington University, is now calling for the disbarment of the two deputy state's attorneys who have argued the cases in court.

By **Kevin Rector · Contact Reporter**
The Baltimore Sun

JULY 19, 2016, 7:45 PM

An activist law professor calling for Baltimore State's Attorney Marilyn J. Mosby to be disbarred over her prosecution of six Baltimore police officers in the arrest and death of Freddie Gray has now taken aim at the two deputy state's attorneys who have argued the cases in court.

John F. Banzhaf III, a public interest law professor at George Washington University known for filing lawsuits in high-profile court cases, said he filed two new complaints with the Maryland Attorney Grievance Commission on Tuesday, calling for the disbarment of Chief Deputy State's Attorney Michael Schatzow and Deputy State's Attorney Janice Bledsoe. He filed a similar complaint last month calling on the commission to disbar Mosby.

Banzhaf said the new complaints are based in part on Circuit Judge Barry G. Williams' acquittal Monday of a third officer, Lt. Brian Rice, of all charges in the case. Banzhaf also noted that Williams previously acquitted two other officers in the case, Edward Nero and Caesar Goodson Jr.

A fourth officer, William Porter, had a mistrial in December. Porter is set to be retried in September, and two other officers, Officer Garrett Miller and Sgt. Alicia White, are to be tried later this month and in October, respectively. All have pleaded not guilty.

Gray, 25, suffered severe spinal cord injuries in the back of a police transport van in April 2015 and died a week later. His death sparked widespread peaceful protests against police brutality in Baltimore, and his funeral was followed by rioting, looting and arson.

Mosby filed charges against the six officers in May 2015.

Mosby's office has said it is barred from commenting on complaints with the Attorney Grievance Commission because of a gag order imposed in the Gray case by Williams.

"The State's Attorney will continue to respect the judge's orders as our office has consistently done throughout these trials," the office said after Banzhaf's complaint against Mosby last month.

Banzhaf alleges that Mosby knew the charges against the officers were not supported by probable cause when she filed them, and should have reassessed her prosecution of the officers after each of Williams' rulings in the case. Banzhaf also points out multiple discovery violations in the officers' trials, in which prosecutors failed to turn over evidence in a timely manner.

In his complaint against Schatzow, Banzhaf argues Mosby's involvement in overseeing the cases "cannot and does not excuse [Schatzow's] conduct since each and every attorney is bound by the same rules of conduct."

He said an argument from Schatzow that he was "just following orders" from Mosby would provide "no defense in a disbarment proceeding."

In his complaint against Bledsoe, Banzhaf argues that as "a very high ranking official, and as one of the two prosecutors primarily responsible for presenting these several cases in court, [Bledsoe] has not only the ethical duty, but also the power, to object and at the very least refuse to participate."

The Attorney Grievance Commission does not comment on pending complaints.

In his rulings in the Gray cases, Williams has repeatedly found prosecutors presented little or no evidence to support the charges alleged. But he has allowed each of the trials to date to proceed,

suggesting prosecutors had met the minimal burden of proof needed to have their cases heard in court.

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BUSINESS AND PROFESSIONS CODE SECTION 6060-6069

6060. To be certified to the Supreme Court for admission and a license to practice law, a person who has not been admitted to practice law in a sister state, United States jurisdiction, possession, territory, or dependency or in a foreign country shall:

(a) Be of the age of at least 18 years.

(b) Be of good moral character.

(c) Before beginning the study of law, have done either of the following:

(1) Completed at least two years of college work, which college work shall be not less than one-half of the collegiate work acceptable for a bachelor's degree granted upon the basis of a four-year period of study by a college or university approved by the examining committee.

(2) Have attained in apparent intellectual ability the equivalent of at least two years of college work by taking any examinations in subject matters and achieving the scores thereon as are prescribed by the examining committee.

(d) Have registered with the examining committee as a law student within 90 days after beginning the study of law. The examining committee, upon good cause being shown, may permit a later registration.

(e) Have done any of the following:

(1) Had conferred upon him or her a juris doctor (J.D.) degree or a bachelor of laws (LL.B.) degree by a law school accredited by the examining committee or approved by the American Bar Association.

(2) Studied law diligently and in good faith for at least four years in any of the following manners:

(A) In a law school that is authorized or approved to confer professional degrees and requires classroom attendance of its students for a minimum of 270 hours a year.

A person who has received his or her legal education in a foreign state or country wherein the common law of England does not constitute the basis of jurisprudence shall demonstrate to the satisfaction of the examining committee that his or her education, experience, and qualifications qualify him or her to take the examination.

(B) In a law office in this state and under the personal supervision of a member of the State Bar of California who is, and for at least the last five years continuously has been, engaged in the active practice of law. It is the duty of the supervising attorney to render any periodic reports to the examining committee as the committee may require.

(C) In the chambers and under the personal supervision of a judge of a court of record of this state. It is the duty of the supervising judge to render any periodic reports to the examining committee as the committee may require.

(D) By instruction in law from a correspondence law school authorized or approved to confer professional degrees by this state, which requires 864 hours of preparation and study per year for four years.

(E) By any combination of the methods referred to in this paragraph (2).

(f) Have passed any examination in professional responsibility or

6065. (a) (1) Any unsuccessful applicant for admission to practice, after he or she has taken any examination and within four months after the results thereof have been declared, has the right to inspect his or her examination papers at the office of the examining committee located nearest to the place at which the applicant took the examination.

(2) The applicant also has the right to inspect the grading of the papers whether the record thereof is marked upon the examination or otherwise.

(b) This section shall become operative on January 1, 2009.

6066. Any person refused certification to the Supreme Court for admission to practice may have the action of the board, or of any committee authorized by the board to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by the Supreme Court, in accordance with the procedure prescribed by the court.

6067. Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license.

6068. It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

CALIFORNIA CODE OF JUDICIAL ETHICS

Amended by the Supreme Court of California effective August, 19, 2015; adopted effective January 15, 1996; previously amended March 4, 1999, December 13, 2000, December 30, 2002, June 18, 2003, December 22, 2003, January 1, 2005, June 1, 2005, July 1, 2006, January 1, 2007, January 1, 2008, April 29, 2009, January 1, 2013, and January 21, 2015.

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY* AND INDEPENDENCE* OF THE JUDICIARY

An independent, impartial,* and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity* and independence* of the judiciary is preserved. The provisions of this code are to be construed and applied to further that objective. A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this code.

ADVISORY COMMITTEE COMMENTARY: Canon 1

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence* of judges. The integrity* and independence* of judges depend in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law* and the provisions of this code. Public confidence in the impartiality* of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violations of this code diminish public confidence in the judiciary and thereby do injury to the system of government under law.*

The basic function of an independent, impartial, and honorable judiciary is to maintain the utmost integrity* in decisionmaking, and this code should be read and interpreted with that function in mind.*

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY* AND THE APPEARANCE OF IMPROPRIETY* IN ALL OF THE JUDGE'S ACTIVITIES

A. Promoting Public Confidence

A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity* and impartiality* of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

ADVISORY COMMITTEE COMMENTARY: Canons 2 and 2A

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.

A judge must avoid all impropriety and appearance of impropriety.* A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.*

The prohibition against behaving with impropriety or the appearance of impropriety* applies to both the professional and personal conduct of a judge.*

The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity,* impartiality,* and competence.*

As to membership in organizations that practice invidious discrimination, see Commentary under Canon 2C.

As to judges making statements that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts, see Canon 3B(9) and its commentary concerning comments about a pending proceeding. Canon 3E(3)(a) concerning the disqualification of a judge who makes statements that commit the judge to a particular result, and Canon 5B(1)(a) concerning statements made during an election campaign that commit the candidate to a particular result. In addition, Code of Civil Procedure section 170.2, subdivision (b), provides that, with certain exceptions, a judge is not disqualified on the ground that the judge has, in any capacity, expressed a view on a legal or factual issue presented in the proceeding before the judge.*

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY,* COMPETENTLY, AND DILIGENTLY

A. Judicial Duties in General

All of the judicial duties prescribed by law* shall take precedence over all other activities of every judge. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities

(1) A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

ADVISORY COMMITTEE COMMENTARY: Canon 3B(1)

Canon 3B(1) is based upon the affirmative obligation contained in Code of Civil Procedure section 170.

(2) A judge shall be faithful to the law* regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.*

ADVISORY COMMITTEE COMMENTARY: Canon 3B(2)

Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office. Canon 1 provides that an incorrect legal ruling is not itself a violation of this code.*

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers and of all staff and court personnel under the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, gender,

religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others. This canon does not preclude legitimate advocacy when race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, political affiliation, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law.* Unless otherwise authorized by law,* a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in all media, including electronic. A judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending* or impending* proceeding, and shall make reasonable efforts to avoid such communications, except as follows:

(a) Except as stated below, a judge may consult with other judges. A judge shall not engage in discussions about a case with a judge who has previously been disqualified from hearing that matter; likewise, a judge who knows* he or she is or would be disqualified from hearing a case shall not discuss that matter with the judge assigned to the case. A judge also shall not engage in discussions with a judge who may participate in appellate review of the matter, nor shall a judge who may participate in appellate review of a matter engage in discussions with the judge presiding over the case.

A judge may consult with court personnel or others authorized by law,* as long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities.

In any discussion with judges or court personnel, a judge shall make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information. In such consultations, the judge shall not abrogate the responsibility personally to decide the matter.

For purposes of Canon 3B(7)(a), "court personnel" includes bailiffs, court reporters, court externs, research attorneys, courtroom clerks, and other employees of the court, but does not include the lawyers in a proceeding before a judge, persons who are appointed by the court to serve in some capacity in a proceeding, or employees of other governmental entities, such as lawyers, social workers, or representatives of the probation department.

ADVISORY COMMITTEE COMMENTARY: Canon 3B(7)(a)

Regarding communications between a judge presiding over a matter and a judge of a court with appellate jurisdiction over that matter, see Government Code section 68070.5.

Though a judge may have ex parte discussions with appropriate court personnel, a judge may do so only on matters that are within the proper performance of that person's duties. For example, a bailiff may inform the judge of a threat to the judge or to the safety and security of the courtroom, but may not tell the judge ex parte that a defendant was overheard making an incriminating statement during a court recess. A clerk may point out to the judge a technical defect in a proposed sentence, but may not suggest to the judge that a defendant deserves a certain sentence.

A sentencing judge may not consult ex parte with a representative of the probation department about a matter pending before the sentencing judge.

This canon prohibits a judge from discussing a case with another judge who has already been disqualified. A judge also must be careful not to talk to a judge whom the judge knows would be disqualified from hearing the matter.*

(b) A judge may initiate, permit, or consider ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(c) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so or when authorized to do so by stipulation of the parties.

(d) If a judge receives an unauthorized ex parte communication, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

ADVISORY COMMITTEE COMMENTARY: Canon 3B(7)

An exception allowing a judge, under certain circumstances, to obtain the advice of a disinterested expert on the law has been eliminated from Canon 3B(7) because consulting with legal experts outside the presence of the parties is inconsistent with the core tenets of the adversarial system. Therefore, a judge shall not consult with legal experts outside the presence of the parties. Evidence Code section 730 provides for the appointment of an expert if a judge determines that expert testimony is necessary. A court may also invite the filing of amicus curiae briefs.*

An exception allowing a judge to confer with the parties separately in an effort to settle the matter before the judge has been moved from this canon to Canon 3B(12).

This canon does not prohibit court personnel from communicating scheduling information or carrying out similar administrative functions.

A judge is statutorily authorized to investigate and consult witnesses informally in small claims cases. Code of Civil Procedure section 116.520, subdivision (c).

(8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.*

ADVISORY COMMITTEE COMMENTARY: Canon 3B(8)

The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.*

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to require that court officials, litigants, and their lawyers cooperate with the judge to those ends.*

(9) A judge shall not make any public comment about a pending* or impending* proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of staff and court personnel subject to the judge's direction and control. This canon does not prohibit judges from making statements in the course of their official duties or from explaining the procedures of the court, and does not apply to proceedings in

which the judge is a litigant in a personal capacity. Other than cases in which the judge has personally participated, this canon does not prohibit judges from discussing, in legal education programs and materials, cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.

ADVISORY COMMITTEE COMMENTARY: Canon 3B(9)

The requirement that judges abstain from public comment regarding a pending or impending* proceeding continues during any appellate process and until final disposition. A judge shall make reasonable efforts to ascertain whether a case is pending* or impending* before commenting on it. This canon does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.*

"Making statements in the course of their official duties" and "explaining the procedures of the court" include providing an official transcript or partial official transcript of a court proceeding open to the public and explaining the rules of court and procedures related to a decision rendered by a judge.

Although this canon does not prohibit a judge from commenting on cases that are not pending or impending* in any court, a judge must be cognizant of the general prohibition in Canon 2 against conduct involving impropriety* or the appearance of impropriety.* A judge should also be aware of the mandate in Canon 2A that a judge must act at all times in a manner that promotes public confidence in the integrity* and impartiality* of the judiciary. In addition, when commenting on a case pursuant to this canon, a judge must maintain the high standards of conduct, as set forth in Canon 1.*

Although a judge is permitted to make nonpublic comments about pending or impending* cases that will not substantially interfere with a fair trial or hearing, the judge should be cautious when making any such comments. There is always a risk that a comment can be misheard, misinterpreted, or repeated. A judge making such a comment must be mindful of the judge's obligation under Canon 2A to act at all times in a manner that promotes public confidence in the integrity* and impartiality* of the judiciary. When a judge makes a nonpublic comment about a case pending* before that judge, the judge must keep an open mind and not form an opinion prematurely or create the appearance of having formed an opinion prematurely.*

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

CA Eth. Op. 2003-162 (Cal.St.Bar.Comm.Prof.Resp.), 2003 WL 23146201

California State Bar
Committee on Professional Responsibility and Conduct

ISSUE: WHAT ETHICAL ISSUES ARE RAISED WHEN A CALIFORNIA ATTORNEY PUBLICLY ADVOCATES CIVIL DISOBEDIENCE, INCLUDING VIOLATIONS OF LAW, IN FURTHERANCE OF HER PERSONALLY-HELD POLITICAL, MORAL, OR RELIGIOUS BELIEFS, AND SIMULTANEOUSLY PRACTICES LAW?

Formal Opinion Number 2003-162

2003

DIGEST: While attorneys have rights under the First Amendment to express political, moral, and religious beliefs and to advocate civil disobedience, attorneys must follow their professional responsibility when acting upon their beliefs and when advising clients. At a minimum, attorneys' performance of their professional duties to clients must not be adversely affected by the attorneys' personal beliefs or exercise of First Amendment rights. In selecting areas of legal practice, types of cases and particular clients, attorneys should be cognizant of the possibility that their moral, social, and religious beliefs, and their exercise of their First Amendment rights, could adversely affect the performance of their duties to clients.

***1** AUTHORITIES INTERPRETED: Rules 3-110, 3-210, and 3-310 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6067, 6068, subdivisions (a) and (c), and 6103.

STATEMENT OF FACTS

An attorney (Attorney) maintains a law practice emphasizing business transactional work, estate and tax planning services, and tax controversy matters. She believes sincerely that the entire state and federal tax system is immoral, and has joined an association (Association) that opposes taxation of individuals and family businesses.

She has spoken at Association conferences and advocated resistance to the state and federal tax systems. In these speeches, she has proposed that individuals and small businesses refuse to report to the Franchise Tax Board and the Internal Revenue Service any transaction or event that might lead to the imposition of income, capital gains, or estate taxation, and has advocated that they also refuse to pay taxes.

Attorney has never represented Association, but she receives a substantial number of client referrals from her speeches on behalf of and through her contacts in the organization. While she has publicly advocated civil disobedience, Attorney advises lawful behavior in counseling her clients.

What ethical considerations govern Attorney's activities?

DISCUSSION

I. Is it ethically permissible for Attorney to publicly advocate the refusal to pay taxes?

The facts do not identify the existence of a law prohibiting advocacy of violations of state or federal tax laws. Even if there were such a law, it might well violate the Firstand Fourteenth Amendments guarantees of free speech and assembly. A state may not forbid or proscribe the advocacy of a violation of law except where such advocacy is directed to inciting

or producing imminent lawless action and is likely to incite or produce such action. (*Brandenburg v. Ohio* (1969) 395 U.S. 444 [89 S. Ct. 1827].)

***2** Attorney's status as a lawyer does not change the analysis. To the extent speech is constitutionally protected, Attorney has the First Amendment right to advocate political and social change through the violation of law, even though the First Amendment rights of lawyers are limited in certain respects. (See *Standing Committee on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430 and *In re Palmisano* (7th Cir. 1995) 70 F.3d 483, cert. denied, 116 S. Ct. 1854 (1996) [both dealing with the special problem of discipline for attorneys who publicly criticize judges].)

The Committee notes, however, the distinction between advocating and engaging in violations of law. Attorneys are subject to discipline for illegal conduct even if their conduct occurs outside the practice of law and does not involve moral turpitude. As the California Supreme Court stated in the seminal case of *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855], explaining why discipline was appropriate for an attorney's criminal conviction of wilful failure to file tax returns: "An attorney as an officer of the court and counselor at law occupies a unique position in society. His refusal to obey the law, and the bar's failure to discipline him for such refusal, will not only demean the integrity of the profession but will encourage disrespect for and further violations of the law. This is particularly true in the case of revenue law violations by an attorney." (See also *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375] [discipline imposed for two drunk driving convictions, the second while on probation from the first]; *In re Morales* (1983) 35 Cal.3d 1 [96 Cal.Rptr. 353] [discipline imposed for failure to withhold or pay taxes and unemployment contributions].)

II. **Is it ethically permissible for Attorney to advise her clients not to pay taxes that are due under applicable law**?

It is important to distinguish between Attorney's exercise of her First Amendment rights and her performance of her duties as a lawyer for clients. By virtue of her participation in and speech on behalf of the Association, Attorney has been retained by clients because of the political and social views she publicly has taken regarding the payment of taxes. Although a lawyer may *advocate* political and social change through the violation of tax laws, she may not *advise* a client to violate the law unless she believes reasonably and in good faith that such law is invalid and there is a good-faith argument for the modification or reversal of that law. [1]

III. **Does Attorney have an ethical duty to disclose her relationship with Association and her position on taxation to prospective and existing clients**?

An attorney may not accept or continue the representation of a client, if the attorney has any of the several potential or actual conflicts of interest listed in rule 3-310 of the California Rules of Professional Conduct, absent "written disclosure" to and, in many instances, "informed written consent" from, the client or potential client. Together, the written disclosure requirements in paragraphs (B)(1) and (B)(2) of rule 3-310 apply when a lawyer has or had "a legal, business, financial, professional or personal relationship with" a party or witness in the same matter in which the lawyer represents the client. [2] Paragraph (B)(4) of the rule applies when a lawyer "has or had a legal, business, financial, or professional interest in the subject matter of the representation." As the Association is neither a party or witness in the matters of Attorney's tax clients, no disclosure pursuant to paragraphs (B)(1) or (B)(2) would be required. Similarly, as the Association is not the subject matter of the Attorney's representation of tax clients, no disclosure pursuant to paragraph (B)(4) would be required either.

***3** We recognize that paragraph (B)(3) might appear at first glance to be applicable to Attorney. This part of the rule states that a lawyer shall not acceptor continue the representation of a client without providing written "disclosure" to the client or potential client where the attorney has or had a "legal, business, financial, professional, or personal relationship with another person or entity" which the attorney "knows or reasonably should" know would be "substantially affected by resolution of the matter." However, there are no facts that implicate paragraph (B)(3). Whether Attorney "knows or

reasonably should know" that the Association would be "substantially affected by the resolution of the matter" depends on the totality of the circumstances. These circumstances might include such things as the scope and object of the client's engagement of Attorney.

IV. **Can Attorney competently represent clients in business and taxation matters**?

Attorney has publicly advocated that others resist state and federal tax laws by refusing to report transactions and events on which taxation could be imposed, and by refusing to pay taxes. While her constitutional rights of speech and assembly may permit her such advocacy, they do not alter her duties to her clients.

These duties include the obligation to provide competent representation found in rule 3-110 of the California Rules of Professional Conduct. [3] Business and Professions Code section 6067 requires that attorneys admitted to practice in California take an oath that includes a promise "faithfully to discharge the duties of an attorney to the best of his [or her] knowledge and ability."

Attorney's personal views and public comments regarding taxation do not necessarily render her unable to competently represent a client in a tax matter. Indeed, it is possible that because of her strong beliefs Attorney has a particularly sophisticated knowledge of the substantive law and the procedures that could be pertinent to her work on tax matters. Despite this possibility, it is important to recognize that the duty of competence includes an emotional component. Rule 3-110 prohibits intentional, reckless or repeated incompetence and defines "competence" as the application of "the 1) diligence, 2) learning and skill, and 3) *mental, emotional* and physical ability reasonably necessary for the performance of legal services." (Italics added.) Thus, if Attorney's mental or emotional state prevents her from performing an objective evaluation of her client's legal position, providing unbiased advice to her client, or performing her legal representation according to her client's directions, then Attorney would violate the duty of competence. (See *Blanton v. Woman care* (1985) 38 Cal.3d 396, 407-408 [212 Cal.Rptr. 151]; *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765 [232 Cal.Rptr. 250]; Cal. State Bar Formal Opn. No. 1984-77; and L.A. Cty. Bar Assn. Formal Opn. No. 504 (2001). [4]

***4** This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the state Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility or any member of the State Bar.

Footnotes

1 Rule 3-210 of the California Rules of Professional Conduct prohibits a member from advising a client to violate the law "unless the member believes in good faith that such law ... is invalid." Similarly, rule 3-200 of the Rules of Professional Conduct prohibits a member from accepting or continuing employment if he or she knows that the client's purpose is "to present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law." Further, subdivision (a) of California Business and Professions Code section 6068 requires that California attorneys support the Constitution and laws of the United States and of this state. Subdivision (c) of section 6068 requires that an attorney maintain such actions or proceedings only as they appear to him or her legal or just. Each of these rule and statutory provisions identifies a duty of an attorney; California Business and Professions Code section 6103 in turn provides that an attorney may be disciplined for violation of his or her duties as an attorney.

2 "Disclosure" is defined as "informing the client ... of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the

client ...." (Rules Prof. Conduct, rule 3-310(A)(1).) Disclosure perm its clients to make knowing and intelligent decisions about their representation when their attorneys have potential or actual conflicts of interest.

3 Rule 3-110 of the California Rules of Professional Conduct provides:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

4 We express no opinion as to whether or not there may be a duty to communicate to clients the possible impact of her views on taxation, or the knowledge of the taxing authorities of those views, on the outcome of the representation.

CA Eth. Op. 2003-162 (Cal.St.Bar.Comm.Prof.Resp.), 2003 WL 23146201

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CALIFORNIA RULES OF PROFESSIONAL CONDUCT

(Current rules as of January 1, 2015. The operative dates of select rule amendments are shown at the end of relevant rules.)

CHAPTER 1.
PROFESSIONAL INTEGRITY IN GENERAL

Rule 1-100 Rules of Professional Conduct, in General

(A) Purpose and Function.

The following rules are intended to regulate professional conduct of members of the State Bar through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules shall be binding upon all members of the State Bar.

For a willful breach of any of these rules, the Board of Governors has the power to discipline members as provided by law.

The prohibition of certain conduct in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, §6000 et seq.) and opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

These rules are not intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.

(B) Definitions.

(1) "Law Firm" means:

(a) two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities; or

(b) a law corporation which employs more than one lawyer; or

(c) a division, department, office, or group within a business entity, which includes more than one lawyer who performs legal services for the business entity; or

(d) a publicly funded entity which employs more than one lawyer to perform legal services.

(2) "Member" means a member of the State Bar of California.

(3) "Lawyer" means a member of the State Bar of California or a person who is admitted in good standing of and eligible to practice before the bar of any United States court or the highest court of the District of Columbia or any state, territory, or insular possession of the United States, or is licensed to practice law in, or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof.

(4) "Associate" means an employee or fellow employee who is employed as a lawyer.

(5) "Shareholder" means a shareholder in a professional corporation pursuant to Business and Professions Code section 6160 et seq.

(C) Purpose of Discussions.

Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them.

(D) Geographic Scope of Rules.

(1) As to members:

These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

firm. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 4-400 Gifts From Client

A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except where the client is related to the member.

Discussion:

A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence. The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline. On the other hand, where impermissible influence occurred, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

CHAPTER 5. ADVOCACY AND REPRESENTATION

Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Discussion:

Rule 5-100 is not intended to apply to a member's threatening to initiate contempt proceedings against a party for a failure to comply with a court order.

Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.

For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.

Rule 5-110 Performing the Duty of Member in Government Service

A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending.

Rule 5-120 Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets. (Added by order of the Supreme Court, operative October 1, 1995.)

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Rule 5-210 Member as Witness

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

(A) The testimony relates to an uncontested matter; or

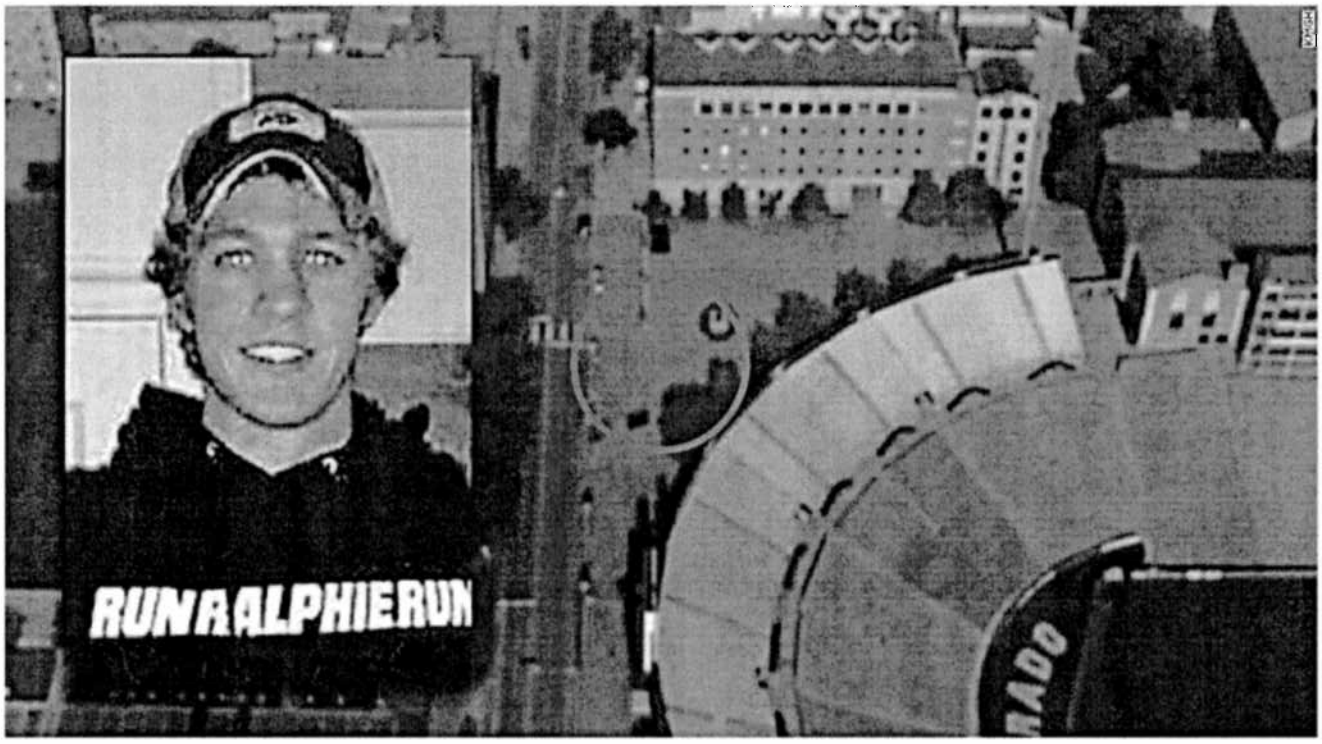
(B) The testimony relates to the nature and value of legal services rendered in the case; or

U.S.

Ex-University of Colorado student's sex assault sentence questioned

By Emanuella Grinberg and Joe Sutton, CNN

Updated 6:37 AM ET, Fri August 12, 2016



Former CU student's sex assault sentence questioned 01:29

Story highlights

Austin James Wilkerson was convicted of raping an intoxicated classmate while claiming to care for her

His lawyer tells local media that his remorse is genuine

(CNN) — A former University of Colorado student was sentenced to two years in jail and probation for sexually assaulting a drunk classmate under the guise of caring for her, a sentence that's drawing criticism for not fitting the crime.

A Boulder jury convicted Austin James Wilkerson in May of one count of sexual assault of a helpless victim and one count of unlawful sexual contact.

Judge Patrick Butler sentenced Wilkerson to two years in jail under work release, meaning he can leave during the day for school or work and return at night. He also received 20 years of sex offender-specific intensive probation, which includes treatment and therapy and lifetime registration as a sex offender with the chance to get off the registry after 20 years.

The sentence fell between the Probation Department's recommendation of no prison time, based on Wilkerson's show of remorse, and the district attorney's request of four to 20 years in prison, based on the nature of the crime and its impact on the survivor.

"I've struggled, to be quite frank, with the idea of, 'Do I put him in prison?'" Butler said, according to Boulder newspaper The Daily Camera.

"Mr. Wilkerson deserves to be punished, but I think we all need to find out whether he truly can or cannot be rehabilitated."

Wilkerson's attorney, Michael Cohen, did not respond to repeated requests for comment. He told The Daily Camera that Wilkerson's remorse was genuine.

"If he was faking it or showing false remorse, this would come out," Cohen said.

The outcome drew comparisons to the sentence of Stanford student Brock Turner, who received six months in jail for raping a woman behind a dumpster.

"We are disappointed to see, yet again, that the impact on the perpetrator, who chose to commit a crime against another person, is being considered over the impact on the victim, who did not have a choice in the matter," said Brie Franklin, executive director of the Colorado Coalition Against Sexual Assault.

"What research tells us is that these incidents are not 'accidents' or 'misunderstandings,' but rather patterns of thought and behavior that will not change, and will most likely escalate, unless the individual is held accountable for their choices and actions."

But sex offender treatment and registration is "another kind of prison," advocates say. Is it enough for survivors seeking justice?

'His actions speak louder than his words'

In her request for prison time for Wilkerson, Deputy District Attorney Lisa Saccomano said he displayed a pattern of "highly deceptive, manipulative behavior," from the night of the incident to his interviews with the probation department, changing his story when it suited him.

Wilkerson knew the young woman from high school. When she became intoxicated at a party on March 15, 2014, Wilkerson brought her to his home off campus, telling her friends he would care for her, according to court documents.

His roommate watched him give her water and check her pulse and temperature. When they were alone, he sexually assaulted her, making sure to send a text message to her friend, who thanked him for caring for her, according to the district attorney's sentencing memo.

He told university investigators that he made moves on her but she rebuffed him, calling her a "f------ bitch" and saying he felt "pissed off."

When confronted with the possibility that his semen may have been found on the victim, he said that he masturbated, claiming he ejaculated into the toilet; the only way she could have his ejaculate on her was from using the toilet, according to the sentencing memo.

He later told friends that he "fingered a girl" while she was passed out and "let his hands wander."

At trial, he testified the woman was not drunk and had engaged with him "passionately," making "pleasure sounds" while he "caressed" her vagina. He said he left in the middle of the encounter because he felt guilty for cheating on his girlfriend.

By the time he spoke to a probation investigator he was contrite, crying as he recalled how the woman's testimony moved him.

Citing his "impressive acceptance" of responsibility and empathy for the woman, the state probation department recommended no prison time.

"However, his actions speak louder than his words," Saccomano said in her sentencing memorandum.

"The defendant raped a helpless young woman after duping the people around her into believing he was going to care for her, tried to cover up his crime, and then repeatedly lied about what he did, including under oath at trial," she said.

Saccomano urged the court to consider the message a sentence would send to the university community, where a recent campus climate survey found that 28% of students said they were sexually assaulted. She noted the third degree felony sexual assault charge for which he was convicted is in the same class of crimes as second degree murder and vehicular homicide.

'Rapists should go to prison'

Susan Walker, director of the advocacy group Coalition for Sexual Offense Restoration, said sex offender treatment and registration is far from getting off light.

It affects where and with whom you live, and your job prospects, she said. Requirements vary, but typically include electronic monitoring, polygraph tests, no Internet access, and giving all your email passwords to law enforcement.

As for treatment, "it's a tough program, the probation officers and treatment providers ride you very hard," she said. "It's a constant emotional strain, another kind of prison."

The purpose of probation and treatment is rehabilitation, Saccomano said. "It is considered a privilege because it allows an offender to remain in the community instead of being behind bars," she said.

It pales in comparison to what a sexual assault survivor experiences, Saccomano said.

"Our contention is that rapists should go to prison. It's a serious crime that deserves a serious punishment."

55 F.3d 1430
United States Court of Appeals,
Ninth Circuit.

STANDING COMMITTEE ON DISCIPLINE OF the UNITED STATES DISTRICT COURT FOR the CENTRAL DISTRICT OF CALIFORNIA, Plaintiff–Appellee,
v.
Stephen YAGMAN, Defendant–Appellant.

No. 94–55918.
|
Argued and Submitted Nov. 2, 1994.
|
Decided May 30, 1995.

Disciplinary proceedings were brought against attorney who made statements criticizing judge. The United States District Court for the Central District of California, Edward Rafeedie, John Davies and David Williams, JJ., 856 F.Supp. 1384, 856 F.Supp. 1395, held that attorney committed sanctionable misconduct and suspended him from practice in Central District for two years. Attorney appealed. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) makeup of standing committee on discipline, which allegedly included members who had conflicts of interest with attorney, did not deny attorney due process; (2) in determining whether attorney violated disciplinary rule, *Sandlin* "reasonable attorney" standard, rather than *New York Times* subjective malice standard applicable in defamation actions, would be applied; (3) attorney's statements did not violate rule's prohibition against attorneys impugning integrity of court; and (4) attorney's statements did not violate rule's prohibition against attorneys interfering with administration of justice.

Reversed.

Wiggins, Circuit Judge, dissented.

Attorneys and Law Firms

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Robert F. Lewis, Graham E. Berry, Michael L. Silk, Michael D. Berger, Lewis, D'Amato, Brisbois & Bisgaard, Los Angeles, CA, for plaintiff-appellee.

***1433** Ben Margolis, Hugh R. Manes, Los Angeles, CA, for amicus Los Angeles Chapter of the Nat. Lawyers Guild.

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Los Angeles, CA, for amicus American Jewish Congress–Pacific Southwest Region, and Article 19.

Appeal from the United States District Court for the Central District of California.

Before: Charles WIGGINS, Alex KOZINSKI and David R. THOMPSON, Circuit Judges.

Opinion

Opinion by Judge KOZINSKI; Dissent by Judge WIGGINS.

KOZINSKI, Circuit Judge.

Never far from the center of controversy, outspoken civil rights lawyer Stephen Yagman was suspended from practice before the United States District Court for the Central District of California for impugning the integrity of the court and interfering with the random selection of judges by making disparaging remarks about a judge of that court. We confront several new issues in reviewing this suspension order.

I

The convoluted history of this case begins in 1991 when Yagman filed a lawsuit pro se against several insurance companies. The case was assigned to Judge Manuel Real, then Chief Judge of the Central District. Yagman promptly sought to disqualify Judge Real on grounds of bias.[1] The disqualification motion was randomly assigned to Judge ***1434** William Keller, who denied it, *Yagman v. Republic Ins.,* 136 F.R.D. 652, 657–58 (C.D.Cal.1991), and sanctioned Yagman for pursuing the matter in an "improper and frivolous manner," *Yagman v. Republic Ins.,* 137 F.R.D. 310, 312 (C.D.Cal.1991).[2]

A few days after Judge Keller's sanctions order, Yagman was quoted as saying that Judge Keller "has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-semitism." Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar,* L.A. Daily J., June 6, 1991, at 1. The district court found that Yagman also told the Daily Journal reporter that Judge Keller was "drunk on the bench," although this accusation wasn't published in the article. *See Standing Comm. on Discipline v. Yagman,* 856 F.Supp. 1384, 1386 (C.D.Cal.1994).

Around this time, Yagman received a request from Prentice Hall, publisher of the much-fretted-about Almanac of the Federal Judiciary,[3] for comments in connection with a profile of Judge Keller. Yagman's response was less than complimentary.[4]

A few weeks later, Yagman placed an advertisement (on the stationary of his law firm) in the L.A. Daily Journal, asking lawyers who had been sanctioned by Judge Keller to contact Yagman's office.[5]

Soon after these events, Yagman ran into Robert Steinberg, another attorney who practices in the Central District. According to Steinberg, Yagman told him that, by levelling public criticism at Judge Keller, Yagman hoped to get the judge to recuse himself in future cases.[6] Believing that Yagman was committing misconduct, Steinberg described his conversation with Yagman in a letter to the Standing Committee on Discipline of the U.S. District Court for the Central District of California (the Standing Committee). *See* SER 326.

***1435** A few weeks later, the Standing Committee received a letter from Judge Keller describing Yagman's anti-Semitism charge, his inflammatory statements to Prentice Hall and the newspaper advertisement placed by Yagman's law firm. Judge Keller stated that "Mr. Yagman's campaign of harassment and intimidation challenges the integrity of the judicial system. Moreover, there is clear evidence that Mr. Yagman's attacks upon me are motivated by his desire to create a basis for recusing me in any future proceeding." SER 329–30. Judge Keller suggested that "[t]he Standing Committee on Discipline should take action to protect the Court from further abuse." SER 330.

[1] After investigating the charges in the two letters, the Standing Committee issued a Petition for Issuance of an Order to Show Cause why Yagman should not be suspended from practice or otherwise disciplined. Pursuant to Central District Local Rule 2.6.4, the matter was then assigned to a panel of three Central District judges, which issued an Order to Show Cause and scheduled a hearing.[7] Prior to the hearing, Yagman raised serious First Amendment objections to being disciplined

for criticizing Judge Keller. Both sides requested an opportunity to brief the difficult free speech issues presented, but the district court never acted on these requests. The parties thus proceeded at the hearing without knowing the allocation of the burden of proof or the legal standard the court intended to apply. [8]

During the two-day hearing, the Standing Committee and Yagman put on witnesses and introduced exhibits. In a published opinion issued several months after the hearing, the district court held that Yagman had committed sanctionable misconduct, 856 F.Supp. 1384 (C.D.Cal.1994), and suspended him from practice in the Central District for two years, 856 F.Supp. 1395, 1400 (C.D.Cal.1994).

II

The Central District provides a mechanism for judges and others who become aware of attorney misconduct to refer the matter to the Standing Committee, a body of twelve members of the Central District bar. *See* Cent.Dist.Local R. (Civil) 2.6.1, 2.6.3. The Standing Committee reviews the charges and conducts an investigation. If it determines that an attorney deserves discipline, it issues a formal complaint and the case is assigned to a randomly selected panel of three judges. *See* Cent.Dist.Local R. (Civil) 2.6.4. The three-judge panel then holds a hearing on the charges with the committee acting as prosecutor.

[2] Yagman challenges the makeup of the Standing Committee on the ground that several of its members had conflicts of interest that could have influenced their decision to pursue disciplinary action against him. [9] Relying principally on ***1436** *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), Yagman argues that this denied him due process.

We find *Young* readily distinguishable. The district court there appointed a private attorney to prosecute the defendant for allegedly violating an injunction protecting Vuitton's trademark. The attorney, however, had represented Vuitton in the civil action which resulted in the injunction, and continued to serve as Vuitton's counsel even as he prosecuted the contempt. He was thus representing two clients with potentially conflicting interests: Vuitton and the United States. The Court noted that by doing so, the attorney was violating ethical standards and a federal criminal law, since he could not "discharge the obligation of undivided loyalty to both clients where both have a direct interest." *Id.* at 805, 107 S.Ct. at 2136. In such situations, the Court concluded, the temptation to use prosecutorial authority to benefit the private client is too great. To avoid such conflicts of interest, the Court held that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." *Id.* at 809, 107 S.Ct. at 2138.

Yagman doesn't contend that any of the Standing Committee lawyers represent Judge Keller (the supposed interested party here), or that Judge Keller stands to benefit from the disciplinary action against Yagman. Nor does he argue that the committee members violated federal law or professional ethical standards. Thus, the concerns undergirding the Court's ruling in *Young* are not implicated. Moreover, even the serious conflict of interest present in *Young* did not result in a denial of due process. [10] Instead, the Court invoked its supervisory authority to prevent federal judges from making appointments that force attorneys to violate federal law and widely accepted ethical standards. *Id.* at 808–09, 107 S.Ct. at 2138–39.

[3] Nor do we find any other support for Yagman's due process claim. The Standing Committee itself has no authority to impose sanctions; whether and to what extent discipline is warranted are matters exclusively within the province of the court. The committee merely assists the district court in maintaining attorney discipline by relieving judges of the awkward responsibility of serving as both prosecutors and arbiters. [11] So long as the judges hearing the misconduct charges are not biased (and Yagman doesn't claim they are), there is no legitimate cause for concern over the composition and partiality of the Standing Committee. *Cf. Wright v. United States,* 732 F.2d 1048, 1058 (2d Cir.1984) (interested prosecutor's handling of criminal investigation and subsequent trial didn't deprive defendant of due process).

III

Local Rule 2.5.2 contains two separate prohibitions. First, it enjoins attorneys from engaging in any conduct that "degrades or impugns the integrity of the Court."

Second, it provides that "[n]o attorney shall engage in any conduct which ... interferes with the administration of justice." The district court concluded that Yagman violated both prongs of the rule. 856 F.Supp. at 1385. Because different First Amendment standards apply to these two provisions, we discuss the propriety of the sanction under each of them separately.

A

[4] **[5]** **1.** We begin with the portion of Local Rule 2.5.2 prohibiting any conduct that "impugns the integrity of the Court." As the district court recognized, this provision is ***1437** overbroad because it purports to punish a great deal of constitutionally protected speech, including all true statements reflecting adversely on the reputation or character of federal judges. A substantially overbroad restriction on protected speech will be declared facially invalid unless it is "fairly subject to a limiting construction." *Board of Airport Comm'rs v. Jews for Jesus, Inc.,* 482 U.S. 569, 577, 107 S.Ct. 2568, 2573, 96 L.Ed.2d 500 (1987).

To save the "impugn the integrity" portion of Rule 2.5.2, the district court read into it an "objective" version of the malice standard enunciated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Relying on *United States Dist. Ct. v. Sandlin,* 12 F.3d 861 (9th Cir.1993), the court limited Rule 2.5.2 to prohibit only false statements made with either knowledge of their falsity or with reckless disregard as to their truth or falsity, judged from the standpoint of a "reasonable attorney." 856 F.Supp. at 1389–90.

[6] *Sandlin* involved a First Amendment challenge to Washington Rule of Professional Conduct 8.2(a), which provided in part: "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, integrity, or record of a judge." *Sandlin,* 12 F.3d at 864. Though the language of the rule closely tracked the *New York Times* malice standard, we held that the purely subjective standard applicable in defamation cases is not suited to attorney disciplinary proceedings. *Id.* at 867. Instead, we held that such proceedings are governed by an objective standard, pursuant to which the court must determine "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Id.* [12] The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made. *Id.* [13]

[7] **[8]** Yagman nonetheless urges application of the *New York Times* subjective malice standard in attorney disciplinary proceedings. *Sandlin* stands firmly in the way. In *Sandlin,* we held that there are significant differences between the interests served by defamation law and those served by rules of professional ethics. Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. *See In re Terry,* 271 Ind. 499, 394 N.E.2d 94, 95 (1979); *In re Graham,* 453 N.W.2d 313, 322 (Minn.1990).

Though attorneys can play an important role in exposing problems with the judicial system, *see Oklahoma ex rel. Oklahoma Bar Ass'n v. Porter,* 766 P.2d 958, 967 (Okla.1988), *false* statements impugning the integrity ***1438** of a judge erode public confidence without serving to publicize problems that justifiably deserve attention. *Sandlin* held that an objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.

[9] **[10]** Attorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context. To begin with, attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense. *See Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964). Moreover, the disciplinary body bears the burden of proving falsity. *See Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 776–77, 106 S.Ct. 1558, 1563–64, 89 L.Ed.2d 783 (1986); *Porter,* 766 P.2d at 969.

[11] **[12]** **[13]** It follows that statements impugning the integrity of a judge may not be punished unless they

are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1 (1990); *Lewis v. Time, Inc.,* 710 F.2d 549, 555 (9th Cir.1983); Restatement (Second) of Torts § 566 (1977) (statement of opinion actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"). Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target. *See Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988). Thus, statements of "rhetorical hyperbole" aren't sanctionable, nor are statements that use language in a "loose, figurative sense." *See National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745 (1974) (use of word "traitor" could not be construed as representation of fact); *Greenbelt Coop. Publishing Ass'n v. Bresler,* 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970) (use of word "blackmail" could not have been interpreted as charging plaintiff with commission of criminal offense).

With these principles in mind, we examine the statements for which Yagman was disciplined.

[14] **2.** We first consider Yagman's statement in the Daily Journal that Judge Keller "has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-semitism." [14] Though the district court viewed this entirely as an assertion of fact, 856 F.Supp. at 1391, we conclude that the statement contains both an assertion of fact and an expression of opinion.

Yagman's claim that he, Kenner and Manes are all Jewish and were sanctioned by Judge Keller is clearly a factual assertion: The words have specific, well-defined meanings and describe objectively verifiable matters. Nothing about the context in which the words appear suggests the use of loose, figurative language or "rhetorical hyperbole." Thus, had the Standing Committee proved that Yagman, Kenner or Manes were not sanctioned by Judge Keller, or were not Jewish, this assertion might have formed the basis for discipline. The committee, however, didn't claim that Yagman's factual assertion was false, and the district court made no finding to that effect. We proceed, therefore, on the assumption that this portion of Yagman's statement is true.

The remaining portion of Yagman's Daily Journal statement is best characterized as opinion; it conveys Yagman's personal belief that Judge Keller is anti-Semitic. As such, it may be the basis for sanctions only if it could ***1439** reasonably be understood as declaring or implying actual facts capable of being proved true or false. *See Milkovich,* 497 U.S. at 21, 110 S.Ct. at 2707; *Phantom Touring, Inc. v. Affiliated Publications,* 953 F.2d 724, 727 (1st Cir.1992).

In applying this principle, we are guided by section 566 of the Restatement (Second) of Torts, which distinguishes between two kinds of opinion statements: those based on assumed or expressly stated facts, and those based on implied, undisclosed facts. Restatement (Second) of Torts § 566, cmt. b; *see Lewis,* 710 F.2d at 555 (following the Restatement). [15] The statement, "I think Jones is an alcoholic," for example, is an expression of opinion based on implied facts, *see id.* § 566, cmt. c, illus. 3, because the statement "gives rise to the inference that there are undisclosed facts that justify the forming of the opinion," *id.* § 566, cmt. b. Readers of this statement will reasonably understand the author to be implying he knows facts supporting his view—*e.g.,* that Jones stops at a bar every night after work and has three martinis. If the speaker has no such factual basis for his assertion, the statement is actionable, even though phrased in terms of the author's personal belief. [16]

A statement of opinion based on expressly stated facts, on the other hand, might take the following form: "[Jones] moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair ... with a drink in his hand. I think he must be an alcoholic." *Id.* § 566, cmt. c, illus. 4. This expression of opinion appears to disclose all the facts on which it is based, and does not imply that there are other, unstated facts supporting the belief that Jones is an alcoholic.

[15] A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning. *Lewis,* 710 F.2d at 555–56; Restatement (Second) of Torts § 566, cmt. c ("A simple expression of opinion based on disclosed ... nondefamatory facts is not itself sufficient for an action of defamation, no matter

how unjustified and unreasonable the opinion may be or how derogatory it is."). The rationale behind this rule is straightforward: When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts. *Phantom Touring,* 953 F.2d at 730; *Lewis,* 710 F.2d at 555. Moreover, "an opinion which is unfounded reveals its lack of merit when the opinion-holder discloses the factual basis for the idea"; readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts. *Redco Corp. v. CBS, Inc.,* 758 F.2d 970, 972 (3d Cir.1985); *see also Potomac Valve & Fitting Inc. v. Crawford Fitting Co.,* 829 F.2d 1280, 1290 (4th Cir.1987) ("[T]he statement in question readily appears to be nothing more than the author's personal inference from the test results. The premises are explicit, and the reader is by no means required to share [defendant's] conclusion."). A statement of opinion of this sort doesn't "imply a false assertion of fact," ***1440** *Milkovich,* 497 U.S. at 19, 110 S.Ct. at 2706, and is thus entitled to full constitutional protection.

We applied this principle in *Lewis v. Time, Inc.,* 710 F.2d 549 (9th Cir.1983), where an attorney claimed he had been defamed by an article calling him a "shady practitioner." We held that this expression of opinion was protected by the First Amendment because the article set forth the facts on which the opinion was based: a judgment entered against the attorney for defrauding his clients, and another judgment holding him liable for malpractice. *Id.* at 556. Because the article's factual assertions were accurate, we concluded that the plaintiff's claim was barred: "[W]here a publication sets forth the facts underlying its statement of opinion ... and those facts are true, the Constitution protects that opinion from liability for defamation." *Id.; see also National Ass'n of Gov't Employees,* 396 N.E.2d at 1000; *Rinaldi v. Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 397 N.Y.S.2d 943, 950, 366 N.E.2d 1299, 1306 (1977).

Yagman's Daily Journal remark is protected by the First Amendment as an expression of opinion based on stated facts. Like the defendant in *Lewis,* Yagman disclosed the basis for his view that Judge Keller is anti-Semitic and has a penchant for sanctioning Jewish lawyers: that he, Kenner and Manes are all Jewish and had been sanctioned by Judge Keller. The statement did not imply the existence of additional, undisclosed facts; it was carefully phrased in terms of an inference drawn from the facts specified rather than a bald accusation of bias against Jews.[17] Readers were "free to form another, perhaps contradictory opinion from the same facts," *Lewis,* 710 F.2d at 555, as no doubt they did.

[16] **[17]** **3.** The district court also disciplined Yagman for alleging that Judge Keller was "dishonest." This remark appears in the letter Yagman sent to Prentice Hall in connection with the profile of Judge Keller in the Almanac of the Federal Judiciary. *See* n. 4 *supra.* The court concluded that this allegation was sanctionable because it "plainly impl[ies] past improprieties." 856 F.Supp. at 1391. Had Yagman accused Judge Keller of taking bribes, we would agree with the district court. Statements that "could reasonably be understood as imputing specific criminal or other wrongful acts" are not entitled to constitutional protection merely because they are phrased in the form of an opinion. *Cianci v. New Times Publishing Co.,* 639 F.2d 54, 64 (2d Cir.1980).

When considered in context, however, Yagman's statement cannot reasonably be interpreted as accusing Judge Keller of criminal misconduct. The term "dishonest" was one in a string of colorful adjectives Yagman used to convey the low esteem in which he held Judge Keller. The other terms he used —"ignorant," "ill-tempered," "buffoon," "sub-standard human," "right-wing fanatic," "a bully," "one of the worst judges in the United States"—all speak to competence and temperament rather than corruption; together they convey nothing more substantive than Yagman's contempt for Judge Keller. Viewed in context of these "lusty and imaginative expression[s]," *Letter Carriers,* 418 U.S. at 286, 94 S.Ct. at 2782, the word "dishonest" cannot reasonably be construed as suggesting that Judge Keller had committed specific illegal acts.[18] *See Bresler,* 398 U.S. at 14, 90 S.Ct. at 1541 ("blackmail"). Yagman's remarks are thus statements of rhetorical hyperbole, incapable of being proved true or false. *Cf. In re Erdmann,* 33 N.Y.2d 559, 347 N.Y.S.2d 441, 441, 301 N.E.2d 426, 427 (1973) (reversing sanction against attorney who criticized trial judges for not following the law, and appellate judges for being "the whores who became madams"); ***1441** *State Bar v. Semaan,* 508 S.W.2d 429, 431–32 (Tex.Civ.App.1974) (attorney's observation that judge was "a midget among giants" not sanctionable because it wasn't subject to being proved true or false).

Were we to find any substantive content in Yagman's use of the term "dishonest," we would, at most, construe it to mean "intellectually dishonest"—an accusation that Judge Keller's rulings were overly result-oriented. Intellectual dishonesty is a label lawyers frequently attach to decisions with which they disagree.[19] An allegation that a judge is intellectually dishonest, however, cannot be proved true or false by reference to a "core of objective evidence." *Cf. Milkovich,* 497 U.S. at 21, 110 S.Ct. at 2707; *Rooney,* 912 F.2d at 1055. "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir.1993). Because Yagman's allegation of "dishonesty" does not imply facts capable of objective verification, it is constitutionally immune from sanctions.

[18] **4.** Finally, the district court found sanctionable Yagman's allegation that Judge Keller was "drunk on the bench." Yagman contends that, like many of the terms he used in his letter to Prentice Hall, this phrase should be viewed as mere "rhetorical hyperbole." The statement wasn't a part of the string of invective in the Prentice Hall letter, however; it was a remark Yagman allegedly made to a newspaper reporter.[20] Yagman identifies nothing relating to the context in which this statement was made that tends to negate the literal meaning of the words he used. We therefore conclude that Yagman's "drunk on the bench" statement could reasonably be interpreted as suggesting that Judge Keller had actually, on at least one occasion, taken the bench while intoxicated. Unlike Yagman's remarks in his letter to Prentice Hall, this statement implies actual facts that are capable of objective verification. For this reason, the statement isn't protected under *Falwell, Bresler* or *Letter Carriers.*

For Yagman's "drunk on the bench" allegation to serve as the basis for sanctions, however, the Standing Committee had to prove that the statement was false. *See Hepps,* 475 U.S. at 776–77, 106 S.Ct. at 1563–64. This it failed to do; indeed, the committee introduced no evidence at all on the point. While we share the district court's inclination to presume, "[i]n the absence of supporting evidence," that the allegation is untrue, 856 F.Supp. at 1391, the fact remains that the Standing Committee bore the burden of proving Yagman had made a statement that falsely impugned the integrity of the court. By presuming falsity, the district court unconstitutionally relieved the Standing Committee of its duty to produce evidence on an element of its case.[21] Without proof of falsity, ***1442** Yagman's "drunk on the bench" allegation, like the statements discussed above, cannot support the imposition of sanctions for impugning the integrity of the court. *See Porter,* 766 P.2d at 969 (dismissing request for sanctions against attorney where no proof of falsity was introduced).

B

As an alternative basis for sanctioning Yagman, the district court concluded that Yagman's statements violated Local Rule 2.5.2's prohibition against engaging in conduct that "interferes with the administration of justice." The court found that Yagman made the statements discussed above in an attempt to "judge-shop"—*i.e.,* to cause Judge Keller to recuse himself in cases where Yagman appeared as counsel.

The Supreme Court has held that speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1074–75, 111 S.Ct. 2720, 2744–45, 115 L.Ed.2d 888 (1991); *see Sheppard v. Maxwell,* 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). Given the significant burden this rule places on otherwise protected speech, however, the Court has held that prejudice to the administration of justice must be highly likely before speech may be punished.

In a trio of cases involving contempt sanctions imposed against newspapers, the Court articulated the constitutional standard to be applied in this context. Press statements relating to judicial matters may not be restricted, the Court held, unless they pose a "clear and present danger" to the administration of justice. *Craig v. Harney,* 331 U.S. 367, 372, 67 S.Ct. 1249, 1252, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida,* 328 U.S. 331, 348, 66 S.Ct. 1029, 1038, 90 L.Ed. 1295 (1946); *Bridges v. California,* 314 U.S. 252, 260–63, 62 S.Ct. 190, 192–94, 86 L.Ed. 192 (1941). The standard announced in these cases is a demanding one: Statements may be punished only if they "constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

Craig, 331 U.S. at 376, 67 S.Ct. at 1255. There was no clear and present danger in these cases, the Court concluded, because any prospect that press criticism might influence a judge's decision was far too remote. In an oft-quoted passage, the Court noted that "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Id.*

More recently, the Court held that the "clear and present danger" standard does not apply to statements made by lawyers participating in pending cases. *Gentile,* 501 U.S. at 1075, 111 S.Ct. at 2745. In *Gentile,* the Court concluded that lawyers involved in pending cases may be punished if their out-of-court statements pose merely a "substantial likelihood" of materially prejudicing the fairness of the proceeding. *Id.* The Court gave two principal reasons for adopting this lower threshold, one concerned with the identity of the speaker, the other with the timing of the speech. First, the Court noted, lawyers participating in pending cases have "special access to information through discovery and client communications." *Id.* at 1074, 111 S.Ct. at 2744–45. As a result, their statements pose a heightened threat to the fair administration of justice, "since [they] are likely to be received as especially authoritative." *Id.; see also In re Hinds,* 90 N.J. 604, 449 A.2d 483, 496 (1982) (noting that attorneys participating in pending cases "have confidential information and an intimate knowledge of the merits" of an action, and that their views "are invested with particular credibility and weight in light of their positions"). Second, statements made during the pendency of a case are "likely to influence the actual outcome of the trial" or "prejudice the jury venire, even if an untainted panel can ultimately be found." *Gentile,* 501 U.S. at 1075, 111 S.Ct. at 2745. The Court also noted that restricting the speech of lawyers while they are involved in pending cases does not prohibit speech altogether but "merely postpones the attorneys' comments ***1443** until after trial." *Id.* at 1076, 111 S.Ct. at 2745.

The Court cited its celebrated decision in *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), which reversed the conviction of a criminal defendant whose right to a fair trial had been compromised by excessive, prejudicial publicity stemming from the comments of lawyers and others involved in the trial. That decision, the Court noted, had served as a catalyst for reform efforts aimed at curbing press statements by lawyers involved in judicial proceedings. After *Sheppard,* a majority of states enacted rules restricting the rights of lawyers to comment on matters pending before the courts. *Gentile,* 501 U.S. at 1067–68, 111 S.Ct. at 2740–41.

The Court in *Gentile* thus focused on situations where public statements by lawyers impair the "fair trial rights" of litigants, and discussed at some length the strong governmental interest in limiting prejudicial comments in this context. *See id.* at 1068, 111 S.Ct. at 2741. The Court noted, for example, that litigants are entitled to have their cases decided by "impartial jurors ... based on material admitted into evidence before them in a court proceeding." *Id.* at 1070, 111 S.Ct. at 2742. Extrajudicial statements that might prejudice the jury's consideration of the merits "obviously threaten to undermine this basic tenet." *Id.* Moreover, statements likely to prejudice the fairness of proceedings in a particular case impose significant costs on the judicial system: "Even if a fair trial can ultimately be ensured through *voir dire,* change of venue, or some other device, these measures entail serious costs to the system.... The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants." *Id.* at 1075, 111 S.Ct. at 2745.

[19] The special considerations identified by *Gentile* are of limited concern when no case is pending before the court. When lawyers speak out on matters unconnected to a pending case, there is no direct and immediate impact on the fair trial rights of litigants. Information the lawyers impart will not be viewed as coming from confidential sources, and will not have a direct impact on a particular jury venire. Moreover, 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.[22] Much speech of public importance—such as testimony at congressional hearings regarding the temperament and competence of judicial nominees—would be permanently chilled if the rule in *Gentile* were extended beyond the confines of a pending matter. We conclude, therefore, that lawyers' statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice. *Accord Hinds,* 449 A.2d at 498.

[20] **[21]** The district court found that Yagman's statements interfered with the administration of justice because they were aimed at forcing Judge Keller to recuse himself in cases where Yagman appears as counsel. Judge-shopping doubtless disrupts the proper functioning of the judicial system and may be disciplined. But after conducting an independent examination of the record to ensure that the district court's ruling "does not constitute a forbidden intrusion on the field of free expression," *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) (internal quotation marks omitted), we conclude that the sanction imposed here cannot stand.

[22] Yagman's criticism of Judge Keller was harsh and intemperate, and in no way to be condoned. It has long been established, however, that a party cannot force a judge to recuse himself by engaging in personal attacks on the judge: "Nor can that artifice prevail, which insinuates that the decision of this court will be the effect of personal resentment; for, if it could, every man could ***1444** evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion...." *Respublica v. Oswald,* 1 U.S. (1 Dall.) 319, 326, 1 L.Ed. 155 (Pa.1788).[23] Modern courts continue to adhere to this view, and with good reason. *See, e.g., United States v. Studley,* 783 F.2d 934, 939–40 (9th Cir.1986) (litigant's "intemperate and scurrilous attacks" on judge could not compel judge's disqualification); *United States v. Wolfson,* 558 F.2d 59, 62 (2d Cir.1977) (defendant's unfounded charges of misconduct against judge didn't require disqualification, because defendant's remarks "only establish[ed his] feelings towards [the judge], not the reverse").

[23] Criticism from a party's attorney creates an even remoter danger that a judge will disqualify himself because the federal recusal statutes, in all but the most extreme circumstances, require a showing that the judge is (or appears to be) biased or prejudiced against a party, not counsel. *United States v. Burt,* 765 F.2d 1364, 1368 (9th Cir.1985); *see also In re Beard,* 811 F.2d 818, 830 (4th Cir.1987); *Gilbert v. City of Little Rock,* 722 F.2d 1390, 1398–99 (8th Cir.1983). Were it otherwise, courts have cautioned, "[l]awyers, once in a controversy with a judge, would have a license under which the judge would serve at their will," *Davis v. Board of Sch. Comm'rs,* 517 F.2d 1044, 1050 (5th Cir.1975), and any "party wishing to rid himself of the assigned judge would need only hire a lawyer with a certified record of abusive criticisms of that judge," *United States v. Helmsley,* 760 F.Supp. 338, 343 (S.D.N.Y.1991), *aff'd,* 963 F.2d 1522 (2d Cir.1992).

[24] Notwithstanding this well-settled rule, judges occasionally do remove themselves voluntarily from cases as a result of harsh criticism from attorneys.[24] As the district court recognized, then, a lawyer's vociferous criticism of a judge could interfere with the random assignment of judges. But a mere possibility—or even the probability—of harm does not amount to a clear and present danger: "The danger must not be remote or even probable; it must immediately imperil." *Craig,* 331 U.S. at 376, 67 S.Ct. at 1255. The "substantive evil must be extremely serious and the degree of imminence must be extremely high before utterances can be punished" under the First Amendment. *Bridges,* 314 U.S. at 263, 62 S.Ct. at 194.

We conclude that "the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment." *Pennekamp,* 328 U.S. at 350, 66 S.Ct. at 1039. As noted above, firm and long-standing precedent establishes that unflattering remarks like Yagman's cannot force the disqualification of the judge at whom they are aimed. The question remains whether the possibility of voluntary recusal is so great as to amount to a clear and present danger. We believe it is not. Public criticism of judges and the decisions they make is not unusual, *see, e.g.,* n. 19 *supra,* yet this seldom leads to judicial recusal. Judge Real, for example, despite receiving harsh criticism from Yagman, did not recuse himself in *Yagman v. Republic Ins.,* where Yagman was not merely the lawyer but also a party to the ***1445** proceedings.[25] Federal judges are well aware that "[s]ervice as a public official means that one may not be viewed favorably by every member of the public," and that they've been granted "the extraordinary protections of life tenure to shield them from such pressures." *In re Bernard,* 31 F.3d 842, 846 n. 8 (9th Cir.1994) (single judge opinion). Because Yagman's statements do not pose a clear and present danger to the proper functioning of the courts, we conclude that the district court erred in sanctioning Yagman for interfering with the administration of justice.

Conclusion

We can't improve on the words of Justice Black in *Bridges,* 314 U.S. at 270–71, 62 S.Ct. at 197–98 (footnote omitted):

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

REVERSED.

WIGGINS, Circuit Judge, dissenting.
I respectfully dissent.

All Citations

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Footnotes

1 As the basis for this claim, Yagman cited an earlier case where Judge Real had granted a directed verdict against Yagman's clients and thereafter sanctioned Yagman personally in the amount of $250,000. We reversed the sanctions and remanded for reassignment to another judge. *In re Yagman,* 796 F.2d 1165, 1188 (9th Cir.1986). Though we found no evidence that Judge Real harbored any personal animosity toward Yagman, we concluded that reassignment was necessary "to preserve the appearance of justice." *Id.* On remand, Judge Real challenged our authority to reassign the case, and Yagman successfully petitioned for a writ of mandamus. *See Brown v. Baden,* 815 F.2d 575, 576–77 (9th Cir.1987). The matter came to rest when the Supreme Court denied Judge Real's petition for certiorari. *See Real v. Yagman,* 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987).

2 The sanctions order harshly reprimanded Yagman, stating that "neither monetary sanctions nor suspension appear to be effective in deterring Yagman's pestiferous conduct," 137 F.R.D. at 318, and recommended that he be "disciplined appropriately" by the California State Bar, *id.* at 319. On appeal, we affirmed as to disqualification but reversed as to sanctions. *Yagman v. Republic Ins.,* 987 F.2d 622 (9th Cir.1993).

3 The Almanac is a loose-leaf service consisting of profiles of federal judges. Each profile covers the judge's educational and professional background, noteworthy rulings, and anecdotal items of interest. One section—which many judges pretend to ignore but in fact read assiduously—is styled "Lawyers' Evaluation." Perhaps because the comments are published anonymously, they sometimes contain criticism more pungent than judges are accustomed to. Judges who believe the comments do not fairly portray their performance occasionally ask Prentice Hall to seek additional comments; Prentice Hall's letter to Yagman was sent pursuant to such a request. The updated survey indeed produced a more positive—and we believe more accurate—picture of Judge Keller than the original survey. *Compare* 1 Almanac of the Fed.Judiciary 48 (1991–1) *with* 1 Almanac of the Fed.Judiciary 49–50 (1991–2).

4 The portion of the letter relevant here reads as follows:

> It is outrageous that the Judge wants his profile redone because he thinks it to be inaccurately harsh in portraying him in a poor light. It is

an understatement to characterize the Judge as “the worst judge in the central district.” It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover. One might believe that some of the reason for this sub-standard human is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed. One other comment: his girlfriend ..., like the Judge, is a right-wing fanatic.

SER 316 (letter dated June 5, 1991). There's no doubt that Yagman wrote this intemperate letter, though the parties disagree about what Yagman did with it. The district court found that Yagman mailed copies both to Prentice Hall and to Judge Keller, 856 F.Supp. at 1386, and we have no basis for rejecting this finding.

5 The full text of the ad reads: “This office is gathering evidence concerning sanctions imposed by U.S. Dist. Judge William D. Keller. It would be appreciated if any attorney who has been sanctioned, or threatened with sanctions, by Judge Keller fill out the form below and mail it to us. Thank you.” SER 380. The record does not disclose whether Yagman received any responses.

6 Though Yagman adamantly denies saying this to Steinberg, the district court heard testimony from both lawyers and believed Steinberg. 856 F.Supp. at 1392.

7 The matter had originally been assigned to a panel of three judges from outside the Central District. After Yagman argued that this assignment violated Local Rule 2.6.4, the out-of-district panel referred the matter back to Chief Judge Real. The matter was then assigned to Central District Judges Rafeedie, Davies and Williams, who presided over all further proceedings.

8 Yagman raises other procedural objections to the district court proceedings, among them the lack of any discovery. Though Yagman and the Standing Committee both submitted lengthy discovery requests, the district court denied all discovery without explanation. *See* SER 666, 669. While the district court has broad discretion over discovery matters, the record does not reflect that it exercised that discretion, as it denied all discovery in summary fashion. The court thus appears to have violated Local Rule 2.6.4, which expressly makes the Federal Rules of Civil Procedure applicable to disciplinary proceedings. One of the rules thus made applicable is Fed.R.Civ.P. 26(b), which, subject to some limitations, affords both parties the right to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Because the district court may not disregard the local rules it has promulgated, *see In re Thalheim,* 853 F.2d 383, 386 (5th Cir.1988), it lacked authority to dispense with discovery altogether.

9 The Chairman of the Standing Committee, Donald Smaltz, represented Judge Real in *Real v. Yagman. see* n. 1 *supra,* and is alleged to have close personal ties to the former Chief Judge. In addition, Yagman alleges that several of the other committee members have been either defendants or opposing counsel in actions brought by Yagman's clients.

10 Justice Blackmun alone concluded that appointing an interested party's attorney to prosecute a criminal contempt action violates due process; no other justice would go that far. *See Young,* 481 U.S. at 814–15, 107 S.Ct. at 2141–42 (Blackmun, J., concurring).

11 Given the relatively small size of the Central District bar, it's highly likely that Standing Committee members will have had some dealings (professional or otherwise) with the court's judges, as well as with the attorneys subject to disciplinary proceedings. The rules nonetheless call for the committee to be drawn from the Central District bar, presumably because those lawyers will be familiar with local practices. The rules thus reflect a judgment that the benefits of having a prosecuting authority composed of one's peers outweigh any resulting loss of independence. We see no constitutional defect in this judgment.

12 *Sandlin* is consistent with the decisions of most state courts that have considered this issue. *See, e.g., Ramirez v. State Bar,* 28 Cal.3d 402, 169 Cal.Rptr. 206, 211, 619 P.2d 399, 404 (1980); *In re Terry,* 271 Ind. 499, 394 N.E.2d 94, 95–96 (1979); *Louisiana State Bar Ass'n v. Karst,* 428 So.2d 406, 409 (La.1983); *In re Graham,* 453 N.W.2d 313, 321–22 (Minn.1990); *In re Westfall,* 808 S.W.2d 829, 837 (Mo.1991); *In re Holtzman,* 78 N.Y.2d 184, 573 N.Y.S.2d 39, 43, 577 N.E.2d 30, 34 (1991) (per curiam). *But see State Bar v. Semaan,* 508 S.W.2d 429, 432–33 (Tex.Civ.App.1974) (adopting subjective *New York Times* malice standard).

13 This inquiry may take into account whether the attorney pursued readily available avenues of investigation. Sandlin, for example, wrongfully accused a district judge of ordering his court reporter to alter the transcript of court proceedings. Though the judge had agreed to let the reporter be deposed, Sandlin didn't wait to see what the deposition would disclose before making his accusation. Sandlin thus lacked a reasonable factual basis for his accusation because he failed to pursue readily available means of verifying his charge of criminal wrongdoing. 12 F.3d at 867; *see also Ramirez,* 169 Cal.Rptr. at 206, 619 P.2d at 404 (upholding sanction where attorney made false statements about judges based solely on conjecture without investigating whether the allegations were factually substantiated); *Holtzman,* 573 N.Y.S.2d at 41–43, 577 N.E.2d at 32–34 (upholding sanction where attorney falsely accused judge of misconduct during in-chambers meeting before interviewing any of the individuals who were present at the meeting).

14 Yagman made a similar assertion to Prentice Hall, mentioning three incidents in which Jewish lawyers were sanctioned by Judge Keller and alleging these incidents “back[ed] up the claim” that Judge Keller is anti-Semitic. *See* SER 315. Our analysis of this assertion does not differ from that of the Daily Journal remark; we focus on the latter because the district court relied on it in imposing sanctions. 856 F.Supp. at 1391.

15 The Restatement's view has been widely adopted. *See, e.g., Dunn v. Gannett New York Newspapers, Inc.,* 833 F.2d 446, 453 (3d Cir.1987); *Orr v. Argus–Press Co.,* 586 F.2d 1108, 1114–15 (6th Cir.1978); *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.,* 379 Mass. 220, 396 N.E.2d 996, 1000–01 (1979). Although section 566 was drafted before *Milkovich* clarified the famous dictum in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339–40, 94 S.Ct. 2997, 3006–07, 41 L.Ed.2d 789 (1974), nothing in *Milkovich* altered the constitutional principles this section articulates. *Phantom Touring,* 953 F.2d at 731 n. 13; *Lyons v. Globe Newspaper Co.,* 415 Mass. 258, 612 N.E.2d 1158, 1164 (1993); *Gross v. New York Times Co.,* 82 N.Y.2d 146, 603 N.Y.S.2d 813, 818, 623 N.E.2d 1163, 1168 (1993).

16 In *Unelko Corp. v. Rooney,* 912 F.2d 1049 (9th Cir.1990), for example, the defendant stated that plaintiff's product “didn't work,” without setting forth the factual basis for his opinion. We held that the defendant could be liable for defamation because his statement implied a specific factual assertion: that

the product didn't perform the functions listed on the bottle. *Id.* at 1055; *cf. Milkovich,* 497 U.S. at 5 n. 2, 110 S.Ct. at 2698 n. 2 (defendant failed to disclose factual basis for his view that plaintiff lied at court hearing).

17 Even if Yagman's statement were viewed as a bare allegation of anti-Semitism, it might well qualify for protection under the First Amendment as mere "name-calling." *Cf. Stevens v. Tillman,* 855 F.2d 394, 402 (7th Cir.1988) (allegation that plaintiff was a "racist" held not actionable); *Buckley v. Littell,* 539 F.2d 882, 894 (2d Cir.1976) (allegation that plaintiff was a "fascist" held not actionable); *Ward v. Zelikovsky,* 136 N.J. 516, 643 A.2d 972, 983 (1994) (allegation that plaintiffs "hate Jews" held not actionable).

18 A lawyer accusing a judge of criminal misconduct would use a more pointed term such as "crooked" or "corrupt." *See Rinaldi,* 397 N.Y.S.2d at 951, 366 N.E.2d at 1307 (accusation that judge was "corrupt" not protected because it implied the judge had committed illegal acts).

19 *See, e.g., The Comeback Kids,* The Recorder, Dec. 29, 1994, at 1 ("[Apple Computer's attorney] call[ed] the Ninth Circuit ruling [in *Apple Computer, Inc. v. Microsoft Corp.*] 'intellectually dishonest' and 'extremely detrimental to the business of the United States.' "); Philip Shenon, *Convictions Reversed in Island Slaying,* N.Y. Times, July 21, 1987, at A1 ("[T]he chief prosecutor in the case[ ] said he would challenge the appeals court's decision, which he described as 'intellectually dishonest.' "); Dawn Weyrich, *Affirmative Action Win Surprises Many,* Wash. Times, June 28, 1990, at A1 ("William Bradford Reynolds ... called the ruling [in *Metro Broadcasting, Inc. v. FCC*] 'intellectually dishonest.' 'There is no legal reasoning to justify this decision. Judicial activism has run rampant again,' Mr. Reynolds said.").

20 The primary evidence of this charge consists of testimony from one of Judge Keller's former law clerks. The law clerk testified that a reporter called the chambers seeking comment on Yagman's "drunk on the bench" statement. The witness did not claim he had spoken with the reporter himself; rather, he testified that the reporter spoke to his co-clerk and that he (the witness) happened to be in the room with the co-clerk when the call came in. *See* ER Tab 32, at 35. The witness did not explain how he came to know what the reporter was saying at the remote end of the telephone line, but presumably he was testifying as to what the co-clerk said the reporter said Yagman said.

21 The effect of this error was exacerbated by the fact that the district court did not advise Yagman until after the hearing that he had to carry the burden on this issue. *See* p. 1435 *supra.* The district court thus not only improperly shifted the burden of proof on a key issue to Yagman, but also denied him fair notice that he was expected to carry this burden at the hearing.

22 Local Rule 2.5.2 does not differentiate between true and false statements. We express no view as to the standard applicable to a narrower rule that punishes only false statements which interfere with the administration of justice.

23 Why, the perceptive reader may wonder, does an opinion of the Pennsylvania Supreme Court appear in the first volume of U.S. Reports? *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy,* 83 Mich.L.Rev. 1291, 1295–96 (1985).

24 Chief Justice Rehnquist, for example, has declined to participate in some cases where James Brosnahan appeared as counsel, leading to speculation that Brosnahan's criticism of the Chief Justice during his 1986 confirmation hearings may have been the reason. *See, e.g.,* Tony Mauro, *The Justices' Imperial Code of Silence,* Legal Times, Feb. 9, 1987, at 9. Similarly, press reports have suggested that Second Circuit Judge John Walker removed himself from post-trial proceedings in the Leona Helmsley case because of

harsh criticism he had received during Senate confirmation hearings from Helmsley's counsel, Harvard Law Professor Alan Dershowitz. *See* Tony Mauro, *The Thomas Recusal Question,* Tex.Law., Apr. 19, 1993, at 18. Closer to home, one Central District judge has decided to recuse himself in all cases where Yagman appears as counsel, after Yagman made baseless allegations against the judge. *See Yagman,* 856 F.Supp. at 1393.

25 The district court noted that, after Yagman made the remarks at issue, Judge Keller did disqualify himself in one of Yagman's cases. 856 F.Supp. at 1394 n. 13. Although Judge Keller stated that his recusal was motivated by the fact that he had referred Yagman for discipline rather than by Yagman's criticism, *see id.* at 1387, this is beside the point. Our inquiry focuses on objective probabilities: the extent to which the statements in question would be likely to cause a judge of average fortitude to disqualify himself. As the Court noted in *Pennekamp,* "[t]he law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess...." 328 U.S. at 348, 66 S.Ct. at 1038.

Duarte, Elena

From: Duarte, Elena
Sent: Tuesday, August 30, 2016 10:43 AM
To: Duarte, Elena
Subject: FW: Brock Turner's Judge: Join us next Wednesday

Begin forwarded message:

From: >
Date: August 18, 2016 at 9:00:36 AM PDT
To:

Subject: Brock Turner's Judge: Join us next Wednesday

We have a chance to make sure Aaron Persky, the judge who shook the country by sentencing rapist Brock Turner to a mere six months in jail, doesn't let another rapist go free.

On Wednesday, August 24th at 11am, the commission that has the power remove Judge Persky will meet--and we'll be right there to demand they take him off the bench.

Momentum is on our side. The commission, which has been protecting Persky, is already in serious trouble: just last week the California legislature approved an audit of the judicial ethics agency.[1] If we pile onto the outrage, the commission will have no choice but to listen.

Let's show them we haven't forgotten about Judge Persky and that we'll keep fighting until we see justice.

WHAT: We demand justice for survivors: Remove Judge Aaron Persky
WHERE: California Commission on Judicial Performance, 455 Golden Gate Ave, San Francisco, CA 94102
WHEN: Wednesday, June 29, 2016, at 11am
Will you be there?
Thank you.

P.S. The survivor in this case wrote a very powerful letter to Judge Persky that he chose to ignore. Her words are a reminder that justice was not served, and a call to keep working. We'll read her statement at Wednesday's event.
Sources:
1. Legislature approves audit of judicial ethics agency, San Diego Union-Tribune, August 15, 2016

The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation

MARGARET TARKINGTON*

TABLE OF CONTENTS

* Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. I especially would like to thank Frederick M. Gedicks for his encouragement and excellent suggestions at critical points in the development of this project. I am also very grateful to Thomas D. Morgan, Geoffrey C. Hazard, Anuj C. Desai, Stephen L. Pepper, Thomas R. Lee, John Fee, and RonNell Andersen Jones for their extremely helpful comments and to Research Librarian Shawn Nevers for his excellent research assistance. I also thank Derek Averett, Brooke Wright, Brigman Harman, Stephen Mouritsen, Lindsey Romankiw, Nephi Hardman, and Cristi Barnes for their research assistance.

INTRODUCTION

> [S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." —*Garrison v. Louisiana*[1]

Shortly after handing down its watershed decision in *New York Times Co. v. Sullivan*, the Supreme Court struck down Louisiana's criminal libel statute as violating the First Amendment. In *Garrison v. Louisiana*, the Court overturned the conviction of a district attorney for criminal defamation after holding a press conference during which he attributed "a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations" of particular judges and mused about possible "racketeer influences on our eight vacation-minded judges."[2] Emphasizing the importance in a self-governing nation of free debate regarding public officials, the Court held that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New*

1. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
2. *Id.* at 65–67.

York Times may be the subject of either civil or criminal sanctions."[3]

After *Garrison*, the American Bar Association (ABA) expressly adopted the *Sullivan* standard in Model Rule of Professional Conduct (MRPC) 8.2 for regulating lawyer speech regarding the judiciary. Thus, the current regulatory regime for the vast majority of states merely prohibits lawyers from making 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."[4]

Despite the ABA's express recognition of the applicability of *Garrison* and *Sullivan*,[5] the courts have not followed the ABA's lead. Indeed, most state judiciaries have read the *Sullivan* standard out of the language of MRPC 8.2, interpreting it and other rules[6] to punish speech that impugns the integrity of the judiciary without requiring a showing of knowledge of or reckless disregard to falsity. Illustrative is the standard set by the Supreme Court of Kentucky, which requires that attorney allegations of judicial "corruption or unethical conduct" be "supported by *substantial competent evidence*."[7] As noted by the Supreme Court of Missouri, "[m]any courts disregard a claim of [F]irst [A]mendment protection in disciplinary proceedings, holding that free speech does not give a lawyer the right openly to denigrate the court in the eyes of the public."[8] Not to be outdone, the Supreme Court of Florida has reaffirmed, post-*Garrison*, its "belief in the essentiality of the chastity of the goddess of justice,"[9] which "demands condemnation and the application of appropriate penalties" for attorney speech that brings the judiciary into disrepute.[10]

Courts vary as to the appropriate sanctions for statements that impugn the integrity of the judiciary or bring it into disrepute. As one court noted, such conduct "invoke[s] punishment ranging from admonition to disbarment."[11] Indeed, attorneys have been admonished,[12] reprimanded,[13] suspended from the

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3. *Id.* at 74–75.

4. MODEL RULES OF PROF'L CONDUCT R. 8.2(a) (1983).

5. The drafters of the Model Rules intentionally incorporated the *Sullivan* standard. *See id.* R. 8.2 legal background at 206 (Proposed Final Draft 1981); *see also infra* note 123 and accompanying text.

6. Courts rely most prominently on MRPC 8.2 to punish attorney speech impugning judicial integrity, but also invoke various other sources of judicial authority including regulations requiring attorneys to treat the judiciary with respect, rules forbidding attorneys from engaging in conduct prejudicial to the administration of justice, the contempt power, local court rules, civility codes, and even an attorney's oath administered upon admission to the bar.

7. Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam) (emphasis added).

8. *In re* Westfall, 808 S.W.2d 829, 833–34 (Mo. 1991) (citation omitted).

9. From a classical perspective, this would probably be Athena—who was a virgin goddess.

10. *In re* Shimek, 284 So. 2d 686, 690 (Fla. 1973) (per curiam).

11. *In re* Frerichs, 238 N.W.2d 764, 769–70 (Iowa 1976).

12. *See id.*

13. *See, e.g.*, Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 511–12, 522 (Conn. 2006); *In re* Abbott, 925 A.2d 482, 484 (Del. 2007) (per curiam); Fla. Bar v. Ray, 797 So. 2d 556, 560 (Fla. 2001) (per curiam); Idaho State Bar v. Topp, 925 P.2d 1113, 1117 (Idaho 1996); *In re* McClellan, 754 N.E.2d 500, 502 (Ind. 2001); *In re* Reed, 716 N.E.2d 426, 428 (Ind. 1999) (per curiam); Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Horak, 292 N.W.2d 129, 130 (Iowa 1980); *In re* Arnold, 56 P.3d 259, 269 (Kan. 2002) (per curiam); Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 169

practice of law,[14] held in criminal contempt,[15] and disbarred.[16] In 2003, the Supreme Court of Ohio declared that "[u]nfounded attacks against the integrity of the judiciary *require an actual suspension* from the practice of law."[17] And other courts have affirmed that they are duty-bound to impose penalties for such statements.[18]

In some contexts, the penalties for such speech have not fallen solely on

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(Ky. 1980) (per curiam); *In re Westfall*, 808 S.W.2d at 839; *In re* Raggio, 487 P.2d 499, 501 (Nev. 1971) (per curiam); *In re* Holtzman, 577 N.E.2d 30, 32 (N.Y. 1991) (per curiam); *In re* Lacey, 283 N.W.2d 250, 253 (S.D. 1979); Anthony v. Va. State Bar, 621 S.E. 2d 121, 123, 127 (Va. 2005).

14. *See, e.g.*, U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 864, 868 (9th Cir. 1993) (six-month suspension for accusing judge of having edited transcript, when judge had in fact edited transcript, though not substantively); Stilley v. Supreme Court Comm. on Prof'l Conduct, 259 S.W.3d 395, 404–05 (Ark. 2007) (explaining that normally use of disrespectful language is not serious misconduct warranting suspension, but in this case the court's striking of the attorney's brief prejudiced a client, which is serious misconduct); Peters v. State Bar of Cal., 26 P.2d 19, 22 (Cal. 1993) (per curiam) (three-month suspension); Ramirez v. State Bar of Cal., 619 P.2d 399, 406 (Cal. 1980) (per curiam) (one-year suspension); *In re Shimek*, 284 So. 2d 686, 690 (written apology accepted in lieu of twenty-day suspension); *In re* Wilkins, 777 N.E.2d 714, 719 (Ind. 2002) (per curiam) (thirty-day suspension for statement in footnote of brief), *modified*, 782 N.E.2d 985, 987 (Ind. 2003) (reducing sanction to reprimand); *In re* Atanga, 636 N.E.2d 1253, 1258 (Ind. 1994) (per curiam) (thirty-day suspension for calling judge racist after judge humiliated attorney by arresting him and having him represent his client in prison garb); *In re* Garringer, 626 N.E.2d 809, 813 (Ind. 1994) (sixty-day suspension); *In re* Becker, 620 N.E.2d 691, 694 (Ind. 1993) (per curiam) (thirty-day suspension); *In re* Glenn, 130 N.W.2d 672, 678 (Iowa 1964) (one-year suspension for circulating leaflet questioning suspicious series of events regarding criminal convictions); *In re* Pyle, 156 P.3d 1231, 1248 (Kan. 2007) (per curiam) (three-month suspension for statements made in letters to clients, friends, and family); Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 183 (Ky. 1996) (suspended for six months); *In re* Simon, 913 So. 2d 816, 827 (La. 2005) (per curiam); La. State Bar Ass'n v. Karst, 428 So. 2d 406, 411 (La. 1983); *In re* Graham, 453 N.W.2d 313, 325 (Minn. 1990) (per curiam) (sixty-day suspension); *In re* Glauberman, 152 A. 650, 652 (N.J. 1930) (one-year suspension); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 433 (Ohio 2003) (per curiam) (six-month suspension); Farmer v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 660 S.W.2d 490, 492 (Tenn. 1983) (sixty-day suspension); Pilli v. Va. State Bar, 611 S.E.2d 389, 392 (Va. 2005) (90-day suspension); Bd. of Prof'l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1010, 1018 (Wyo. 2009) (two-month suspension for statements made in court filing and for failure to timely file pleading); State Bd. of Law Exam'rs v. Spriggs, 155 P.2d 285, 292 (Wyo. 1945) (six-month suspension).

15. *See, e.g.*, *Waller*, 929 S.W.2d 181 (sentenced to thirty days in jail for contempt, fined $499, and additionally disciplined and suspended for six months); *see also Ex parte* Friday, 32 P.2d 1117, 1118 (Cal. 1934); *In re* Pryor, 18 Kan. 72, 72 (1877).

16. *See, e.g.*, *In re* Palmisano, 70 F.3d 483 (7th Cir. 1995); *In re* Evans, 801 F.2d 703, 708 (4th Cir. 1986) (disbarred from United States District Court for the District of Maryland); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 523 (Iowa 1996); *In re* Meeker, 414 P.2d 862, 870 (N.M. 1966); *see also In re* Cobb, 838 N.E.2d 1197, 1202–09 (Mass. 2005) (involving many ethical violations in addition to impugning judicial integrity); *In re Lacey*, 283 N.W.2d at 253 (court said disbarment might be warranted but did not disbar because attorney was receiving award for fifty years of active practice at annual bar conference and was on deathbed).

17. *Gardner*, 793 N.E.2d at 433 (emphasis added).

18. *Ramirez*, 619 P.2d at 406 ("Appropriate discipline *must be imposed*, if for no other reason than the protection of the public and the preservation of respect for the courts and the legal profession." (emphasis added)); *In re McClellan*, 754 N.E.2d 500; *In re Reed*, 716 N.E.2d at 428 (stating that court has "constitutional duty" to preserve adjudicatory system and punish); *In re Atanga*, 636 N.E.2d at 1257–58 (stating that it "must preserve integrity of the process and impose discipline" despite outrageous conduct of the judge).

attorneys. In 2007, the Utah Supreme Court in *Peters v. Pine Meadow Ranch Home Ass'n* struck the brief of the party represented by the offending attorney and summarily affirmed a lower court decision that the court acknowledged was both legally and factually erroneous.[19] The lower court's decision was erroneous in precisely the manner argued by the offending attorney, but the attorney made the fatal mistake of attributing nefarious motives to the lower court.[20] In a subsequent decision in which an attorney argued that a criminal defendant had been denied due process because of a biased judge, the Utah Supreme Court cited *Peters* and "remind[ed] attorneys of the pitfalls that may accompany" such an argument.[21] The court elaborated, "Any allegation that a trial judge became biased against a defendant should be supported by copious facts and record evidence" and "should be made in a reserved, respectful tone, shunning hyperbole and name-calling."[22]

The speech being sanctioned runs the gamut of criticism and derogation. In some cases, the statements have been as mild as accusing the judiciary of being result-oriented or politically motivated.[23] At the other end of the spectrum are accusations of widespread judicial corruption and conspiracy.[24] Rarely do attorneys resort to crude language or expletives.[25] Rather, the best descriptor for the typical verbal excess by attorneys in these cases is rhetorical hyperbole.

Nor does the forum in which the speech is made appear to make much difference in terms of the standard applied or punishment imposed. Attorneys are punished for allegations in briefs and filings with courts,[26] statements to the

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19. Peters v. Pine Meadow Branch Home Ass'n, 151 P.3d 962, 963, 967–68 (Utah 2007).

20. *See id.* at 963 (explaining the factual and legal arguments that were raised on appeal and gave rise to the attorney's accusations and stating as to each that "[t]he court of appeals did err" regarding the law and facts).

21. State v. Santana-Ruiz, 167 P.3d 1038, 1044 (Utah 2007).

22. *Id.*

23. For example, in *Idaho State Bar v. Topp*, 925 P.2d 1113, 1115 (Idaho 1996), an attorney who attended a hearing (and who was not involved in the case) was reprimanded for opining to the press that the ultimate decision differed from a similar case because the judge in the first decision "wasn't worried about the political ramifications." His statement "necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations" and thus "impugned his integrity." *See id.* at 1117; *see also In re Reed*, 716 N.E.2d at 427; *In re* Westfall, 808 S.W.2d 829, 831 (Mo. 1991); *In re* Raggio, 487 P.2d 499, 500 (Nev. 1971) (per curiam).

24. In *Committee on Legal Ethics of the West Virginia State Bar v. Farber*, 408 S.E.2d 274, 284 (W. Va. 1991), the attorney accused a judge of being part of a secret Masonic plot to cover up the arson of a local establishment.

25. *But see* Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006) (making crude remarks on radio show about judges after verdict for client was reversed on appeal), *cert. denied*, 549 U.S. 1205 (2007); Tresa Baldas, *Lawyers Critical of Judges Fight for Rights,* NAT'L L.J., Feb. 9, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428070373 (stating that comments posted by lawyers on blogs are sometimes crude and "vile").

26. *In re* Abbott, 925 A.2d 482, 483 (Del. 2007) (per curiam); *In re* Wilkins, 777 N.E.2d 714, 715–16 (Ind. 2002) (per curiam), *modified*, 782 N.E.2d 985, 987 (Ind. 2003); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 427 (Ohio 2003) (per curiam); Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962, 967–68 (Utah 2007).

Attorneys have been punished for statements about the judiciary in briefs to the court even when the

press,[27] letters to the judiciary,[28] communications with an authority to complain about a judge,[29] pamphlets or campaign literature,[30] comments posted on blogs,[31] and even correspondence with friends, family, and clients.[32] Attorneys have been punished when the statements made could not have prejudiced or affected a pending proceeding[33] and when the statements are made by attorneys

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suit is filed against judges, and the question at issue is whether an exception to judicial immunity exists. *See* Ramirez v. State Bar of Cal., 619 P.2d 399, 406, 414 (Cal. 1980) (per curiam).

27. *Topp*, 925 P.2d at 1115 (statements to press that implied judge's decision was politically motivated); *In re Reed*, 716 N.E.2d at 427 (statements in interview with press); *In re* Atanga, 636 N.E.2d 1253, 1256 (Ind. 1994) (per curiam) (statements in interview for ACLU local newsletter); Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 166 (Ky. 1980) (per curiam) (statement to press criticizing judge for holding restraining order hearing ex parte); Ky. Bar Ass'n v. Nall, 599 S.W.2d 899, 899 (Ky. 1980) (per curiam) (statements in radio interview); *Fieger*, 719 N.W.2d 123 (statements on radio show); *In re Westfall*, 808 S.W.2d at 831 (statements to press criticizing appellate decision that had been released); *In re* Holtzman, 577 N.E.2d 30, 40–41 (N.Y. 1991) (per curiam) (letter sent to press criticizing judge's treatment of sexual assault victim); *In re Raggio*, 487 P.2d at 500 (statements made in television interview criticizing decision of Nevada Supreme Court to have death penalty case reheard); *In re* Lacey, 283 N.W.2d 250, 251 (S.D. 1979) (statements to press criticizing state courts' handling of the case after appellate decision received); Ramsey v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 771 S.W.2d 116, 120–21 (Tenn. 1989) (statements to the press complaining about a judge and then the disciplinary process).

28. *In re* Evans, 801 F.2d 703, 703–04 (4th Cir. 1986) (letter sent to magistrate after case was on appeal and no longer before the magistrate or the district court); *In re* Guy, 756 A.2d 875, 877–78 (Del. 2000) (letter sent to judge); Fla. Bar v. Ray, 797 So. 2d 556, 557 (Fla. 2001) (per curiam) (three letters sent to chief immigration judge complaining about another immigration judge); *In re* Arnold, 56 P.3d 259, 263 (Kan. 2002) (per curiam) (disqualified attorney sent letter to judge).

29. U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 863–64 (9th Cir. 1993) (statements made to FBI and appropriate authorities at U.S. Attorney's office regarding judge's editing of transcripts); *Ray*, 797 So. 2d at 560 (letter sent to chief immigration judge complaining about another immigration judge, which Ray and amici argued was "an accepted manner in which to seek redress when an attorney is having difficulties with an immigration judge"); *In re* Disciplinary Action Against Graham, 453 N.W.2d 313, 315, n.3 (Minn. 1990) (per curiam) (statements made in letter to U.S. Attorney, in judicial misconduct complaint, and in affidavit in support of motion to recuse, although court indicates that the charges were also released to the public).

30. *See, e.g.*, *In re* Glenn, 130 N.W.2d 672, 674–75 (Iowa 1964) (leaflet circulated in community); *In re* Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807, 810 (Minn. 2006) (statement by judicial candidate's campaign issued about incumbent judge).

31. *See, e.g.*, Baldas, *supra* note 25 (reporting pending proceedings in various states regarding discipline for comments posted by lawyers on blogs, including a Florida attorney who is being disciplined for describing a judge on a blog as an "'evil, unfair witch' with an 'ugly condescending attitude'").

32. *See, e.g.*, *In re* Pyle, 156 P.3d 1231, 1233–36 (Kan. 2007) (per curiam) (letter sent to family, friends, and clients); *In re* Shay, 117 P. 442, 443–44 (Cal. 1911) (letter sent to client). Courts still rely on *Shay* as authority. *See, e.g.*, Ramirez v. State Bar of Cal., 619 P.2d 399, 411 (Cal. 1980).

33. *See, e.g.*, *In re Glenn*, 130 N.W.2d at 674–75 (pamphlet after cases decided with no appeal pending); *In re Pyle*, 156 P.3d 1231 (explanatory letter regarding earlier discipline sent to family, friends, and clients). There are several cases where statements are made to the press after an appellate decision has been handed down. *See, e.g*, Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006), *cert. denied*, 549 U.S. 1205 (2007); *In re* Westfall, 808 S.W.2d 829, 831 (Mo. 1991); *In re* Raggio, 487 P.2d 499, 500 (Nev. 1971) (per curiam); *In re* Lacey, 283 N.W.2d 250, 251 (S.D. 1979); *see also In re Evans*, 801 F.2d at 704–05, 708 (attorney disbarred from United States District Court after sending letter accusing magistrate of incompetence and pro-Jewish bias, where attorney waited to send letter until after district court had adopted magistrate's ruling and Fourth Circuit had rejected summary reversal, although full disposition at the Fourth Circuit was still pending).

who are not engaged in a representative capacity before the criticized court.[34] Indeed, this Article excludes cases in which the speech was made verbally in a courtroom during a court proceeding or in which the speech was made at a time or in a manner that could potentially influence a jury trial. Thus, the cases focused on involve scenarios in which the special interests of the government in preserving courtroom order or in ensuring a fair jury trial are not at issue.

The widespread decision of judiciaries to carve out an exception to *Sullivan* and *Garrison* for statements regarding themselves is nothing less than shocking. In the context of attorney discipline, courts act as judge and jury, and, where the speech regards the judiciary, the courts are also the victim.[35] Yet courts abuse this position and impose extreme punishment on attorneys and their clients to preserve their own reputation and suppress further disparagement. Some courts even deny attorneys the defense of truth.[36] In the twenty-first century, courts cite, as authoritative, cases decided before *Sullivan* and even cases predating the incorporation of the Bill of Rights.[37] Ironically, the punishment and suppression of attorney speech is done in the name of preserving the public *perception* of judicial integrity—an interest that the Supreme Court has never recognized as valid despite its being proffered in other cases.[38] Rather than address problems and improve integrity itself, courts have downplayed judicial abuses while punishing attorney speech aimed at exposing them.[39] As shown, the cases are numerous[40] and have enjoyed a recent resurgence.[41]

Some courts have implicitly recognized a right of an attorney to criticize the judiciary after a case is no longer pending. *See In re* Cobb, 838 N.E.2d 1197, 1210 (Mass. 2005) (holding that the state has the power "to regulate the speech of an attorney representing clients in pending cases," suggesting it does not once a case is no longer pending); *In re Graham*, 453 N.W.2d at 321 (stating that the First Amendment protects the ability to "criticize rulings of the court *once litigation was complete* or to criticize judicial conduct or even integrity" (emphasis added)).

34. Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1437, 1440 (9th Cir. 1995) (initially suspended for one year for comment sent to Prentice Hall for publication in the Almanac of the Federal Judiciary suspension reversed by Ninth Circuit, but Ninth Circuit still rejected applicability of *Sullivan* standard); Idaho State Bar v. Topp, 925 P.2d 1113, 1115 (Idaho 1996); *In re Pyle*, 156 P.3d at 1233–34, 1248; Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 166 (Ky. 1980) (per curiam).

35. *See infra* note 236 and accompanying text.

36. *See infra* section I.C.2.

37. *See infra* section III.A.1.

38. *See infra* notes 167–73 and accompanying text.

39. *See infra* notes 238–50 and accompanying text.

40. *See supra* notes 11–16.

41. *See, e.g.*, Stilley v. Supreme Court Comm. on Prof'l Conduct, 259 S.W.3d 395 (Ark. 2007); Notopoulos v. Statewide Grievance Comm., 890 A.2d 509 (Conn. 2006); *In re* Abbott, 925 A.2d 482 (Del. 2007) (per curiam); *In re* Guy, 756 A.2d 875 (Del. 2000); Fla. Bar v. Ray, 797 So. 2d 556 (Fla. 2001) (per curiam); *In re* Wilkins, 777 N.E.2d 714 (Ind. 2002) (per curiam), *modified*, 782 N.E.2d 985, 987 (Ind. 2003); *In re* McClellan, 754 N.E.2d 500 (Ind. 2001) (per curiam); Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71 (Iowa 2008); *In re* Pyle, 156 P.3d 1231 (Kan. 2007) (per curiam); *In re* Arnold, 56 P.3d 259 (Kan. 2002) (per curiam); *In re* Simon, 913 So. 2d 816 (La. 2005) (per curiam); *In re* Cobb, 838 N.E.2d 1197 (Mass. 2005); Grievance Adm'r v. Fieger, 719 N.W.2d 123 (Mich. 2006), *cert. denied*, 549 U.S. 1205 (2007); *In re* Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807 (Minn. 2006); *In re* Madison, No. SC 89654, 2009

W. Bradley Wendel has written one of the few in-depth doctrinal treatments[42] of attorney speech in his widely cited article, *Free Speech for Lawyers*.[43] However, Wendel does not address separately the problem of attorney speech critical of the judiciary. To the extent that he treats the problem, Wendel largely rejects the use of the *Sullivan* standard for lawyer speech,[44] instead calling for analysis of "lawyer-speech cases under ordinary constitutional rules, such as those employed by the Supreme Court in *Snyder*, *Sawyer*, and *Gentile*."[45] As

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WL 1211256 (Mo. May 5, 2009) (per curiam); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 1197 (Ohio 2003) (per curiam); Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962 (Utah 2007); Pilli v. Va. State Bar, 611 S.E.2d 389 (Va. 2005); Anthony v. Va. State Bar, 621 S.E.2d 121 (Va. 2005); Bd. of Prof'l Responsibility Wyo. State Bar v. Davidson, 205 P.3d 1008 (Wyo. 2009).

42. Commentators have examined issues related to the question but failed to address—from a doctrinal position that takes into consideration the various forums where such speech is made—the constitutionality of restricting attorney speech that is critical of the judiciary. *See, e.g.*, Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998) (arguing that *Sullivan*'s reckless disregard standard should apply for pretrial publicity); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705 (2004) (discussing courtroom speech from a political theory perspective rather than a doctrinal view); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998) (examining free speech issues regarding pretrial publicity to the press, solicitation, and advertising, but not addressing lawyer speech impugning judicial integrity).

Some law review articles have been written regarding a particular case where an attorney has been sanctioned. But these are in large part narrow discussions focusing on one decision or containing sparse analysis. *See, e.g.*, Carol T. Rieger, *Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?*, 2 CONST. COMMENT. 69 (1985) (discussing the *Snyder* case, which was then on appeal); Elizabeth A. Bridge, Note, *Professional Responsibility and the First Amendment: Are Missouri Attorneys Free to Express their Views?*, 57 MO. L. REV. 699 (1992); Angela Butcher & Scott MacBeth, Comment, *Lawyers' Comments about Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL ETHICS 659 (2004); Richard A. McGuire, Comment, *How Far Can a Lawyer Go in Criticizing a Judge?*, 27 J. LEGAL PROF. 227 (2003); Caprice L. Roberts, Note, Standing Committee on Discipline v. Yagman*: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary?*, 54 WASH. & LEE L. REV. 817 (1997).

43. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001). Wendel's article has a number of useful analogies and explores various principles of constitutional law as they might apply to attorney speech but does not provide many concrete solutions to specific problems.

Terri Day recently published an article arguing that "[l]awyers should not be restricted from making critical statements about the judiciary when the statements are made *out-of-court* and in *non-pending* cases." Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 163 (2008) (emphasis added). Notably, my thesis is not limited to speech disassociated from ongoing judicial proceedings; rather, I argue that whenever the reason for punishing attorney speech is to protect judicial reputation, the *Sullivan* standard applies and attorney speech can be punished only if it is knowingly false or made with reckless disregard as to its truth. Further, while Day provides a short analysis of *Sullivan* and a few other First Amendment cases involving content-based restrictions, *see id.* at 180-87, she ultimately leaves the question of the appropriate analysis open. *Id.* at 187 ("Whether the Supreme Court would apply a defamation analysis or a strict scrutiny analysis to this type of case is unclear. Perhaps an analogy to public employee speech cases provides a third avenue of analysis."). The problems with a public employee analogy are discussed *infra* note 357.

44. Wendel, *supra* note 43, at 427–31. Wendel seems to accept the argument that "the interests served by defamation law are different from those advanced by the law of professional discipline," *id.* at 427–28, a premise explored and disputed *infra* section III.C. He also posits that using defamation case law in the attorney discipline context can "create[] undue complications." *Id.* at 431.

45. Wendel, *supra* note 43, at 431.

shown below, these very cases have caused confusion and are used to support the misunderstanding that judiciaries can freely punish attorney speech—a proposition that Wendel does not ultimately support.[46]

This Article argues that the standard set forth in *Sullivan* and *Garrison* is the constitutional standard that must be employed to punish attorneys for speech impugning judicial integrity. Part I will show that attorney speech critical of the judiciary is core political speech entitled to the fullest protection offered by the Constitution and clearly falls within *Sullivan* and *Garrison*.

State and federal courts, nevertheless, have discarded the requirements of *Sullivan* in this context, usually citing the imperative interest in preserving the public perception of judicial integrity. Part II will explore why this interest cannot justify suppression of attorney speech and in fact is antithetical to democracy itself. Indeed, the interest in preserving judicial integrity, although asserted as the primary justification for suppressing speech, instead underscores why the speech rights of attorneys to criticize the judiciary must be preserved.

Courts have offered various rationales for disciplining attorneys who impugn judicial integrity, which are explored in Part III, primarily relying on the following arguments: (1) the Supreme Court has exempted attorney speech critical of the judiciary from the strictures of *Sullivan*; (2) the restrictions on attorney speech are a constitutional condition imposed on attorneys in return for granting attorneys the privilege of practicing law; and (3) the interests served by the tort of defamation are different from the interests served by imposition of attorney discipline. None of these rationales, however, withstand scrutiny, and ultimately they can neither remove attorney speech impugning judicial reputation from the requirements of *Sullivan* nor justify a prophylactic viewpoint-based prohibition on political speech.

Part IV briefly discuses the need for much greater regulatory and analytic precision in prohibiting attorney speech regarding the judiciary. Courts should not be punishing attorney speech solely to preserve judicial reputation—an interest that of itself cannot justify suppression of core political speech outside the requirements of *Sullivan* and *Garrison*. Significant state interests do exist that justify restrictions on attorney speech—even when that speech regards the judiciary. Narrow restrictions tailored to these state interests may be imposed constitutionally. Nonetheless, speech regarding the qualifications and integrity of members of the judiciary is essential for democracy to function properly and cannot be suppressed merely to protect judicial reputation.

I. IMPUGNING JUDICIAL INTEGRITY IS CORE POLITICAL SPEECH

A. HISTORICAL AND THEORETICAL FOUNDATIONS OF THE FIRST AMENDMENT

Speech critical of the judiciary falls within the central purposes and core

46. *See, e.g.*, *id.* at 440 (stating that "even the most vitriolic criticism of judges" should be protected).

protection of the First Amendment. As Cass Sunstein has stated, "There can be little doubt that suppression by the government of political ideas that it disapproved, or found threatening, was the central motivation for the [speech] clause. The worst examples of unacceptable censorship involve *efforts by government to insulate itself from criticism*."[47] Historical rationales for the Speech Clause include the American theory of democratic self-government, the rejection of seditious libel, and the American view of sovereignty in the people rather than in government officials. These purposes directly correlate to major academic theories of Speech Clause protection[48] and were the very theories relied upon by the *Sullivan* and *Garrison* Courts in holding that speech critical of government officials could not be punished absent knowledge of or reckless disregard as to a statement's falsity.[49] An examination of these theories demonstrates that allowing speech critical of the judiciary is an essential component of the American system of government.

1. Self-Government

A major theory of the Speech Clause, initially propounded by Alexander Meiklejohn, posits that the purpose of free speech is to provide the means whereby the citizens of the United States can govern themselves. Thus, "[t]he First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'"[50] Meiklejohn relies on the social contract created by the Constitution under which "We, the People of the United States" established a government where all citizens have the privilege and responsibility of participating in government and all agree to abide by the laws created.[51] Meiklejohn contends that speech

47. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 305 (1992) (emphasis added).

48. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 101–31 (1980) (discussing need for free speech to reinforce representation and preserve democratic process); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (basing theory for need for free speech on idea of self-government); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (arguing that checking value embodies the rejection of seditious libel and was the primary purpose for the Speech Clause); Sunstein, *supra* note 47, at 257 (arguing that "the American tradition of free expression" and its "extraordinary protection" for "political speech can well be understood as an elaboration of the distinctive American understanding of sovereignty").

There are free speech theories that are more restrictive than that of Sunstein or Meiklejohn, such as the theory of Robert Bork. But even Bork recognizes that the Speech Clause must at least protect political speech. *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–28 (1971). Similarly, theories that expand the purpose for free speech protection beyond the realm of politics still protect political speech. Thus, theories based on personal autonomy, individualism, or the marketplace of ideas would call for protection of speech critical of the judiciary.

49. *See infra* notes 97–99 and accompanying text.

50. Alexander Meiklejohn, *The First Amendment Is Absolute*, 1961 SUP. CT. REV. 245, 255; *see also id.* at 252 ("The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government.").

51. MEIKLEJOHN, *supra* note 48, at 14–16.

relevant to self-government is absolutely protected by the First Amendment.[52] Meiklejohn's theory encompasses all speech relevant to the responsibilities that a self-governing people must undertake[53]—such as obtaining information related to understanding political and social issues, passing judgment upon the activities of governmental officials, and discussing methods for solving concerns raised.[54]

Speech regarding members of the judiciary or their decisions is patently relevant to self-governance. Thirty-nine states elect their judiciary either initially or through retention elections. A surprising twenty-two of those states popularly elect all members of their judiciary, another eleven states popularly elect trial court judges but appoint appellate court judges who are then subject to a retention election, and six states appoint the judiciary with a popular retention election.[55] In order to vote with informed judgment, citizens should be free to make and obtain opinions and information regarding such candidates. Even as to appointed judges, the citizenry perform self-governance in selecting representatives responsible for appointing judges and can call upon those representatives to use their power to address concerns.

Meiklejohn's theory has been extremely influential on the Supreme Court and

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52. *See id.* at 46 (explaining that "[s]o long as [a citizen's] active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged"); *see also* Meiklejohn, *supra* note 50, at 257. Notably, Meiklejohn does not believe that all speech is absolutely protected by the Speech Clause, but only speech related to self-government. Meiklejohn expressly rejects that the First Amendment is "an unlimited license to talk" and contends that "there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment." *Id.* at 258.

53. Meiklejohn's theory would provide protection for all speech that helps "voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare" that assists self-government. *See* Meiklejohn, *supra* note 50, at 255. Thus, protection for such things as "[e]ducation, in all its phases," as well as philosophic, scientific, literary, and artistic speech should be included within the protection of the Speech Clause. *Id.* at 256–57. Of course, at the core of self-government protection is "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues." *Id.* at 257.

54. *Id.* at 255.

55. Thus, in only eleven states and the District of Columbia is the general citizenry *not* responsible for voting on the selection or retention of judges. *See* American Judicature Society: Methods of Judicial Selection, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Feb. 7, 2009). The twenty-two states that popularly elect their judiciary are: Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. *See id.* Of the eleven that popularly elect trial court judges while appointing appellate court judges who are then subject to a retention election, seven states elect all trial court judges (California, Florida, Indiana, New York, Oklahoma, South Dakota, and Tennessee), and four states popularly elect some of their trial court judges, with appointment and retention elections for other trial court judges (Arizona, Kansas, Maryland, and Missouri). *See id.* The six states that appoint all of their judges but subject them to a popular retention election are Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming. *See id.*; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring).

the academy.[56] Prior to *Sullivan*, Meiklejohn contended that the First Amendment required constitutional protection for libel regarding governmental officials.[57] Indeed, commentators recognize that *Sullivan* and *Garrison* adopted—at least in part—Meiklejohn's democratic theory of free speech.[58] However, the Supreme Court did not adopt Meiklejohn's thesis to its full extent, as Meiklejohn, along with other commentators, argued that the First Amendment required absolute protection for statements regarding governmental officials[59]—a protection greater than that afforded by *Sullivan*.[60]

Martin Redish and Abby Mollen recently wrote that at this point "[t]he assertion that democracy and free expression are inextricably intertwined in a symbiotic relationship should hardly be considered controversial."[61] Redish and Mollen offer a democratic theory of the First Amendment that is broader than Meiklejohn's theory[62] and that certainly would protect speech currently pun-

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56. *See, e.g.*, Blasi, *supra* note 48, at 554 (stating that "[t]he most influential scholarly analysis of the First Amendment to be published since World War II is Professor Alexander Meiklejohn's *Free Speech and Its Relation to Self-Government*").

57. Meiklejohn, *supra* note 50, at 259.

58. Shortly after Meiklejohn's death, Justice Brennan, the author of both *Sullivan* and *Garrison*, noted that the language of those opinions "echoes" Meiklejohn's formulation that the freedom the First Amendment protects is the presence of self-government. *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 18 (1965). Harry Kalven opined that "in its rhetoric and sweep, [*Sullivan*] almost literally incorporated Alexander Meiklejohn's thesis . . . ." *See* Harry Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209. Kalven reports that Meiklejohn said the *Sullivan* opinion was "an occasion for dancing in the streets." *See id.* at 221 n.125. *See also* Sunstein, *supra* note 47, at 269 (explaining that "observers often understand *Sullivan* to reflect Alexander Meiklejohn's conception of freedom of expression"). Nevertheless, Blasi argues that subsequent history demonstrates that the Court did not accept the entirety of Meiklejohn's theory and that the checking value represents a truer understanding of the Speech Clause and provides a better rationale for protecting speech. *See* Blasi, *supra* note 48, at 575–76; *infra* section I.A.2 (explaining the checking value).

59. *See, e.g.*, MEIKLEJOHN, *supra* note 48, at 37, 46; Meiklejohn, *supra* note 50, at 257; *see also* Blasi, *supra* note 48, at 587 (concluding that "an absolute privilege for communications about official behavior" would be the more appropriate approach, particularly in light of the "self-censorship danger"); Paul A. LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249, 290 (1987) (arguing that "absolute immunity" from liability is needed "for speech about government").

60. The concurring Justices in *Sullivan* took Meiklejohn's position that the First Amendment required absolute protection for speech regarding public officials. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293 (Black, J., concurring) (arguing that the First Amendment "completely prohibit[s] a State from exercising such a power" and the "defendants had an absolute, unconditional constitutional right to publish . . . their criticisms"); *id.* at 298 (Goldberg, J., concurring) (stating that "the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct").

61. Martin H. Redish & Abby Marie Mollen, Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression, 103 NW. U. L. REV. (forthcoming 2009) (manuscript at 1, on file with the Social Science Research Network).

62. *See id.* at 4–26. Redish and Mollen ultimately contend:

> [I]ndividual autonomy is both practically necessary for collective autonomy to exist and theoretically necessary for the value of collective autonomy to make sense in the first place. As a result, we argue that the purpose of democracy is to guarantee each individual the equal

ished for impugning judicial integrity. Notably, Redish and Mollen contend that any democratic theory of the First Amendment "must prohibit the government from managing public opinion, whether by overt coercion or by the indirect manipulation that comes with forcing a people to be ignorant."[63] Significantly, punishment of attorney speech that impugns judicial integrity manages public opinion through both means: it *overtly* coerces attorneys to utter only favorable opinions; and, by silencing the segment of society that has the training, education, and exposure to best offer criticism, it *indirectly* keeps the public ignorant of derogatory opinions of the judiciary.

2. The Checking Value

Vincent Blasi has argued that "the checking value" provides a more appropriate and compelling rationale for *Sullivan* than does Meiklejohn's self-government theory. The checking value is "the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials."[64] According to Blasi, the historical context of the Speech Clause demonstrates that the checking value "was uppermost in the minds of the persons who drafted and ratified the First Amendment."[65] Blasi further contends that the checking value remains a persuasive theoretical basis for interpreting what speech cannot be suppressed.

Blasi's premises regarding the need for the checking value in our democratic society are compelling in the context of attorney speech critical of the judiciary. First, Blasi points out that "the abuse of official power is an especially serious evil"[66] that relies for its correction on "the power of public opinion" to either retire officials or make other needed changes—complete with the ultimate threat

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opportunity to affect the outcomes of collective decisionmaking according to her own values and interests as she understands them.

Id. (manuscript at 11). Robert Post also criticizes Meiklejohn for his view of democracy as not being broad enough and not taking into account individual autonomy. *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111–19 (1993).

63. *See* Redish & Mollen, *supra* note 61 (manuscript at 3).

64. Blasi, *supra* note 48, at 527.

65. *Id.*; *see also id.* at 538 ("There can be no doubt, however, that one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them. Insofar as the views prevalent at the time of adoption have relevance to contemporary interpretation, the checking value rests on a most impressive foundation.").

66. *Id.* at 538. Blasi argues that official power is a particularly serious evil for several reasons, including that much human suffering "is caused by persons who hold public office." *Id.* at 541. Thus, persons should "value free expression primarily for its modest capacity to mitigate the human suffering that other humans cause." *Id.*

At a more universal level for government officials, Blasi explains that "because the investiture of public power represents a form of moral approval, public servants are probably more likely than those who wield private power to lose their humility and acquire an inflated sense of self-importance, often a critical first step on the road to misconduct," and because they have been chosen by the people in an election or through appointment are received by the public with less skepticism than powerful private figures as "[w]e *want* to believe in the trustworthiness of our officials." *Id.* at 540. Further, once public

of the power of the populace "to withdraw the minimal cooperation required for effective governance."[67] Blasi acknowledges that the United States government already has a structural system of checks and balances whereby "[e]ach branch of government may impose specific sanctions against members of the other branches."[68] Nevertheless, Blasi observes that this system breaks "down in certain political contexts" and is reliant on public opinion to effectively operate. He explains that "the system of checks and balances usually functions only when an aroused populace demands that one segment of the government perform its checking function."[69] Thus free speech not only provides a means whereby the populace can check official abuse, but also acts as a catalyst for the other branches of government to perform their checking functions.

As noted, most states elect or popularly retain their judiciaries.[70] Thus, where speech regarding the judiciary is quelled, the public is denied its ability to learn of and check judicial power through voting. Where a judiciary is not elected or popularly retained, the checking value maintains its importance and perhaps is strengthened. The very lack of public power to directly check judicial power intensifies the need for free speech regarding wrongdoing or incompetence so the public can call upon other governmental powers to perform their checking functions.

Blasi explains that the checking value is additionally based on the "premise that the general populace must be the ultimate judge of the behavior of public officials" and must determine whether misconduct has occurred.[71] It is for "the general populace" to "defin[e] norms for public officials."[72] The populace cannot determine whether misconduct has occurred or define norms if it is kept in ignorance about what is taking place. Further, in light of the size and complexity of modern government, a need exists for "critics capable of acquiring enough information to pass judgment on the actions of government."[73] In the context of the judiciary, it is attorneys who have such knowledge. As Blasi notes, the "historical abhorrence of seditious libel" and the consequent creation of a political system with a free speech guarantee "stem[med] largely from the fact that [seditious libel] was used by tyrants to silence *potentially influential*

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trust is betrayed, it has a greater "cost to the society . . . if important expectations have been defeated." *Id.*

67. *Id.* at 539.

68. *Id.*

69. *Id.*

70. *See supra* note 55 and accompanying text.

71. Blasi, *supra* note 48, at 542. Blasi grounds this premise in the democratic theories of John Locke and Joseph Schumpeter. *See id.*

72. *Id.*

73. *Id.* at 541. Blasi is contending that there is a need for "well-organized, well-financed, professional critics to serve as a counterforce to government." *Id.* Although attorneys are not a well-organized, well-financed, cohesive whole, they are the very critics capable of acquiring the requisite information to scrutinize judicial behavior.

critics."[74] Notably, courts punishing attorneys for their speech have expressly acknowledged that a reason for such punishment is the *influence* that attorney views may have on public opinion regarding the judiciary.[75] Indeed, there are some cases where attorneys are punished more harshly because of their excellent reputation and record—on the notion that views coming from reputable attorneys are more likely to be influential and thus are more dangerous.[76]

Of course, the Speech Clause only came to implicate state action by virtue of its incorporation under the Fourteenth Amendment. At the time of the adoption of the Fourteenth Amendment, there was significant distrust of state governments (including state judiciaries) to protect and enforce individual rights. For example, in enacting legislation aimed at enforcing the Fourteenth Amendment, Congress found that "state *courts* were being *used to harass and injure individuals*, either because the state courts were powerless to stop deprivations or *were in league* with those who were bent upon abrogation of federally protected rights."[77] Thus, the historical context of the Fourteenth Amendment indicates the need to curb and check not solely state legislative and executive power, but also judicial power. Judiciaries were not considered, nor are they in reality, above abuse of power and, thus, should not be entitled to command respect through coercive law.

Finally, Blasi argues that the checking value provides a rationale for the

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74. *Id.* at 575 (emphasis added). Blasi argues, consequently, that the speech of public employees should be protected. He states:

> Since under the checking value information about the conduct of government is accorded the highest possible valuation, speech critical of public officials by those persons in the best position to know what they are talking about—namely, government employees—would seem to deserve special protection.

Id. at 634. Blasi urges that the "high standard of protection for such speech" found in *Pickering* be "augmented and extended." *Id.* Unfortunately, the Supreme Court's recent case, *Garcetti v. Ceballos*, significantly curbs the protection afforded to public employee speech by holding that "when public employees make statements pursuant to their official duties . . . the Constitution *does not* insulate their communications from employer discipline." Garcettit v. Ceballos, 547 U.S. 410, 421 (2006) (emphasis added).

75. *See infra* notes 202 & 230–33 and accompanying text.

76. *See, e.g.*, *In re* Reed, 716 N.E.2d 426, 429 (Ind. 1999) (Shepard, C.J., dissenting) (arguing for a more severe punishment in part because Reed was "a seasoned veteran [of the profession] holding an office of great public trust"); *In re* Westfall, 808 S.W.2d 829, 839 (Mo. 1991) (including Westfall's twenty years of service as a prosecutor as an aggravating factor); *In re* Raggio, 487 P.2d 499, 500 (Nev. 1971) (per curiam) (noting that at the time of his statements, Raggio "was prominently mentioned as a candidate for either governor or United States senator" and thus "[m]aximum dissemination was given his views"; "[t]he public was quick to respond"; and the Nevada Supreme Court "became the center of controversy"). *But see In re* Lacey, 283 N.W.2d 250 (S.D. 1979) (fifty years of service to the bar was a mitigating factor).

77. Mitchum v. Foster, 407 U.S. 225, 240 (1972) (emphasis added). In *Mitchum*, the Supreme Court interpreted 42 U.S.C. § 1983, which was enacted contemporaneously with the Fourteenth Amendment and was intended "to enforce . . . the Fourteenth Amendment" against state executive, legislative, or *judicial* action. *Id*. The legislative history for § 1983 reveals that Congress "was concerned that state instrumentalities [including courts] could not protect [federal] rights." *Id.*

Court's concern in *New York Times Co. v. Sullivan*[78] and subsequent cases[79] with the severity of the punishment imposed for speech and not solely with the fact of punishment itself.[80] Blasi contends the press (and citizens) "will be unable to provide a powerful check against the misuse of government power" if their examination of the government is "distorted by financial disincentives."[81] Speakers will engage in greater self-censorship to the extent they fear not merely liability, but "financially debilitating awards."[82]

Certainly an exacerbated chilling effect from the possibility of excessive punishment is relevant in the context of attorney speech about the judiciary. A sizeable number of attorneys have not merely been disciplined, but have been suspended from the practice of law for having made statements impugning judicial integrity.[83] The Supreme Court of Ohio has stated that actual suspension from the practice of law is a *mandatory* punishment for impugning judicial integrity.[84] Although an attorney threatened with admonition or reprimand might risk punishment to make a statement about the judiciary that she felt was important (even if the statement turned out to prove incorrect), the attorney threatened with suspension from practice and loss of her livelihood will likely walk as far from the line of impugning judicial integrity as possible. Thus speech impugning the judiciary is not merely chilled, it is frozen by the severity of the sanction that courts have imposed—even for relatively minor statements.[85]

3. The Rejection of Seditious Libel

Related to the checking value, Harry Kalven contends, and interprets the *Sullivan* case as establishing, that "[t]he touchstone of the First Amendment has

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78. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). In *Sullivan*, the trial court awarded a verdict of $500,000 against the *New York Times* for its technically inaccurate portrayal of civil rights abuses that occurred in the South in a paid advertisement. Further, three additional lawsuits by other southern officials were pending against the *New York Times* for the same ad—they sought an additional $2 million in damages. *See id.* at 278 n.18. Harry Kalven argues that the extent of liability was an additional rationale for the *Sullivan* decision. *See* Kalven, *supra* note 58, at 200.

79. Blasi primarily cites the Court's decisions in *Rosenbloom v. Metromedia*, 403 U.S. 29, 61 (1971), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 387 (1974), as cases in which the Court emphasized "the danger of excessive damage awards." Blasi, *supra* note 48, at 576. But Blasi also contends that in *Sullivan* itself "the size of the award . . . undoubtedly had much to do with the Court's initial perception that defamatory speech should no longer be considered outside the ambit of First Amendment protection." *Id.* at 579.

80. Blasi, *supra* note 48, at 576–77.

81. *Id.* at 577.

82. *Id.* at 588.

83. *See supra* note 14 (citing cases where attorneys were suspended from the practice of law).

84. Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 433 (Ohio 2003) (per curiam).

85. *See, e.g.,* U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 867–68 (9th Cir. 1993). In *Sandlin*, the Ninth Circuit upheld a six-month suspension from the practice of law for accusations made by Sandlin in confidence to authorities that a judge was editing the transcripts of court proceedings. Sandlin was found to have impugned judicial integrity even though on investigation from those authorities, the judge did edit his transcript because the judge only made clerical rather than substantive changes. *Id.*

become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy."[86] According to Kalven, it is not sufficient to merely have "leeway for criticism of the government"; rather, "defamation of the government is an impossible notion for a democracy" because "[p]olitical freedom ends when government can use its power and its courts to silence its critics."[87] Kalven argues that speech critical of the government constitutes "a core of protection of speech without which democracy cannot function."[88]

4. The American Conception of Sovereignty

Commentators, including Meiklejohn and Sunstein, have noted the importance of the American view of sovereignty in the protection of speech. Sunstein posited that "the American tradition of free expression" and its "extraordinary protection" for "political speech can well be understood as an elaboration of the distinctive American understanding of sovereignty."[89] Meiklejohn eloquently explained that "[a]ll constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic."[90] Through the Constitution, the people have delegated "specific and limited powers" to "subordinate agencies, such as the legislature, the executive, [and] the judiciary."[91] Yet, "[t]he people do not delegate all their sovereign powers."[92] Consequently:

> Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom *unabridged by our agents*. Though they govern us, *we, in a deeper sense, govern them*. Over our governing, they have no power. *Over their governing we have sovereign power*.[93]

The idea that the people maintain sovereignty and power over governmental action has significant implications for the restriction of speech regarding the judiciary. If the criticized arm of government has ultimate power to punish speech regarding itself, the people have lost their sovereign power over that

86. Kalven, *supra* note 58, at 209.
87. *Id.* at 205.
88. *Id.* at 208. Kalven further explains:

> This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected. The theory of the freedom of speech clause was put right side up for the first time.

Id.
89. Sunstein, *supra* note 47, at 257.
90. Meiklejohn, *supra* note 50, at 253.
91. *Id.* at 254.
92. *Id.*
93. *Id.* at 257 (emphasis added).

branch of government.[94] Further, as Sunstein points out, "[r]estrictions on political speech have the distinctive feature of impairing the ordinary channels for political change" and thus "are especially dangerous."[95] For "if the government forecloses political argument, the democratic corrective is unavailable,"[96] and the people cease to have their sovereign control over their agents: the government.

B. THE SUPREME COURT, CORE SPEECH, AND OFFICIAL REPUTATION

The academic theories outlined above comprise the central rationales offered by the Supreme Court in *Sullivan* and *Garrison* for categorically protecting speech regarding government officials unless it is knowingly false or made with reckless disregard as to falsity. Namely, the Court relied on the concept of democratic self-government requiring "uninhibited, robust, and wide-open" debate on public issues,[97] the rejection of seditious libel and the need to check abuse of power,[98] and the American model of sovereignty in the people.[99]

The *Sullivan* Court,[100] in light of the history and purposes of the First and Fourteenth Amendments outlined above, "'eschewed silence coerced by law—the argument of force in its worst form'"[101] and denied governmental power to impose "'any kind of authoritative selection'" in public debate regarding government officials.[102] The Court instead concluded that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and

94. Sunstein also points out that government is most likely to be biased in regulating speech when the speech is directed at government itself. *See* Sunstein, *supra* note 47, at 305–06.

95. *Id.* at 306.

96. *Id.*

97. *See* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (explaining that "speech concerning public affairs is more than self-expression; it is the essence of self-government" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

98. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964) (reviewing the history of the Sedition Act of 1798 and ultimately concluding that it was unconstitutional as violative of the First Amendment).

99. *See id.* at 274–75. The Court, citing James Madison, reiterated that it is the people who possess the ultimate sovereignty and not the government. *Id.* at 274. Moreover, the American form of government "dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels." *Id.*

100. *Sullivan* involved a libel judgment of $500,000 against the *New York Times* for publishing a paid advertisement soliciting donations to help with the civil rights movement in the South. The ad recited various events that occurred in the South, including in Montgomery, Alabama, but was inaccurate in its descriptions. Sullivan was the Montgomery Commissioner and supervised the police. He claimed the ad, which did not name him at all, would be read as imputing abuses to him because at a few points it referred to abuses committed by the police. Because of the inaccuracies in the ad, Sullivan prevailed on his libel claim, even though most of the inaccuracies were seemingly trivial. For example, they arrested Martin Luther King, Jr. only four times rather than seven; students were expelled for demanding service at a lunch counter and not for leading a demonstration at the capitol; and the police did not literally "ring" the campus but were deployed near the campus en masse on three occasions. *See id.* at 256–59.

101. *Id.* at 270 (quoting Whitney v. California, 274 U.S. 357, 376 (1926) (Brandeis, J., concurring)).

102. *See id.* (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

that the fitting remedy for evil counsels is good ones."[103]

The Court recognized that "erroneous statement is inevitable in free debate" and so "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[104] Thus, while truth could never form the basis of liability or punishment,[105] even false statements deserved some constitutional protection. Consequently, a government official could not recover for libel unless he showed that the statements were false and that the speaker knew they were false or made the statements with reckless disregard as to their falsity—even for "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[106] The *Garrison* Court extended this ruling to criminal defamation and expressly stated that "*only* those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either *civil* or *criminal sanctions*."[107]

It would thus seem obvious that punishment of attorney speech impugning judicial integrity would fall squarely within the *Sullivan* and *Garrison* rules. Indeed, both cases expressly contemplate their applicability to statements regarding the judiciary. In *Sullivan*, the Court noted that the judiciary cannot protect its reputation through contempt citations—even if the statements contain "half-truths" and "misinformation."[108] The Court surmised, "If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials."[109] Further, *Garrison* directly involved speech by an attorney accusing judges of incompetence, laziness, and possible racketeer influences.[110] Nevertheless, the *Garrison* Court adopted the *Sullivan* standard.[111] There is no basis in the language or rationale from *Sullivan* or *Garrison* that would exempt from their strictures attorney speech critical of the judiciary.

Moreover, by definition, speech that is punished because it impugns the integrity of a particular judge (or the judiciary as a whole) is what the Supreme Court has classified as core First Amendment speech—thus requiring strict scrutiny even outside the context of *Sullivan*.[112] As the Court has recognized, "'Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment

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103. *Id.*

104. *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

105. Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.").

106. *Sullivan*, 376 U.S. at 270.

107. *Garrison*, 379 U.S. at 74 (emphasis added).

108. *Sullivan*, 376 U.S. at 272–73 (quoting Pennekamp v. Florida, 328 U.S. 331 (1946)).

109. *Id.* at 273 (citation omitted).

110. *Garrison*, 379 U.S. at 66.

111. *Id.* at 74–75, 77.

112. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002).

was to protect *the free discussion of governmental affairs*.'"[113]

The Supreme Court has repeatedly recognized core constitutional protection for speech about the judiciary. In *Landmark Communications, Inc. v. Virginia*, the Supreme Court found unconstitutional a statute that criminalized reports (truthful or not) regarding the proceedings of the Virginia Judicial Inquiry and Review Commission.[114] Virginia argued that the statute served interests of protecting the personal reputation of judges where complaints were unwarranted and protected "confidence in the judiciary as an institution."[115] The Court held that the speech was core political speech, and although judges traditionally "will not respond to public commentary, the law gives '[j]udges as persons, or courts as institutions . . . *no greater immunity from criticism* than other persons or institutions.'"[116] The Court explained that "[t]he operations of the courts and *the judicial conduct of judges* are matters of utmost public concern" and the speech at issue "served those interests in public scrutiny and discussion of governmental affairs *which the First Amendment was adopted to protect*."[117]

Similarly, in *Republican Party of Minnesota v. White*,[118] the Court applied strict scrutiny in striking down as unconstitutional Minnesota's "announce clause," which prohibited judges and attorneys running for judicial office from announcing "views on disputed legal or political issues."[119] The Court categorized the speech as being "at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office."[120] In like manner, speech about judicial qualifications and integrity would necessarily be such political speech "at the core of our First Amendment freedoms." As Justice

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113. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)) (emphasis added).

114. *Id.* at 830, 841–42.

115. *Id.* at 835. The state offered another justification, namely that judges will voluntarily retire in the face of complaints warranting suspension or removal if it will spare them publicity of the charges. Indeed, the Court noted that in California "not less than two or three judges a year have either retired or resigned voluntarily, rather than confront the particular charges that are made," which closes such cases "without any public furor, or without any harm done to the judiciary." *Id.* at 836 & n.7. This idea is fascinating as it relates to the other justification offered in *Landmark Communications*, that of preserving the public's "confidence in the judiciary as an institution." *Id.* at 835. Public confidence in the judiciary is maintained by keeping the public ignorant of charges levied against the judiciary, and apparently valid charges were being brought somewhat frequently if at least two to three judges in the state of California alone were voluntarily resigning each year rather than face charges—again underscoring that the judiciary is not somehow immune from, as Blasi states, "the inherent tendency of government officials to abuse the power entrusted to them." Blasi, *supra* note 48, at 538.

Another interest asserted by the state in *Landmark Communications* was protecting the citizens who filed complaints from "possible retaliation or recrimination." *Landmark Commc'ns, Inc.*, 435 U.S. at 835. This interest is not relevant to the issue of attorney discipline for statements regarding the judiciary; when an attorney is disciplined, her identity obviously was not confidential.

116. *Id.* at 839 (quoting Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting)) (emphasis added).

117. *Id.* (emphasis added).

118. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

119. *Id.* at 788.

120. *Id.* at 774 (footnote omitted).

O'Connor noted, "39 states currently employ some form of judicial elections,"[121] and of course, "[i]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages."[122]

C. TREATMENT OF ATTORNEY SPEECH IMPUGNING JUDICIAL INTEGRITY

1. Rejecting the *Sullivan* Standard

One of the most jarring aspects of the cases on attorney speech impugning judicial integrity is the near universal rejection by state courts of the *Sullivan* standard. This divergence is particularly surprising because generally the authority applied is MRPC 8.2, which expressly adopts the *Sullivan* standard. Moreover, the drafters of the Model Rules intentionally incorporated the *Sullivan* standard. In the proposed final draft of the current language for 8.2, the drafters cited both *Sullivan* and *Garrison* and explained that "[t]he Supreme Court has held that false statements about public officials may be punished only if the speaker acts with knowledge that the statement is 'false or with reckless disregard of whether it is false or not'" and that "Rule 8.2 is consistent with that limitation."[123]

Nevertheless, most courts have rejected the *Sullivan* standard in favor of an objective reasonableness standard. Some courts have even determined that MRPC 8.2 is a constitutional restriction on speech because its express language adopts the standard set forth in *Sullivan* and *Garrison* and then proceeded to interpret the rule as creating an objective "reasonableness" standard—the very standard that *Garrison* rejected as unconstitutional.[124] Indeed, the 2007 edition of the Annotated Model Rules of Professional Conduct, in contrast to earlier editions,[125] appears to embrace, and thus proliferate, this approach.[126]

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121. *Id.* at 790 (O'Connor, J., concurring); *see also* American Judicature Society, *supra* note 55.

122. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 281 (1964) (quoting Coleman v. MacLennan, 78 Kan. 711, 724 (1908)).

123. *See* MODEL RULES OF PROF'L CONDUCT R. 8.2 legal background at 206 (Proposed Final Draft 1981). The drafters also state that "[t]he critical factors in constitutional analysis are the statement's falsity and the individual's knowledge concerning its falsity at the time of the utterance," again citing *Garrison*. *Id.*

124. *See, e.g.*, Fla. Bar v. Ray, 797 So. 2d 556, 558–59 (Fla. 2001) (per curiam); *In re* Simon, 913 So. 2d 816, 824 (La. 2005) (per curiam); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 431 (Ohio 2003) (per curiam). The Supreme Court of Louisiana explained that "[b]ecause this rule [8.2] proscribes only statements which the lawyer knows to be false or which the lawyer makes with reckless disregard for the truth, it comports with the First Amendment's guarantee of free speech" and cites *Garrison* as support for that conclusion. *See In re Simon*, 913 So. 2d at 824. However, the court then adopts "an objective standard," punishing the speech at issue unless "a reasonable attorney would believe in the truth of the allegations." *Id.* As explained *infra* notes 128–31 and accompanying text, *Garrison* expressly rejected an objective standard based on the reasonable person. It seems incredible that courts rely on *Garrison* to establish the constitutionality of Rule 8.2 as written and then interpret Rule 8.2 as creating the very standard that *Garrison* rejected as unconstitutional.

125. The Annotated Model Rules of Professional Conduct for 1984 and 2003 state that Rule 8.2 incorporates the *Sullivan* and *Garrison* standard. *See* ANN. MODEL RULES OF PROF'L CONDUCT R. 8.2

The *Sullivan* standard for determining whether a statement is made with reckless disregard as to truth or falsity has been extensively litigated and is determined by examining the speaker's *subjective* intent, which requires "that the defendant *in fact entertained serious doubts* as to the truth of his publication."[127] Indeed, an objective standard—what a reasonable person would believe was true or false—has been repeatedly rejected, beginning in *Garrison*.

As noted above, *Garrison* involved accusations of incompetence, laziness, and possible racketeer influence as to certain judges. Louisiana convicted Garrison of criminal libel because his statement was "not made in the *reasonable belief* of its truth," on the theory that it was "inconceivable" that he "had a reasonable belief . . . that not one but all eight of these Judges . . . were guilty of what he charged them with."[128] The Supreme Court's response is direct:

> This is *not* a holding applying the *New York Times* test. The *reasonable-belief* standard applied by the trial judge *is not the same as the reckless-disregard-of-truth* standard. According to the trial court's opinion, a reasonable belief is one which 'an ordinarily prudent man might be able to assign a just and fair reason for'; the suggestion is that under this test the immunity from criminal responsibility . . . disappears on proof that *the exercise of ordinary care would have revealed that the statement was false*. The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.[129]

In *St. Amant v. Thompson*, the Court reaffirmed that *Garrison* made it "clear that reckless conduct is *not* measured by whether a reasonably prudent man would have published, or would have investigated before publishing."[130] Despite *Garrison's* unambiguous rejection of a reasonableness standard in the precise context of attorney speech impugning judicial integrity, state courts have almost

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annot. at 344 (1984) (discussing the *Garrison* and *Sullivan* cases and explaining that "Rule 8.2 is consistent with the *New York Times* standard"); ANN. MODEL RULES OF PROF'L CONDUCT annot. at 581 (5th ed. 2003) ("Model Rule 8.2 incorporates the standard of 'knowledge or reckless disregard' developed in the libel context in *New York Times v. Sullivan*."); s*ee also*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 114 cmt. B (2000) (explaining the holding of *Sullivan* and stating that "[s]imilar considerations should also lead to application of the standard in *New York Times v. Sullivan* in lawyer-discipline cases").

126. *See* ANN. MODEL RULES OF PROF'L CONDUCT R. 8.2 annot. at 565–66 (6th ed. 2007). In a similar vein to earlier editions, *see supra* note 125, the ABA's 2007 Annotated Model Rules of Professional Conduct cites *Garrison* and *Sullivan* and explains that "Rule 8.2(a) adopts *the same scienter requirement* for professional responsibility purposes." ANN. MODEL RULES OF PROF'L CONDUCT R. 8.2 annot. at 566 (emphasis added). Unfortunately, the 2007 version later states that "[t]he lawyer's mental state—that is, whether the lawyer either knew the statement was false or recklessly disregarded its falsity—is to be assessed objectively," and cites many of the cases adopting an objective "reasonable attorney" standard. *See id.* As shown, this is the very standard rejected in *Garrison* itself as unconstitutional. *See infra* notes 128–32 and accompanying text.

127. St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added).

128. Garrison v. Louisiana, 379 U.S. 64, 78 (1964) (emphasis added).

129. *Id.* at 79 (emphasis added).

130. *St. Amant*, 390 U.S. at 731 (emphasis added).

universally disciplined attorneys under a reasonableness standard.[131]

The objective standard adopted by the states comes in two basic variants. Some courts focus on "whether the attorney had an objectively reasonable factual basis for making the statements."[132] Other courts examine "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances."[133] Some courts combine these tests,[134] or do not expressly adopt either, while rejecting the subjective *Sullivan* test.[135]

The two approaches are not necessarily the same, although both are termed the "objective standard" by courts. For example, an attorney could arguably have a reasonable basis in fact for saying something, and yet a reasonable attorney in light of all of his functions and duties would still refrain from saying it. Indeed, in *Idaho State Bar v. Topp*,[136] a part-time county attorney attended a politically sensitive hearing (but was not involved in the case) about a proposed county expenditure of $4.1 million. After the hearing, he was asked by the press to comment on the court's decision as compared to a similar issue that had been decided a different way by another judge. Topp responded that he thought the other judge "wasn't worried about the political ramifications."[137] Topp was publicly reprimanded for violating MRPC 8.2 because the "statement necessarily implied that Judge Michaud based his decision on completely irrelevant and improper considerations" and thus "impugned his integrity."[138] At his disciplinary hearing, Topp brought forth three pieces of evidence that supported his

131. The exceptions are cases where the court did not reach the question of whether a subjective or objective standard applied. *See In re* Green, 11 P.3d 1078, 1086 n.7 (Colo. 2000) (per curiam); State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958, 969 (Okla. 1988).

132. Fla. Bar Ass'n v. Ray, 797 So. 2d 556, 559 (Fla. 2001) (per curiam); *see also In re* Cobb, 838 N.E.2d 1197, 1214 (Mass. 2005).

133. *In re* Graham, 453 N.W.2d 313, 322 (Minn. 1990); *see* Idaho State Bar v. Topp, 925 P.2d 1113, 1116 (Idaho 1996); *In re* Simon, 913 So. 2d 816, 824 (La. 2005) (per curiam); *In re* Westfall, 808 S.W.2d 829, 837 (Mo. 1991); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam); *see also* Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 166, 168 (Ky. 1980) (per curiam) (discussing what Heleringer, as a practicing attorney, "knew or should have known").

134. *See, e.g*, Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995) (speaking of both what a "reasonable attorney" would do and whether there was "a reasonable factual basis"); Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 84 (Iowa 2008) (examining whether "reasonable attorney" would make statement and determining that attorney "did not have an objectively reasonable basis for his statement"); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 431 (Ohio 2003) (per curiam) (looking at "'what the reasonable attorney, considered in light of all his professional functions, would do in the same or in similar circumstances' . . . [and] focus[ing] on whether the attorney had a reasonable factual basis" (citation omitted)); Bd. of Prof'l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1014 (2009) (stating that "the attorney must have had an objectively reasonable basis for making the statements" and that "the standard is whether a reasonable attorney would have made the statements, under the circumstances" (internal quotation marks and citations omitted)).

135. *See, e.g*, *In re* Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam) (rejecting standard from libel case as applicable in the context of attorney discipline); Grievance Adm'r v. Fieger, 719 N.W. 2d 123, 141 (Mich. 2006), *cert. denied*, 549 U.S. 1205 (2007).

136. *Topp*, 925 P.2d 1113.

137. *Id.* at 1115.

138. *Id.* at 1117.

statement,[139] but the court rejected them, summarily concluding that "a reasonable attorney, in considering these facts, would not have made the statement in question."[140]

Notably, the *Topp* decision is typical in that the court and disciplinary authority garnered no evidence, standards, or testimony as to what a reasonable attorney would do or say in such a circumstance (indeed, I have yet to read such a case). The assumption in these cases appears to be either (1) that judges themselves, often former attorneys, are competent to decide summarily what a reasonable attorney would or would not say; or (2) that a reasonable attorney would never impugn the dignity of a court without significant evidence of misconduct. The second idea is supported by a 2003 Ohio Supreme Court decision where the court held that objective reckless disregard (an oxymoron) could be found because Ethical Consideration 8-6, under the Code of Professional Conduct, "admonishes attorneys to 'be certain' that their criticism [of judges] has merit."[141] Thus, failure to investigate and "be certain" demonstrates failure to live up to the attorney standard.[142] The same logic could extend to incorporate an attorney oath to maintain the respect due the judiciary or a civility code: reasonable attorneys are respectful to courts unless they have (substantial) evidence of serious misconduct. So if an attorney makes derogatory statements without substantial evidence then she has failed to act as a reasonable attorney.

The "reasonable basis in fact" standard also is not applied in a manner consistent with typical evaluations of that standard. In most contexts, such as Federal Rule of Civil Procedure (FRCP) 11[143] or MRPC 3.1,[144] a reasonable basis in fact sets a very low threshold of proof. Indeed, federal appellate courts interpreting FRCP 11 allow a reasonable basis in fact to be shown even though evidence is weak,[145] and, of course, allow reliance on circumstantial evidence.[146] Indeed, sanctions are not warranted "unless a particular allegation is

139. Specifically, *Topp* pointed to the following facts: (1) there had been "a political frenzy" in the county on the issue, of which the judge certainly was aware; (2) the judge rendered an oral decision "immediately after the close of argument" and released a written decision "within minutes" of the end of the hearing, which Topp thought supported "an inference that the case was decided prior to argument and that Judge Michaud was concerned with disseminating that decision to the public quickly"; and (3) "another district judge in a similar case had reached a different decision." *Id.* at 1114, 1117.

140. *Id.* at 1117.

141. Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 432 (Ohio 2003) (per curiam) (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 8-6 (1980)). At the time, Ohio used the Model Code of Professional Conduct, which is split into Canons, Ethical Considerations, and Disciplinary Rules. The Ethical Considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive," while the "Disciplinary Rules, unlike the Ethical Considerations, are "mandatory in character" and subject lawyers to "disciplinary action." *See* MODEL CODE OF PROF'L RESPONSIBILITY, Preliminary Statement (1980).

142. *Gardner*, 793 N.E.2d at 432 (internal quotations omitted).

143. FED. R. CIV. P. 11 (2007).

144. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007).

145. Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998).

146. Rounseville v. Zahl, 13 F.3d 625, 633 (2d Cir. 1994).

utterly lacking in support"[147] or is made in "deliberate indifference to obvious facts."[148] Further, "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement."[149] In contrast, courts applying the reasonable basis standard to statements regarding the judiciary have required that the statements be supported by "copious facts"[150] and eschew circumstantial evidence[151] or anything less than direct proof of the assertions.[152] Further, courts have taken an extremely literal (and sometimes exaggerated) reading of statements regarding the judiciary.[153]

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147. O'Brien v. Alexander, 101 F.3d 1479, 1489 (2d Cir. 1996).

148. *Baker*, 158 F.3d at 524 (internal quotations omitted).

149. Navarro-Ayala v. Hernandez-Colon, 3 F.3d 464, 467 (1st Cir. 1993).

150. State v. Santana-Ruiz, 167 P.3d 1038, 1044 (Utah 2007); *see also* Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165 (Ky. 1980) (per curiam).

151. *See, e.g.*, *In re* Wilkins, 777 N.E.2d 714, 716–17 (Ind. 2002) (per curiam), *modified*, 782 N.E.2d 985, 987 (Ind. 2003). Wilkins signed a petition to transfer filed with the Indiana Supreme Court that stated in a footnote that the lower court's decision was "so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion . . . ." *See id.* at 715–16 n.2. At the disciplinary hearing, Wilkins brought in support of his statement evidence regarding the facts and law that the Court of Appeals had ignored or misstated. *See id.* at 716. The Court concluded, nevertheless, that Wilkins "offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for appellee, no matter what." *See id.* at 717. The Court apparently wanted Wilkins to bring direct evidence of the motive of the court, rather than relying on circumstantial evidence. Similar scenarios occurred in *In re Glenn*, 130 N.W.2d 672 (Iowa 1964), and *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962 (Utah 2007).

152. *See, e.g.*, U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993). In *Sandlin*, the attorney had a reasonable, factual basis for his statements under an MRPC 3.1 or FRCP 11 standard when he accused the judge of substantively editing a transcript. Sandlin misremembered a statement from the judge about a witness that was not in the transcript. Sandlin's "memory of the TRO hearing agreed with that of his wife, his client, and his former law clerk, all of whom were present at the hearing." *Id.* at 867. Sandlin "took, and passed, two polygraph tests" regarding his memory of the hearing. *Id.* Further, the judge edited the transcript, which the court reporter told Sandlin, and Sandlin consulted experts who said that they could not determine whether the audio tape had been edited. *See id.* at 864. Certainly this is sufficient evidence to have satisfied MRPC 3.1 or FRCP 11. *See supra* notes 145–49 and accompanying text. Yet the court held that Sandlin did not have a "reasonable basis in fact" for his statement and thus suspension from the practice of law was warranted. *See Sandlin*, 12 F.3d at 867.

153. *In re Westfall*, 808 S.W.2d 829 (Mo. 1991), provides a striking example of construction of statements about the judiciary. Prosecutor Westfall made statements to the press about an appellate decision prohibiting him from pursuing a prosecution on the grounds of double jeopardy. Westfall stated in part that the decision did not follow the Supreme Court "for reasons that I find somewhat illogical, and I think even a little bit less than honest" and that the opinion "distorted the statute and . . . convoluted logic to arrive at a decision that [the judge] personally likes." *Id.* at 831.

In disciplining Westfall and finding that he lacked evidence for the statement, the court rephrased his statement each time, claiming, for example, that Westfall "accused Judge Karohl of deliberate dishonesty" and of "purposefully ignoring the law to achieve his personal ends"—not as "an implication of carelessness or negligence but of a deliberate, dishonest, conscious design on the part of the judge to serve his own interests." *Id.* at 838. The dissent (in addition to pointing out that the majority's construction was not even grammatically plausible as the phrase "a little bit less than honest" grammatically refers to "the reasons, not the judge") points out that the majority used "at least six unsupportable paraphrases of the respondent's actual words" to support its decision, each of which, "are the words of the writer [the court], not the words of" Westfall. *See id.* at 841 (Blackmar, J., dissenting).

2. Placing the Burden of Proof on Attorneys and Presuming Falsity

Another major point of departure from *Sullivan* and *Garrison* is the failure of courts to verify that the statements for which attorneys are punished are in fact false.[154] This occurs in large part because many courts place the burden of proof on the disciplined attorney to bring forth evidence supporting his statement. Thus, in a number of cases, the court holds that the speech is punishable because the *attorney failed* to bring forth sufficient evidence to support his statement, and no further examination is made as to whether the statement is true or not.[155]

Additionally, some courts appear to presume falsity. Applying an objective standard, they examine whether the attorney had a reasonable basis in fact for making the statement or whether a reasonable attorney would make the statement. If the answer to either of those inquiries is no, the court assumes that the assertion was therefore false.[156] In a few extreme examples, courts have denied the attorney the opportunity to prove that the statement was true.[157]

Westfall claimed that what he meant was that "the court of appeals opinion was 'intellectually dishonest.'" *Id.* at 833.

See also In re Frerichs, 238 N.W.2d 764, 767 (Iowa 1976) (construing attorney's statement in petition for rehearing that court was "willfully avoiding the substantial constitutional issues" raised in this and two other cases to "alleg[e] commission of public offenses," including a misdemeanor and a felony, and thus accusing the court of "sinister, deceitful and unlawful motives and purposes").

154. *See, e.g.*, Anthony v. Va. State Bar, 621 S.E.2d 121, 125 (Va. 2005) (rejecting attorney's argument that the state "had the burden of proving that his various statements concerning judges were in fact false"). Notably, a few courts do require that the disciplinary authority prove that the statement was false. *See* Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430 (9th Cir. 1995); State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958 (Okla. 1988).

155. *See, e.g.*, *In re Wilkins*, 777 N.E.2d at 717 (noting that attorney "offered no evidence to support his contentions" regarding the motive of the court, even though Wilkins did bring circumstantial evidence); *In re Glenn*, 130 N.W.2d at 676 (stating that attorney "offered no evidence" supporting statements, although Glenn brought significant circumstantial evidence).

156. *See, e.g.*, *In re Wilkins*, 777 N.E.2d at 717 (failing to examine whether false, but relying on fact that attorney allegedly failed to bring forth sufficient evidence in support); *In re Westfall*, 808 S.W.2d at 838 (same); *In re* Raggio, 487 P.2d 499, 500–01 (Nev. 1971) (per curiam) (failing to examine whether or not statements false); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 431 (Ohio 2003) (per curiam) (noting that attorney argued disciplinary authority must prove statement was false and made with reckless disregard, but holding that objective standard applies instead and finding that statement is punishable because reasonable attorney would not have made it); *Peters*, 151 P.3d at 963 (failing to examine whether false, but relying on fact that attorney, allegedly, failed to bring forth sufficient evidence in support); *Anthony*, 621 S. E. 2d at 125–26 (explaining that state need not prove falsity of statements, but must prove that "the statement was made with reckless disregard of its truth or falsity," and finding this standard satisfied where attorney relied on anonymous telephone calls and anonymous letter).

At oral argument in the *Peters* case, an unidentified justice stated in question to the offending attorney: "Would you care to address the question about [sanctions] or *is your answer simply that you were right*. That's what I hear you saying is . . . that your material is *not inappropriate simply because it's correct*." Audio: Oral Argument Before the Utah Supreme Court (June 7, 2006), *available at* www.utcourts.gov/courts/sup/streams/index.cgi?mon=2006 (emphasis added).

157. *See, e.g.*, *In re* Atanga, 636 N.E.2d 1253, 1257 (Ind. 1994) (per curiam) (excluding from evidence as "irrelevant" attorney's proffered witnesses to testify regarding judge's racism); Ky. Bar

The *Garrison* Court maintained, "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."[158] As the Court in *Sullivan* explained, the burden of proving truth should not be placed on the speaker because "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[159] Finally, the *Sullivan* Court held that such constitutional requirements could not be avoided by the creation of presumptions.[160]

II. PRESERVING JUDICIAL INTEGRITY CANNOT JUSTIFY SUPPRESSION OF ATTORNEY SPEECH

The primary reason that courts impose serious sanctions for attorney speech impugning judicial integrity and reject the *Sullivan* standard is the belief that such measures are justified by "the state's compelling interest in preserving public confidence in the judiciary."[161] The Supreme Court of Delaware ex-

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Ass'n v. Waller, 929 S.W.2d 181, 182–83 (Ky. 1996) (denying attorney evidentiary hearing and rejecting argument that "truth or some concept akin to truth, such as accuracy or correctness, is a defense to the charge against him").

In *In re Cobb*, 838 N.E.2d 1197, 1211 (Mass. 2005), the court stated: "The Supreme Court decisions in the *Bradley*, *Sawyer*, and *Gentile* cases did not distinguish between true and false criticism, founded and unfounded criticism." Notably, *Bradley* and *Sawyer* were decided before *Sullivan* and *Garrison*, *see infra* section III.A.2, and *Gentile* involved pretrial publicity rules rather than discipline for impugning judicial integrity, *see infra* section III.A.3.

158. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

159. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

160. *Id.* at 283–84.

161. Fla. Bar v. Ray, 797 So. 2d 556, 559 (Fla. 2001) (per curiam); *see also* U.S. Dist. Court for the E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993); *In re* Evans, 801 F.2d 703, 707 (4th Cir. 1986) (positing that "the public interest and the administration of the law demand that the courts should have the confidence and respect of the people" and thus "[u]njust criticism, insulting language and offensive conduct toward the judges, personally, by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity, cannot be permitted"); Ramirez v. State Bar of Cal., 619 P.2d 399, 414 (Cal. 1980) (holding that discipline was necessary to "protect . . . the public and preserv[e] . . . respect for the courts and the legal profession"); Idaho State Bar v. Topp, 925 P.2d 1113, 1116 (Idaho 1996) (citing "the State's legitimate interest in preserving the integrity of its judicial system"); *In re* Wilkins, 777 N.E.2d 714, 718 (Ind. 2002) (per curiam) (citing the "state's interest in preserving the public's confidence in the judicial system and the overall administration of justice"), *modified*, 782 N.E.2d 985, 987 (Ind. 2003); *In re* Garringer, 626 N.E.2d 809, 813 (Ind. 1994) (contending that statement "'does nothing but weaken and erode the public's confidence in an impartial adjudicatory process'" (quoting *In re* Terry, 394 N.E.2d 94, 96 (Ind. 1979) (per curiam))); State v. Nelson, 504 P.2d 211, 216 (Kan. 1972) (stating that attorneys may not "create disrespect for courts or their decisions"); *In re Cobb*, 838 N.E.2d at 1214 (holding that objective standard was proper because of the "State's interest in protecting the public, the administration of justice, and the legal profession"); *In re* Graham, 453 N.W.2d 313, 322 (Minn. 1990) (same); *In re Westfall*, 808 S.W.2d at 833 (relying on the state's substantial interest in maintaining "public confidence in the administration of justice"); *In re Raggio*, 487 P.2d at 500 (positing that as a result of an attorney's public statements, "[e]ssential public confidence in our system of administering justice may have been eroded"); *In re* Meeker, 414 P.2d 862, 868 (N.M. 1966) (characterizing attorney's comments about judiciary as an "attempt[] to destroy the trust of the people of New Mexico, and elsewhere, in their

pounded: "Adherence to the rule of law keeps America free. Public respect for the rule of law requires the public's trust and confidence that our legal system is administered fairly . . . ."[162] An attorney's statement to the press regarding a court's decision to hold a politically sensitive hearing ex parte was characterized as "chip[ping] away at public confidence in the integrity of the judicial system" and bringing "the judicial system into discredit in the public mind."[163] For "[e]very lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure."[164] Finally, in oft-quoted language, the Supreme Court of Indiana stated that the *Sullivan* standard is inappropriate because attorneys who disparage the judiciary commit a "wrong . . . against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations."[165]

A close examination of the interest in preserving the public perception of judicial integrity and the assumptions underlying it paradoxically underscores the important reasons why attorney speech critical of the judiciary must be

courts and in their judges"); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam) (stating that "[i]n order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard"); *Gardner*, 793 N.E.2d at 432 (citing the state's compelling interest "to preserve public confidence in the fairness and impartiality of our system of justice" as supporting rejection of *Sullivan* standard for attorney discipline).

Notably, the alleged interest in preserving public confidence could not have been served by the discipline imposed in *Ray* because the communication was made in a private letter to the chief immigration judge pursuant to local practice for complaining about an immigration judge. *See Ray*, 797 So. 2d at 560. The public would never have known of the statements but for the filing of a disciplinary action against the attorney. This same disconnect between the interest asserted and the context of the speech occurs in several cases. *See, e.g.*, *Sandlin,* 12 F.3d 861 (statements were made confidentially to authorities in FBI and U.S. Attorney's office, who in turn were required to keep the information confidential, and insulted judge was the one who complained to the bar); *In re Evans*, 801 F.2d 703 (letter was sent solely to the insulted magistrate, who filed a grievance); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 114 (2000) (explaining that "[b]ecause the purpose" of the rule "is to protect the public reputation of the judicial and public legal office, there is less reason for concern with statements made by a lawyer in private conversation" and, consequently, "[s]uch conversation is *not* included within the rule" (emphasis added)).

162. *In re* Abbott, 925 A.2d 482, 488 (Del. 2007) (per curiam); *see also*, *In re* Shimek, 284 So. 2d 686, 688 (Fla. 1973) (per curiam) (stating, post-*Sullivan*, that "[n]othing is more sacred to man and, particularly, to a member of the judiciary, than his integrity" and that "[o]nce the integrity of a judge is in doubt, the efficacy of his decisions are [sic] likely to be questioned"); *In re Atanga*, 636 N.E.2d at 1258 (positing that "the judicial institution is greatly impaired if attorneys choose to assault the integrity of the process and the individuals who are called upon to make decisions").

163. Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam). Notably, the attorney's comment that the ex parte hearing was "highly unethical and grossly unfair" was, at most, an overstatement. *Id.* at 166. Further, the attorney was not engaged in the underlying case, but worked for Right to Life and was politically interested in the outcome. *Id.*

164. *Id.* at 169.

165. *In re* Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam); *In re Cobb*, 838 N.E.2d at 1213 (same, quoting *In re Terry*); *In re Graham*, 453 N.W.2d at 322 (same, quoting *In re Terry*); *In re Holtzman*, 577 N.E.2d at 34 (same, quoting *In re Terry*); Bd. of Prof'l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1015–16 (Wyo. 2009) (same, quoting *In re Terry*).

protected, rather than demonstrating that such speech should be suppressed.[166] Indeed, the Supreme Court has already addressed the validity of this interest in other related contexts. In *Bridges v. California*,[167] the Court analyzed the validity of a California court's contempt citation against a newspaper and a non-attorney individual for publications made regarding a pending case. One of the justifications proffered by California was the possibility that the publications might create disrespect for the judiciary. The Court gave that interest precisely zero weight.[168] The Court eloquently explained:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[169]

Similarly, in *Landmark Communications, Inc. v. Virginia*, the State offered as justifications for its statute the interest in preserving unwarranted injury to reputation of individual judges as well as preserving the integrity of the entire judiciary in the eye of the public.[170] Citing *Sullivan* and *Garrison*, the Supreme Court explained that Virginia had "an interest in protecting the good repute of its judges, *like that of all other public officials*," but that such an interest was "*an insufficient reason for repressing speech* that would otherwise be free."[171] The Court then went further and explained that "the institutional reputation of the courts, is entitled to *no greater weight* in the constitutional scales" than the reputation of government officials.[172] The Court concluded, "*[S]peech cannot be punished when the purpose is simply to protect the court* as a mystical entity or the judges as individuals or as anointed priests set apart from the community and *spared the criticism to which in a democracy other public servants are exposed*."[173]

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166. Wendel similarly posits: "[I]t is hardly clear that preserving respect for the bar and the judiciary counts as a state interest sufficiently important to justify restrictions on speech." *See* Wendel, *supra* note 43, at 426.

167. Bridges v. California, 314 U.S. 252 (1941).

168. *Id.* at 270–71.

169. *Id.*

170. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 840–43 (1978).

171. *Id.* at 841–42 (emphasis added) (internal quotation marks omitted).

172. *Id.* at 842 (emphasis added).

173. *Id.* at 842 (emphasis added) (internal quotation marks omitted). This statement also contradicts the worshipful rhetoric of the Florida and Michigan Supreme Courts. *See In re* Shimek, 284 So. 2d 686, 690 (Fla. 1973) (per curiam) (reaffirming "the essentiality of the chastity of the goddess of justice"); Grievance Adm'r v. Fieger, 719 N.W.2d 123, 144 (Mich. 2006) (stating that attorneys cannot denigrate courts, which "gave [the attorney] the high privilege, not as a matter of right, to be a priest at the altar of justice" (internal quotations omitted)), *cert. denied*, 549 U.S. 1205 (2007).

The Supreme Court's flat denial of any validity in repressing speech solely to preserve the integrity of the judiciary in both *Landmark Communications, Inc.* and *Bridges* directly contradicts the core rationale for punishing attorney speech critical of the judiciary. Courts that impose discipline on attorneys often discount *Bridges* on the basis that it concerns speech by lay persons and the press.[174] But *Bridges* is precisely on point as to the appropriate constitutional weight to be given the state's interest in punishing and chilling speech as a method for maintaining public confidence in the judiciary.

Further, the rejection of *Bridges* and the other contempt cases as being irrelevant to the question of disciplining attorney speech partakes of historic irony. The constitutional standard eventually adopted in *Bridges* and the other contempt cases is adopted from earlier case law as to the appropriate scope of the federal contempt statute.[175] Notably, that contempt statute was adopted in response to, and in order to curtail future instances of, punishment of an attorney for criticizing the decision of a court. In 1831, James H. Peck, a United States District Court Judge for the District of Missouri, used the contempt power to imprison attorney Luke E. Lawless for one day and to suspend Lawless from the practice of law for eighteen months.[176] The reason for the contempt citation and suspension was a newspaper article that Lawless wrote in which he criticized Peck's decision in a case Lawless had argued before Peck.[177] Judge Peck was impeached as a result of punishing Lawless, which the Articles of Impeachment declared was an "abuse of judicial authority" and a "subversion of the liberties of the people of the United States."[178] In the Senate proceedings, James Buchanan, who later became President and who "had charge of the prosecution of Judge Peck,"[179] argued that Peck had in essence punished Lawless for libel of the judiciary without a jury, explaining:

> To allow the judiciary to dispense with this tribunal [a jury], whenever any publication has been made *affecting the dignity or the official conduct of a judge*, is to create a privileged order of men in the state *whose will is law*, and who are not only judges *in their own cause* [i.e., when the judges are the victims] of the guilt of the accused, but also of *the extent of his punishment*.

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174. *See, e.g*, *In re* Frerichs, 238 N.W.2d 764, 768 (Iowa 1976); *In re* Cobb, 838 N.E.2d 1197, 1210 (Mass. 2005).

175. *See* Nye v. United States, 313 U.S. 33, 44–45 (1941) (interpreting federal contempt statute); *see also* Craig v. Harney, 331 U.S. 367, 373 (1947) (looking to *Nye* in determining if use of contempt power was unconstitutional); *id.* at 387–89 (Frankfurter, J., dissenting) (noting that *Nye* interpreted the federal contempt statute); Bridges v. California, 314 U.S. 252, 267 (1941) (looking to *Nye* in determining if use of contempt power was unconstitutional).

176. *See* ARTHUR J. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 52 (Boston, Hilliard, Gray & Co. 1833) (referring to the articles of impeachment). Judge Peck published his opinion in a newspaper, and Lawless published a response noting eighteen legal errors in the opinion. When Lawless published his article, the underlying case was on appeal to the United States Supreme Court. *See id.* at 1, 50–51.

177. *See id.* at 52 (referring to the articles of impeachment).

178. *Id.*

179. *Nye*, 313 U.S. at 46.

> Such a power, so far as it goes, partakes of the very essence and rankness of despotism.[180]

Although Judge Peck was not convicted, the impeachment trial led to the enactment of the current federal contempt statute.[181] As Buchanan stated, "whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim."[182] Thus, the constitutional standard adopted in *Bridges* and related cases had its germinal seed in the idea that the judiciary cannot use its power to punish members of the bar (without a jury) to quell attorney speech critical of the bench. Unfortunately, courts have used the disciplinary process to achieve this same end.

But beyond historical justifications and Supreme Court precedent, there are several reasons, vital to democracy itself, why the specific interest of preserving public confidence in the integrity of the judiciary (which, as discussed below, is another way to say preserving judicial reputation) cannot of itself justify the suppression of speech. First, the interest is grounded in the constitutionally forbidden notion that dangerous ideas (for example, that members of the judiciary may abuse their power or be biased, incompetent, or corrupt) must be suppressed to preserve society. Second, the interest is premised on keeping the public in ignorance as to the actual performance of government officials, an idea completely contrary to the essential workings of our American government. Finally, the promotion of this interest enhances self-entrenchment by members of the judiciary (both those that are elected and those who can only be removed for serious cause) and correspondingly lessens the electoral and sovereign power of the people.

A. SUPPRESSING THE DANGEROUS IDEA

The theory of the cases that punish attorney speech impugning judicial integrity is that *Sullivan* and *Garrison* should not apply because of the state interest in preserving the public perception of and confidence in an impartial judiciary.[183] The reason why public perception and confidence must be maintained—apparently more so than for legislative and executive branches who remain subject to the *Sullivan* standard—is that if the judiciary, or individual members of it, are perceived by the public to be biased or to abuse power then there will be a corresponding loss in respect for the rule of law and for judicial decisions.[184] Judicial decisions will lose their power, and people will stop

180. STANSBURY, *supra* note 176, at 426 (emphasis added).

181. *See Nye*, 313 U.S. at 45 (explaining that the Act of March 8, 1834 arose in response to the "impeachment proceedings against James H. Peck, a federal district judge, who had imprisoned and disbarred one Lawless for publishing a criticism of one of his opinions in a case which was on appeal").

182. *Id.* at 46.

183. *See supra* notes 161–65 and accompanying text.

184. *See supra* note 162 and accompanying text.

obeying them.[185]

The idea, therefore, that the judiciary (whether as individual members or on the whole) may lack qualifications of integrity, impartiality, or competence is a "dangerous" idea. That is, it is an idea that should be subjected to greater regulation, suppression, and chilling because of the effect that the idea itself may have on the public. Further, the idea appears to be much more dangerous when espoused by attorneys, who are perceived as knowing what the judiciary is and should be doing. Alternatively, and more cynically, if attorneys are quelled from making the assertion, it will be made less frequently and by someone who can be discounted as less informed.

The Supreme Court has explained that speech cannot be suppressed constitutionally on the basis that it constitutes allegedly "dangerous ideas."[186] But states have failed to recognize that they are suppressing an idea for its dangerous impact when they use the phrase "preserving the public perception of judicial integrity" as justifying the punishment of speech.[187] As John Hart Ely explained, "Restrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying; reference will generally be made to some danger beyond the message, such as a danger of riot, unlawful action or violent overthrow of the government."[188] Ely contends that asserted state interests "will always be unrelated to [suppression of] expression" and so one must examine the "causal connection" between the ultimate harm and the suppression or punishment of speech.[189] He explains:

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185. *See, e.g.*, *In re* Shimek, 284 So. 2d 686, 688 (Fla. 1973) (per curiam) (stating, post-*Sullivan*, that "'[o]nce the integrity of a judge is in doubt, the efficacy of his decisions are [sic] likely to be questioned'" (quoting the order issued by the lower court)). No rationale is offered in the case law explaining why this is truer for the judiciary than the other branches of government. If the people begin to believe that their police are corrupt, they will likely lose their confidence in, and perhaps feel less of a need to obey, the police. Further, if the people believe the legislature has been bought off in making laws, the people may feel less of a need to follow and obey those laws. While political impartiality may be an attribute unique to the judiciary (or may not, *see* Republican Party of Minn. v. White, 536 U.S. 765, 770–88 (2002) (holding that the Minnesota Supreme Court's canon of judicial conduct, which prohibits judicial candidates from expressing views on disputed legal and political issues, violates the First Amendment)), integrity and competence in performing one's office is universally needed in government.

186. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 519 (1958) (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

187. *See supra* note 161.

188. *See* John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975). In *Democracy and Distrust*, Ely contends:

> Allowing people to assault our eardrums with outrageous and overdrawn denunciations of institutions we treasure will inconvenience, annoy, and infuriate us on occasion, even set us to wondering about the stability of our society: that's exactly what such messages are meant to do, and exactly the price we shouldn't think twice about paying. By silencing such people we may be protecting something, but we certainly won't be protecting "the American way."

ELY, *supra* note 48, at 116.

189. Ely, *supra* note 188, at 1497.

> If, for example, the state asserts an interest in discouraging riots, the Court will ask why that interest is implicated in the case at bar. If the answer is (as in such cases it will likely have to be) that the danger was created by what the defendant was saying, the state's interest is not unrelated to the suppression of free expression . . . .[190]

In like manner, the reason that the state interest in preserving public confidence in judicial integrity is implicated in attorney discipline cases is that *what the attorney has said* will allegedly tarnish the public's belief in the integrity of the court system and lead people to lose respect for the judiciary.[191] The causal connection is based entirely on the communicative impact of the attorney's message on the public.

This causal connection is enhanced by the fact that the restriction is merely on attorneys. One of the major justifications proffered by courts in avoiding the *Sullivan* standard is a belief that greater restrictions on attorney speech are needed because attorneys "possess, and are perceived by the public as possessing, special knowledge of the workings of the judicial branch" and thus "'[c]ritical remarks from the Bar . . . have more impact on the judgment of the citizen than similar remarks by a layman.'"[192] Again, the concern is one of communicative impact, or as Geoffrey Stone phrases the problem, the regulation is based on "a fear of how people will react to what the speaker is saying."[193] The fear of the impact on people is enhanced by the credentials of the messenger. Not only will the public receive disparaging statements about the judiciary, but, because the statements come from attorneys, the public may believe them.

The viewpoint-discriminatory nature of the regulation further underscores that it is the idea itself which is being repressed. The punishment of attorneys for speaking about courts in a manner that lessens the respect owed the judiciary or for impugning judicial integrity is aimed not merely at the *content* of the expression (statements about the judiciary), but at the particular *viewpoint* expressed (criticism or derogation of members of the judiciary). No restriction is placed on the opposing viewpoint. Attorneys are free to pronounce embellished praises of courts and judges, and to do so in every forum—in court filings, in public remarks, in letters, in pamphlets, or on blogs. Thus, if an attorney after receiving a decision in favor of her client states that the judge

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190. *Id.*

191. *See supra* notes 161–65 and accompanying text.

192. Fla. Bar v. Ray, 797 So. 2d 556, 560 (Fla. 2001) (per curiam) (quoting State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958, 969 (Okla. 1999)); *see also, e.g.*, *In re* Pyle, 156 P.3d 1231, 1248 (Kan. 2007) (per curiam) ("'Precisely because lawyers are perceived to have special competence in assessing judges, the public tends to believe what lawyers say about judges, even when lawyers speak inappropriately or make claims about which they are uncertain.'" (quoting ANN. MODEL RULES OF PROF'L CONDUCT R. 8.2 at 585 (5th ed. 2003))).

193. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 212 (1983).

fairly decided the case and disregarded any political influences, no punishment can be brought. If, however, her opponent states to the press that the judge acted unfairly and was politically motivated, punishment could well be expected.

Viewpoint-based restrictions have been consistently declared unconstitutional.[194] Among the many problems with viewpoint-based restrictions is that they distort public debate by allowing the public to hear only one side of an issue. The public should "be extremely skeptical about the claims of the judiciary to be competent to act as some sort of Consumer Product Safety Commission for [the] marketplace" of ideas—especially when the viewpoint being suppressed regards defects in the judiciary.[195] Distortion of public debate is particularly problematic whenever it regards the qualifications and integrity of government officials—an area that requires "uninhibited, robust, and wide open" debate.[196] Consequently, as explored below, the distortion is not merely the distortion of debate, but the distortion of democracy.

B. COERCED PUBLIC IGNORANCE AND DEMOCRACY

Perhaps the greatest problem with suppressing attorney speech critical or disparaging of the judiciary is that the public loses its right to receive that information. The premise underlying the cases involving attorney speech is that public confidence in the judiciary must be preserved, and the manner of preservation is suppressing speech significantly beyond the standard allowed by *Sullivan* for speech regarding government officials. In essence, public confidence is preserved through public ignorance. Government-coerced public ignorance regarding the qualifications of public officials is antithetical to democracy. It deprives the citizen of the ability to self-govern.[197] It deprives the American people, who possess the ultimate sovereignty over government, of the ability to exercise their power to respond to or correct government abuses. It eliminates the checking power of the people, and denies them the right to define misconduct. To the extent that they are left in the dark, the people cannot exercise their democratic power and right to govern themselves.

The Supreme Court has recognized in the context of commercial speech that the right to free speech creates a reciprocal right to receive information,[198]

194. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 384–88 (1992) (explaining rationale that government is prohibited by the First Amendment from "driv[ing] certain ideas or viewpoints from the marketplace" (quoting Simon & Schuster v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991))); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46–49 (1983); Police Dep't. v. Mosley, 408 U.S. 92, 95–98 (1972).

195. LeBel, *supra* note 59, at 293. LeBel made this statement assuming that *Sullivan* would provide the applicable standard, which he believes "offers insufficient protection for the critic of government." *Id.*

196. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

197. ELY, *supra* note 48, at 125 ("[P]opular choice will mean relatively little if we don't know what our representatives are up to.").

198. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756–57 (1976).

including information from attorneys.[199] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, for example, the plaintiffs were the listeners and not the speakers.[200] The Court held that even though the state could regulate the dissemination of the prescription drug information at issue, the First Amendment protection is "enjoyed by the appellees *as recipients of the information*, and not *solely*, *if at all*," by the speakers.[201] Thus, even if courts could constitutionally restrict attorney speech on the theory that attorneys agree to such regulation as a condition of their admittance to the bar, that would not eliminate the right of the public to receive this information.

Further, as noted above, it is the class of people who have the knowledge and exposure to comment on judicial operations whose speech is restricted. While this fact has been offered as a justification for such restrictions,[202] the difficulty with this justification is why it fails to cut the other way and provide for greater, rather than less, protection. Because lawyers have the education and training to recognize, understand, and articulate problems with the judiciary, and are regularly exposed to and experiencing those problems as they bring their clients' cases before judges, they have more expertise and are better able to comment on the judiciary and judicial qualifications. This is precisely the kind of information that the public has a right and need to receive in order to make informed decisions about the judiciary, to fulfill their self-governing role, and check judicial abuses. As Justice Goldberg quoted in *Sullivan*, "'The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.'"[203] But by silencing *all lawyers*, the courts have denied the public the opportunity to gain an informed opinion regarding deficiencies in the judiciary from those who know best because of education, training, and exposure to actual judges—leaving relatively few other effective critics.[204] The Supreme Court of Oklahoma is the only court to examine these ideas and to recognize the free speech interests of the recipients in obtaining informed and

199. Bates v. State Bar of Ariz., 433 U.S. 350, 365–66, 372–76, 384 (1977) (stating that the decision to allow attorney advertising "might be said to flow *a fortiori* from" the *Virginia State Board of Pharmacy* case, noting the potential value of advertising material to the public, and holding that "the *flow* [that is, to the public] of such information may not be restrained" (emphasis added)).

200. *Va. State Bd. of Pharmacy*, 425 U.S. at 753.

201. *Id.* at 756 (emphasis added).

202. *See, e.g.*, *In re* Pyle, 156 P.3d 1231, 1248 (Kan. 2007) (per curiam) (stating that "'[p]recisely because lawyers are perceived to have special competence in assessing judges, the public tends to believe what lawyers say about judges'" (quoting ANN. MODEL RULES OF PROF'L CONDUCT R. 8.2 at 585 (5th ed. 2003))).

203. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 304 n.5 (1964) (Goldberg, J., concurring) (quoting Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring)); *see also id.* at 281 ("'[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.'" (quoting Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908))).

204. As the *Sullivan* Court observed, "Criticism of . . . official conduct does not lose its constitutional protection merely because it is effective criticism." *Id.* at 273.

educated criticisms about the judiciary from attorneys.[205]

The general rule seems to be one of keeping the public in ignorance for the good of society. But such paternalistic arguments do not even withstand the lesser scrutiny applied to commercial speech—let alone the heightened scrutiny applied in the area of core political speech about the qualifications and integrity of governmental officials. As the Supreme Court has commented in the area of restrictions on advertising, "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."[206] The Court in *Bates v. State Bar* applied this same reasoning to restrictions on lawyer advertising, which were based on preserving respect for the legal profession, explaining that "we view as dubious any justification that is based on the benefits of public ignorance" as "the preferred remedy is more disclosure, rather than less."[207] As the *Virginia State Board of Pharmacy* Court had explained, state interests that at heart are aimed at "keeping the public in ignorance" not only fail to support the suppression of speech, but demonstrate the need for protection of the speech sought to be restricted.[208] "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[209]

Many courts have argued that the restriction on attorney speech is appropriate because the attorney can always file a complaint with the relevant judicial disciplinary authority if there is a real problem.[210] But this alternate forum is

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205. State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958, 968–69 (Okla. 1988). The Oklahoma Supreme Court explained:

> We agree that the attorney's personal First Amendment rights might properly be subordinated to the attorney's duties as officers of the courts. Such a consideration does nothing to weigh in the balance against the right of the public generally to be informed of the affairs of their government. In keeping with the high trust placed in this Court by the people, we cannot shield the judiciary from the critique of that portion of the public most perfectly situated to advance knowledgeable criticism, while at the same time subjecting the balance of government officials to the stringent requirements of *New York Times Co. v. Sullivan* and its progeny.

Id. (citation omitted).

206. *Va. State Bd. of Pharmacy*, 425 U.S. at 769.

207. Bates v. State Bar of Ariz., 433 U.S. 350, 375 (1977).

208. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

209. *Id.*

210. *See In re* Evans, 801 F.2d 703, 707 (4th Cir. 1986) (explaining that "'whenever there is proper ground for serious complaint against a judge it is the right and duty of a lawyer to submit his grievances to the proper authorities'" (quoting People *ex rel.* the Chi. Bar Ass'n v. Metzen, 125 N.E. 734, 735 (1919))); Ramirez v. State Bar of Cal., 619 P.2d 399, 405 n.13 (Cal. 1980); *In re* Wilkins, 777 N.E.2d 714, 717 (Ind. 2002) (per curiam) ("Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission."), *modified*, 782 N.E. 985 (Ind. 2003); Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam) (stating that if an attorney "had reason to believe in good faith" that improper conduct had occurred "then the proper forum in which to have made his claim was the Judicial Retirement and Removal Commission as provided in our Constitution"); *In re* Westfall, 808 S.W.2d 829, 839 (Mo. 1991); *In re* Lacey, 283 N.W.2d 250, 252 (S.D. 1979); Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962, 964 (Utah

wholly inadequate for a number of reasons.[211] Perhaps the most important reason is that, in every state, complaints filed with the judicial disciplinary authority are confidential—at least until a formal charge is filed, and sometimes until discipline is ordered by the state supreme court.[212] Thus, the use of this forum continues to keep the public in ignorance as to assessments of and information regarding the judiciary. Further, this forum does not avoid the problem of authoritative selection and distortion of public debate. Not all complaints are made public, but only those that the disciplinary authority determines warrant official investigation or punishment. Consequently, the people do not have the opportunity to perform their checking function and determine what constitutes misconduct until a government authority passes on the validity and seriousness of the alleged misconduct.[213] Thus, the people are denied their ultimate sovereignty because the "censorial power [resides] in the Government over the people," rather than where it belongs: "in the people over the Government."[214] Certainly complaints against judges, even if they do not warrant discipline in the eyes of the state, would be relevant for citizens in evaluating the effectiveness and competence of the judiciary. If the citizenry is denied access to such information, it cannot invoke democratic corrections for the judiciary. Moreover, attorneys may have opinions regarding members of the bench that would not be of sufficient magnitude that the attorney would file a complaint against the judge, but again would be relevant to the public's exercise of their democratic responsibilities.

It is probably a truism that attorneys will be much more hesitant to file complaints with a judicial disciplinary authority than they would be to express opinions as to judges, their competence, and their motivations in ordinary public fora. An attorney may say, and have reason to believe, that she thinks a decision of a court is politically motivated but may be unlikely to file a complaint with a judicial disciplinary authority on that basis, particularly in those states where such complaints must be verified, notarized, or otherwise sworn to under penalty of perjury as to their truth.[215] This method of allowing

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2007) (stating that attorneys "faced with genuine judicial misconduct" have "appropriate avenues" for complaint, including "a separate proceeding before the Judicial Conduct Commission").

211. As a doctrinal point, an ample alternate forum only cures a *content-neutral* restriction on speech, making such restriction a valid time, place, and manner regulation. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); United States v. Grace, 461 U.S. 171, 177 (1983). As noted, the punishment of attorney speech critical of the judiciary is not only content-based, but is moreover viewpoint-based. Thus, under normal First Amendment doctrine, it cannot be saved by the provision of an ample alternate forum. *See supra* note 194 and accompanying text.

212. *See* AMERICAN JUDICATURE SOCIETY, APPENDIX D: WHEN CONFIDENTIALITY CEASES, http://www.ajs.org/ethics/pdfs/When%20confidentiality%20ceases.pdf.

213. *See supra* notes 71–72 and accompanying text.

214. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) (quoting 4 ANNALS OF CONG. 934 (1794)).

215. Connecticut, Idaho, Indiana, Michigan, Nevada, New Mexico, Rhode Island, Tennessee, West Virginia, and Wyoming each require that complaints filed with its judicial conduct authority be notarized and verified, attesting to the truth of the allegations. *See* Connecticut Judicial Review Council: Information Handbook, http://www.ct.gov/jrc/cwp/view.asp?a=3061&q=384644 (last visited

speech solely through the filing of official complaints cannot be squared with the prohibition on "rule[s] compelling the critic of official conduct to guarantee the truth of all his factual assertions"[216] or with the "uninhibited, robust, and wide-open" debate regarding government officials envisioned by the *Sullivan* Court as necessary to our American form of government.[217] Indeed, it grinds against the underlying premise of *Sullivan* "[t]hat 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.'"[218]

Further, in both *Sullivan* and *Garrison*, the Court expressly recognized both the importance and probability that people would attribute motives to actions of government officials.[219] Yet, in a number of cases, attorneys have been punished precisely because they went beyond stating facts or making arguments and attributed possible motives to the actions of the court.[220] However, the *Sullivan* Court contemplated that the speech it was protecting would be inclusive of "[e]rrors of fact, particularly in regard to a man's mental states and processes, [which errors] are inevitable."[221] In *Garrison*, the Court explained:

> The public-official rule protects *the paramount public interest in a free flow of information to the people concerning public officials,* their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or *improper motivation* . . . .[222]

Combined, *Sullivan* and *Garrison* contemplate that speech regarding the motiva-

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June 28, 2009); Idaho Judicial Council, http://judicialcouncil.idaho.gov/ComplaintBrochure.pdf (last visited June 28, 2009); Indiana Judicial Qualifications Commission, http://www.in.gov/judiciary/jud-qual/filing.html (last visited June 28, 2009); Michigan Judicial Tenure Commission, http://jtc.courts.mi.gov/grievance.htm (last visited June 28, 2009); Nevada Commission on Judicial Discipline, http://www.judicial.state.nv.us/complaintformncjd.pdf (last visited June 28, 2009); New Mexico Judicial Standards Commission, http://www.nmjsc.org/docs/complaintform.pdf (last visited June 28, 2009); Rhode Island Commission on Judicial Tenure and Discipline, http://www.courts.state.ri.us/supreme/jtd/Instructions_&_Complaint_Form.pdf (last visited June 28, 2009); West Virginia Judicial Investigation Commission, http://www.state.wv.us/wvsca/JIC/complain2.PDF (last visited June 28, 2009); State of Wyoming Commission on Judicial Conduct and Ethics, http://judicialconduct-wy.us/complaint.php (last visited June 28, 2009). Georgia and Maryland specifically require that complainants sign under penalty of perjury. *See* Georgia Judicial Qualifications Commission, http://www.georgiacourts.org/agencies/jqc/Pages/FAQ.htm#complain2 (last visited June 28, 2009); Maryland Commission on Judicial Disabilities, http://www.mdcourts.gov/cjd/complaint.html (last visited June 28, 2009).

216. *Sullivan*, 376 U.S. at 279.

217. *Id.* at 270.

218. *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

219. *See infra* notes 221–23 and accompanying text.

220. Idaho State Bar v. Topp, 925 P.2d 1113, 1115 (Idaho 1996); *In re* Wilkins, 777 N.E.2d 714, 716–17 (Ind. 2002) (per curiam), *modified*, 782 N.E.2d 985 (Ind. 2003); *In re* Atanga, 636 N.E.2d 1253, 1258 (Ind. 1994) (per curiam); *In re* Raggio, 487 P.2d 499, 500 (Nev. 1971) (per curiam); Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962, 963–64 (Utah 2007).

221. *Sullivan*, 376 U.S. at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).

222. Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (emphasis added).

tion of government officials is one of the most important subjects to be discussed in free debate and disseminated to the public, but is also a topic regarding which "[e]rrors of fact . . . are inevitable."[223] This is one of the reasons why the subjective *Sullivan* test for punishing speech about government officials is so important. Generally, people do not really know what motivates others, but improper motivation is an important factor in measuring the fitness of government officials. Thus, either the discussion of motivation must be removed from the table of free debate by punishing it whenever it is inaccurately ascribed,[224] or it should not be punished unless a person knows it to be false or subjectively entertains doubts as to its truth or falsity.

C. JUDICIAL SELF-ENTRENCHMENT

As noted above, the severity of sanctions imposed on attorneys and the objective standard offered, requiring the attorney to prove the truth of the assertion, has a chilling if not freezing effect on attorney speech critical of the judiciary. Further, as noted, attorneys are in the best position to know of judicial incompetence and abuse and have the training and education to aptly recognize and criticize such behavior. Attorney discipline thus silences the most effective critics of the judiciary. In *Democracy and Distrust*, John Hart Ely argues that a representative government malfunctions not when substantive ends are achieved with which one may disagree, but "when the *process* [of representative government] is undeserving of trust."[225] One way that such a malfunction occurs is when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[226] In other words, democratic malfunction occurs when those in government positions use their power to entrench themselves.

An example provided by Ely is the problem of allowing the legislature to manipulate voting rights. As Ely notes, voting is "essential to the democratic process" and its "dimensions cannot safely be left to our elected representatives,

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223. *Sullivan*, 376 U.S. at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).

224. An additional wrinkle with punishing attributions of motivation is illustrated by *Idaho State Bar v. Topp*, 925 P.2d 1113 (Idaho 1996). In *Topp*, the parties stipulated to certain facts, including that the judge would testify, if called, and say that his decision was not politically motivated. *Id.* at 1116. The court took this stipulation as establishing that the decision in fact was not politically motivated, and not as an admission that the judge would deny political motivation (as would any judge). *Id.* Topp presented several facts from which political motivation could certainly be inferred, but the court took the stipulated testimony of the judge as the definitive answer as to the judge's ultimate motivation and Topp was consequently disciplined for his incorrect attribution. *Id.* at 1116–17.

Even if the judge honestly testified that he was not politically motivated, that does not answer the question as to what motivated the judge. The problem with punishing speech regarding potential motivations for actions is that even the person acting often cannot pinpoint or cannot recognize what actually motivated him. Try as one might to be completely objective, it is probably safe to say that everyone is biased in some way or another. And sometimes a person is most biased when she cannot even recognize the bias.

225. ELY, *supra* note 48, at 103.

226. *Id.*

who have an obvious vested interest in the status quo."[227] In like manner, the judiciary has authority to punish attorneys, their most likely and effective critics. Public debate as to the qualifications, integrity, and impartiality of the judiciary is essential to the democratic process. This is particularly obvious where the judiciary is elected or retained by election, but it is also true where the judiciary is appointed because institutional checks will generally only be invoked as a result of public insistence.[228] As with Ely's example, the punishment of speech critical of the judiciary "cannot safely be left to [the judiciary], who have an obvious vested interest in the status quo" and in preserving their own reputations.[229] To the extent that public debate is distorted to be rid of attorney criticism and disparagement of particular judges, the populace will not be aware of the problem and will not vote out those judges who are elected, or, alternatively, will not call upon the people's elected legislative and executive officials to investigate and remove offending judges who are appointed.

Indeed, because it is the judiciary who punishes the attorney, the situation is more suspect than the scenario presented in *Sullivan* or *Garrison*. In *Sullivan*, the punishment for offensive speech had to come from a jury, and in *Garrison*, the punishment for criminal defamation of the judiciary came from both a prosecutor (the executive branch) and a jury. But in the scenario of attorney discipline, the punishment is made by the branch being criticized, which has an obvious interest in keeping the ins in and in avoiding negative public exposure.

In re Raggio provides an example.[230] William J. Raggio was an attorney of excellent reputation who "was prominently mentioned as a candidate for either governor or United States senator" for Nevada.[231] Raggio made a statement in an interview with the press about a decision of the Nevada Supreme Court to rehear a death penalty case he had prosecuted and called that decision "most shocking and outrageous" and "judicial legislation at its very worst."[232] In disciplining Raggio, the Nevada Supreme Court revealed its concern with his comments. Noting Raggio's prominence, the Court related:

> Maximum dissemination was given his views. His initial comments were frequently repeated in the press and on television during the weeks and months to follow. *The public was quick to respond. This court became the center of controversy.* Essential public confidence in our system of administering justice may have been eroded.[233]

Certainly the (popularly elected) Nevada Supreme Court did not appreciate

227. *Id.* at 117.
228. *See* Blasi, *supra* note 48, at 539.
229. ELY, *supra* note 48, at 117.
230. *In re* Raggio, 487 P.2d 499 (Nev. 1971) (per curiam).
231. *Id.* at 500.
232. *Id.*
233. *Id.* (emphasis added).

being "the center of controversy"—which is precisely why it should not be the entity punishing such speech, or at the very least should not be allowed to carve out an exception to the *Sullivan* rule for itself.

But even the protection promised in *Sullivan* may not be enough. Justice Goldberg argued that the *Sullivan* standard was insufficient to protect critics of the government because of the possibility of "friendly juries" who would protect the government and find that the requisite mental state had been met.[234] Thus, Goldberg argued that "the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."[235] The possibility of a government-friendly jury is hard to quantify. But in cases involving attorney discipline for statements regarding the judiciary, Goldberg's hypothetical problem of a judiciary-friendly "jury" is a reality. As Justice Boehm of the Indiana Supreme Court stated in a dissenting opinion, "This Court acts as judge, jury, and appellate reviewer in a disciplinary proceeding," and "[w]here the offense consists of criticism of the judiciary, we become the victim as well."[236]

The problems of self-entrenchment do not involve solely the malfunction of the democratic process and the ins staying in. Rather, self-entrenchment and the protection of one's own dignity leads to additional abuses of power made in pursuit of that end. Again, as Justice Goldberg argued in his *Sullivan* concurrence, "The American Colonists were not willing, nor should we be, to take the risk that '[m]en who injure and oppress the people in their administration [and] provoke them to cry out and complain' will also be empowered to 'make that very complaint the foundation for new oppressions and prosecutions.'"[237]

Unfortunately, Goldberg's scenario has occurred on a few occasions in the context of punishing speech critical of the judiciary. In *In re Atanga*, Judge Donald C. Johnson rescheduled a hearing in a criminal case for a day that the judge knew defense attorney Jacob A. Atanga (who was African-American) could not attend because Atanga had to appear in court in another county at that same time.[238] The judge then held Atanga in contempt for missing the hearing, had Atanga arrested at his office and jailed, had Atanga brought before the court, and forced him to represent his client while Atanga was dressed in prison clothes.[239] Atanga was interviewed by an editor of an ACLU newsletter about the episode. Atanga told the editor regarding Judge Johnson, "I think he is

234. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300, 304 (1964) (Goldberg, J., concurring).

235. *Id.* at 298.

236. *In re* Wilkins, 777 N.E.2d 714, 720–21 (Ind. 2002) (per curiam), *modified*, 782 N.E.2d 985, 987 (Ind. 2003).

237. *Sullivan*, 376 U.S. at 301 (Goldberg, J., concurring) (quoting The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721–22 (1735)).

238. *In re* Atanga, 636 N.E.2d 1253, 1255 (Ind. 1994) (per curiam).

239. *Id.* at 1255–56.

ignorant, insecure, and a racist."[240] Atanga was suspended from the practice of law for thirty days for this statement, which allegedly violated MRPC 8.2.[241] But Indiana never proved Atanga's statement to the press was false (that Johnson was not ignorant, insecure, and a racist) and indeed excluded as irrelevant Atanga's proffered testimony from witnesses in support of his statement.[242] In suspending Atanga, the Supreme Court of Indiana explained that "the judicial institution is greatly impaired if attorneys choose to assault the integrity of the process and the individuals who are called upon to make decisions" and thus, "[t]his *court must preserve the integrity of the process* and impose discipline."[243] The Indiana Supreme Court apparently believed that punishing speech about Judge Johnson and an opinion regarding him for what was clearly outrageous judicial conduct is the best way to "preserve the integrity of the process." Over a year later, the Indiana Supreme Court publicly reprimanded Judge Johnson for the episode in a matter-of-fact decision that simply stated agreed-upon facts and concluded that those facts constituted violations of various codes of judicial conduct.[244] Entirely missing from the opinion is any of the rhetoric of the kind used about Atanga's conduct,[245] for example that Atanga "greatly impaired" the "judicial institution" by "assault-[ing] the integrity of the process and the individuals who are called upon to make decisions."[246] Further, Atanga received a significantly harsher punishment for his speech regarding Judge Johnson's abuse of power than Judge Johnson received for the underlying abuse. Indeed, the Indiana Supreme Court, in its opinion disciplining Atanga, downplayed the extreme nature of Judge Johnson's conduct by characterizing it as "not represent[ing] contemporary jurisprudence in this state" and as being a "questionable practice."[247] While using understatement regarding Judge Johnson's behavior, the court cracked down on Atanga and suspended him from the practice of law. The scenario is precisely along the lines predicted by Justice Goldberg in *Sullivan*. Atanga was "injure[d] and oppress[ed]" by Judge Johnson, and then when Atanga spoke "out and com-

240. *Id.* at 1256.

241. *Id.* at 1257.

242. *See id*.

243. *Id.* at 1258 (emphasis added). Notably, the hearing officer had recommended to the Indiana Supreme Court that Atanga receive no discipline because he "ha[d] already been adequately punished." *See id.* But the supreme court determined that it "must preserve the integrity of the process and impose discipline," and suspended him from the practice of law. *Id.*

244. *See In re* Johnson, 658 N.E.2d 589 (Ind. 1995).

245. *See id*. The Court dryly states the facts and then concludes:

> We find that the Respondent violated Canon 1 of the 1975 Code of Judicial Conduct which required judges to uphold the integrity and independence of the judiciary and to maintain high standards of conduct; that he violated Canon 3A(3) of the 1975 Code of Judicial Conduct, which required judges to be patient, dignified, and courteous to lawyers and others . . . .

Id.

246. *In re Atanga*, 636 N.E.2d at 1258.

247. *Id.* at 1257.

plain[ed],” “that very complaint [became] the foundation for new oppressions and prosecutions.”

Other cases follow similar lines where a judge does something that cannot be condoned, an attorney complains about it, and the attorney is severely sanctioned for his speech. Meanwhile, the disciplining authority downplays the conduct of the criticized judge.[248] Thus the manner by which some courts have “preserved the integrity” of the judiciary is to understate judicial abuses and errors to make them more palatable while at the same time punishing attorney speech that amplifies it. This in itself is an abuse of judicial power. The Constitution does not condone such a method—“silence coerced by law” and “authoritative selection”—as a proper means of improving the public perception of judicial integrity.[249] Acknowledging wrongs and addressing them would, by definition, improve integrity. For, “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”[250] Perhaps public *perception* of judicial integrity (as opposed to integrity itself) is more readily obtained by punishing critical speech, but the First Amendment forbids governmental resort to that option.[251]

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248. *In re Glenn*, 130 N.W.2d 672 (Iowa 1964), deals with an attorney who was punished for circulating a leaflet that questioned what was behind a rather strange set of circumstances regarding the arrest and forfeiture of bail bonds of seventy-nine people for patronizing a bootlegging establishment in violation of a city ordinance while letting the establishment out on a plea with almost no penalties and without forfeiting its bond. The Supreme Court of Iowa disciplined Glenn, while admitting that the plea agreement “does little credit to those who participated in it,” including the criticized judge. *See id.* at 674. Rather than be concerned that something fishy was going on in the arrest and forfeiture of the bonds of seventy-nine citizens, the court suspended Glenn for one year for questioning and trying to expose it. *See id.* at 674–75.

In *United States District Court for the Eastern District of Washington v. Sandlin*, 12 F.3d 861 (9th Cir. 1993), the attorney ordered a transcript and found out from the court reporter that the judge regularly told the court reporter to edit the transcript in what the judge called “do-overs.” Sandlin misremembered something that he thought the judge had said and asked for a transcript and a copy of the tape. Sandlin reported the editing to authorities in the FBI and the United States Attorney General’s office. After investigation by the FBI and others, it was determined that, while the judge did indeed edit the transcript, it was only for stylist changes, and the judge did not edit the audio tape. The judge filed a grievance against Sandlin for impugning his integrity. Sandlin was suspended for six months from practice in the Eastern District of Washington for his “false” reports of substantive editing. The Ninth Circuit upheld the suspension but commented that it did “not condone editing *in any form* of official transcripts.” *Id.* at 866.

In *Kentucky Bar Ass’n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), the judge in a politically sensitive hearing on an injunction for an abortion statute heard the matter ex parte. The attorney for the government had told the judge that he would be late because of another hearing that was lasting longer than expected in the same courthouse and asked the judge to wait. The judge indicated he would wait, but then did not and granted the restraining order without hearing from the government at all. An attorney for Right to Life who attended the hearing (but was not actually engaged in the case) told the media that the judge’s decision to proceed ex parte was “highly unethical and grossly unfair.” *Id.* at 166. The attorney was disciplined with a public reprimand for his comment. *Id.* at 169.

249. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

250. *Id.*

251. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 365 (1977) (“The choice between the dangers of suppressing information and the dangers arising from its free flow [is] seen as precisely the

III. PURPORTED RATIONALES FOR PUNISHING SPEECH DO NOT WITHSTAND SCRUTINY

As demonstrated, prohibiting attorney speech critical of the judiciary is antithetical to the democratic process, and because it is a viewpoint-based prohibition on speech concerning the qualifications of government officials, it is patently unconstitutional under *Sullivan* or any regular Speech Clause analysis. Nevertheless, state and federal courts have punished attorney speech critical of the judiciary based on the following arguments (none of which withstand scrutiny): (1) the Supreme Court has exempted attorney speech critical of the judiciary from the strictures of *Sullivan*; (2) restrictions on attorney speech are a constitutional condition imposed on attorneys in return for granting attorneys the privilege of practicing law; (3) the interests served by the tort of defamation are different from the interests served by imposition of attorney discipline.

A. THE ALLEGED EXCEPTIONS FOUND IN *BRADLEY*, *SAWYER*, AND *SNYDER*

The Supreme Court has decided a few cases in which the issue of discipline for impugning judicial integrity was directly raised, but in each the Supreme Court declined to address the constitutional question. Unfortunately, the Supreme Court's avoidance of the constitutional issue has made possible state court interpretation of the cases as creating an exception to the general constitutional rules (such as *Sullivan*) and thus as granting the states wide latitude to punish attorney speech that impugns judicial integrity.

1. The Shifting Legal Landscape

One of the fundamental problems with state court analysis of attorney speech is the consistent failure of courts to reanalyze precedent in light of major shifts in the legal landscape, most notably incorporation of the First Amendment, but equally important, the handing down of major decisions such as *Sullivan*, *Garrison*, and other cases that established that rules of professional conduct could violate the First Amendment.

One of the cases regularly cited into the twenty-first century as authorizing punishment of attorney speech critical of the judiciary is *Bradley v. Fisher*.[252] In *Bradley*, the Court declared that, when admitted, attorneys take upon themselves the obligation "to maintain *at all times* the respect due to courts of justice and judicial officers," which "includes abstaining *out of court* from all insulting language and offensive conduct toward the judges personally for their judicial

choice 'that the First Amendment makes for us.'" (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976))).

252. Bradley v. Fisher, 80 U.S. 335 (1871). *See In re* Cobb, 838 N.E.2d 1197, 1211 (Mass. 2005) (relying on *Bradley*); Grievance Adm'r v. Fieger, 719 N.W. 2d 123, 133 (Mich. 2006), *cert. denied*, 549 U.S. 1205 (2007); *In re* Madison, No. SC 89654, 2009 WL 1211256, *3 (Mo. May 5, 2009) (per curiam); *In re* Westfall, 808 S.W.2d 829, 834 (Mo. 1991).

acts."[253] While arguments can be made that the statement is dicta,[254] the biggest problem with citing *Bradley* as answering a First Amendment challenge is that it was decided in 1871 when the Fourteenth Amendment was less than a decade old.[255] While the Fourteenth Amendment technically existed at this time, the doctrine of incorporation of the Bill of Rights as prohibitions on state authority had not been announced and would not be recognized for more than thirty years.[256] The First Amendment itself would not be incorporated as a limitation on state government until 1925—over 50 years later.[257] The *Bradley* case, thus, could have nothing authoritative to say regarding the First Amendment's limitation on state power to regulate attorney speech.[258]

The legal landscape problem pervades this area because the first regulations on attorney conduct were drafted by the ABA in 1908—again, well before incorporation of the First Amendment. While the ABA subsequently changed its rules to conform with *Sullivan*, states have continued to cite their older case law based on earlier regulations. Under the 1908 Canons of Professional Ethics, an attorney had a duty of respect and courtesy to the judiciary and was advised to "submit his grievances to the proper authorities" for a "serious complaint" about a judge.[259] If the attorney did so, "*but not otherwise*, such charges [against the judiciary] should be encouraged and the person making them should be protected."[260] Ethical Consideration 8-6 found in the Model Code of Professional Conduct admonished the attorney to "be *certain of the merit of his complaint*, use appropriate language, and avoid petty criticisms" of the judiciary.[261] These regulations became entrenched in the case law prior to the adoption of the Model Rules of Professional Conduct. And while MRPC 8.2 is the governing rule, the language of Ethical Consideration 8-6, which has been rejected by the

253. *Bradley*, 80 U.S. at 355 (emphasis added).

254. *See, e.g.*, *Westfall*, 808 S.W.2d at 845 (Blackmar, J., dissenting). As Justice Cavanagh of the Michigan Supreme Court explained in his dissent in *Fieger*:

> Even a cursory reading of *Bradley* reveals three important facts. First, the attorney in *Bradley* criticized the judge *in the courtroom in the context of litigation*. Second, the entire *Bradley* opinion was devoted to whether the judge, who thereafter struck the attorney from the rolls, was entitled to [judicial] immunity for the act. Third, the statement the majority quotes was quintessential dicta; the Court decided that the judge was entitled to absolute immunity for his act, and, thus, no commentary on the attorney's behavior was necessary or relevant to the holding.

Fieger, 719 N.W.2d at 174 (Cavanagh, J., dissenting).

255. *Bradley*, 80 U.S. at 336. *Bradley* concerns a spat between a judge and an attorney during the trial of John H. Suratt for the murder of Abraham Lincoln. *Id.*

256. *See* Twining v. New Jersey, 211 U.S. 78, 99 (1908).

257. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

258. In similar fashion, the California Supreme Court, post-*Garrison*, relied on precedent from its own court from 1894 as its authority for rejecting the proposition that "'outrageous' and 'unwarranted' statements concerning a justice of this court were protected by 'free speech' considerations." Ramirez v. State Bar of Cal., 619 P.2d 399, 404 (Cal. 1980) (quoting *In re* Philbrook, 38 P. 884, 886 (Cal. 1895)).

259. ABA CANONS OF PROF'L ETHICS, Canon 1 (1908).

260. *Id.* (emphasis added).

261. MODEL CODE OF PROF'L RESPONSIBILITY EC 8-6 (1980) (emphasis added).

ABA,[262] surfaces as authoritative in cases decided in the twenty-first century.[263]

2. Stretching Authority

Another stumbling block in this area is reliance on *In re Sawyer* and *In re Snyder* as creating an exception to regular constitutional rules and as allowing punishment of attorney speech contrary to *Sullivan*, when, in fact, neither the *Sawyer* nor *Snyder* Court addressed—and thus could not have created an exception to—the constitutional question.

In *Sawyer*,[264] which is paradoxically set in the context of a trial of four alleged communists under the notorious Smith Act, defense attorney Harriet Bouslog Sawyer held a public meeting during the pendency of the trial. Sawyer gave a speech where she told "about some rather shocking and horrible things that go on at the trial."[265] Noting the gross inequities generally concomitant with Smith Act prosecutions, Sawyer declared, "there's no such thing as a fair trial in a [S]mith [A]ct case" because "all rules of evidence have to be scrapped or the government can't make a case."[266] Sawyer provided examples from the trial, explaining that hearsay rules were not applied and that "a federal judge sitting on a federal bench permits [a key witness at the trial] . . . to tell what was said when [one of the criminal] defendant[s] was five years old. There's no fair trial in the case. They just make up the rules as they go along."[267] Sawyer was

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262. *See* ANN. MODEL RULES OF PROF'L CONDUCT R. 8.2 at 345–46 (1984). After discussing *Sullivan* and *Garrison* and explaining that Rule 8.2 incorporates the standard from those cases, the ABA explains:

> Rule 8.2 *does not* continue the standard of Model Code EC 8-6 which stated that a lawyer who criticizes judicial officials "should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms." The EC 8-6 standard has been invoked by courts to penalize criticism considered to be undignified in manner, intemperate in tone or expressed in inappropriate language.

Id. at 345 (emphasis added).

263. *See In re* Arnold, 56 P.3d 259, 264 (Kan. 2002) (per curiam) (quoting language from former EC 8-6, even though 8.2 is the governing rule); *In re* Simon, 913 So. 2d 816, 824 (La. 2005) (per curiam) (same).

264. *In re* Sawyer, 360 U.S. 622 (1959).

265. *Id.* at 641.

266. *Id.* at 644.

267. *Id.* at 645. Sawyer provided another example from the trial itself, concerning the testimony of a witness named Johnson, who said:

> [H]e came back from [S]an [F]rancisco with communist books and literature in a duffel bag. He said when he got to Honolulu he told Jack Hall [one of the defendants] the names of some of the books. Then the government for two days read from books supposed to have been in the duffel bag . . . [o]n cross-examination Johnson said he did not tell the names of the books, but just showed [J]ack [H]all the duffel bag. So [J]ack [H]all violated the [S]mith [A]ct because he saw a duffel bag with some books on overthrowing the government in it. It's silly. Why does the government use your money and mine to put people in jail for thoughts . . . . [U]nless we stop the Smith trial in its tracks here there will be a new crime. [P]eople will be charged with knowing what is included in books—[i]deas. . . . [T]here'll come a time when the only thing to do is to keep your children from learning how to read.

suspended from the practice of law for one year for her remarks.[268] The basis for the suspension was that Sawyer "impugned the integrity of the judge presiding" in the Smith Act case and thus "create[d] disrespect for the courts of justice and judicial officers generally."[269]

Sawyer's suspension was reversed by the Supreme Court in a plurality opinion. Justice Brennan announced the judgment of the Court, but his opinion only garnered four votes. Justice Stewart concurred solely in the result reached by Justice Brennan, writing his own separate opinion, and Justice Frankfurter wrote a dissenting opinion for four justices.[270]

Justice Brennan's opinion was narrowly decided on the facts and expressly avoided any treatment of the constitutional question of whether Sawyer's speech was protected by the First Amendment.[271] Because the Hawaii Bar failed to discipline Sawyer on the basis of obstructing justice or violating any sort of trial publicity rule (such as Canon 20 of the Canons of Professional Ethics, applicable in Hawaii at the time), Brennan ignored these aspects of Sawyer's speech.[272] Rather than examine the Constitution at all, Justice Brennan examined whether the statements that the Hawaii Bar found worthy of discipline in fact impugned the integrity of the trial court.[273] Brennan sorted Sawyer's speech into categories of speech that factually could not form the basis for Sawyer's discipline because they did not impugn the personal integrity of the trial court judge. Namely, Brennan stated that attorneys could, without impugning judicial integrity, "criticize the state of the law,"[274] "criticize the law-enforcement agencies of the Government, and the prosecution,"[275] and criticize a judge as being "wrong on his law."[276]

Id. at 644–45.

268. The Bar Association for the then-territory of Hawaii amended its rules specifically for the purpose of making it possible to bring a charge against Sawyer. Judge Wiig, who presided at the Smith Act trial, "requested the local Bar Association to investigate" Sawyer's conduct. But under the Hawaii rules, professional misconduct charges could only be made by an aggrieved client or by the Attorney General. The Bar Association referred it to the Attorney General, who decided not to file a complaint. So the Sawyer matter was "referred to the Committee on Legal Ethics to study amendments to the Rules." The applicable rule was amended, and the President of the Bar Association then filed a complaint against Sawyer on behalf of the Association. *See id.* at 624 n.2.

269. *Id.* at 626.

270. Justice Black also wrote a separate opinion, *id.* at 646 (Black, J., concurring), but additionally joined Justice Brennan's opinion, *id.* at 623–46 (majority opinion). Similarly, Justice Clark authored a separate opinion, *id.* at 669–71 (Clark, J., dissenting), but additionally joined Justice Frankfurter's opinion, *id.* at 647–69 (Frankfurter, J., dissenting).

271. *Id.* at 627 (majority opinion) (expressly stating that the opinion did "not reach or intimate any conclusion on the constitutional issues presented").

272. *Id.*

273. *Id.* at 626–27.

274. *Id.* at 631. The Court went on to explain that "[s]uch criticism simply cannot be equated with an attack on the motivation or the integrity or the competence of the judges." *Id.* at 632.

275. *Id.*

276. *Id.* at 635 (explaining that this did not impugn judicial integrity because "appellate courts and law reviews say that of judges daily, and it imputes no disgrace").

Brennan's opinion has been hopelessly misconstrued by subsequent state and federal courts. Courts have cited Brennan's categorization of speech that cannot impugn judicial integrity, and they have determined by negative implication that anything not listed by Brennan is both (1) subject to punishment and (2) constitutionally so.[277] Because Brennan did *not* reach the constitutional question, *Sawyer* cannot provide the authority that states construe it to create—namely, that certain attorney statements are "the subject of professional discipline"[278] or "properly censurable"[279] under the Constitution. The only negative implication of Brennan's opinion is that certain statements not listed might impugn judicial integrity. But that does not mean that punishment for impugning judicial integrity would be constitutional—a proposition that must be examined in light of the Court's subsequent holdings in *Sullivan* and *Garrison*.

Finally, Brennan rejected the idea that Sawyer's critical remarks were improper because she was counsel of record in an ongoing trial.[280] Brennan's focus again was with what Sawyer had been charged—namely, "impugn[ing] the integrity of Judge Wiig."[281] As to these charges, Brennan said, in words that are frequently quoted, "A lawyer does not acquire any license to [impugn the integrity of the court] by not being presently engaged in a case. They are equally serious whether he currently is engaged in litigation before the judge or not."[282] This statement is quoted in modern cases to punish attorneys for speech about the judiciary even when the attorney is not engaged in a pending case. *Kentucky Bar Ass'n v. Heleringer* provides an example.[283] The Supreme Court of Kentucky quoted the above language from Brennan's *Sawyer* opinion as support for disciplining an attorney for Right to Life for making a statement to the press about a judge even though the attorney was not engaged as counsel in the underlying lawsuit.[284] What courts fail to consider is Brennan's remaining explanation:

> We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, *other than that they might tend to obstruct the administration of justice* . . . . But *this distinction is foreign to this case*, because the charges and findings in no

277. For example, the Supreme Court of Oklahoma has read Brennan's opinion as establishing that "criticism by an attorney amounting to *an attack on the motivation*, *integrity or competence of a judge* whose responsibility it is to administer the law may be under certain circumstances properly censurable." State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958, 965 (Okla. 1988) (emphasis added); *see also* Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 167 (Ky. 1980) (per curiam); Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46, 52–53 (Neb. 1982); *In re* Meeker, 414 P.2d 862, 869 (N.M. 1966).

278. *Michaelis*, 316 N.W.2d at 53.

279. *Porter*, 766 P.2d at 965.

280. *Sawyer*, 360 U.S. at 636.

281. *Id.*

282. *Id.*

283. Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165 (Ky. 1980) (per curiam).

284. *Id.* at 167.

> way turn on an allegation of obstruction of justice or of an attempt to obstruct justice, in a pending case. *To the charges made and found*, it is irrelevant whether the Smith Act case was still pending. *Judge Wiig remained equally protected from statements impugning him*, and petitioner remained equally free to make critical statements that did not cross that line.[285]

Notably, Brennan's overall point was that absent obstruction to the administration of justice, *even attorneys engaged in pending cases* (like Sawyer) should be allowed to speak without being disciplined. Ironically, the statement is construed to prohibit speech not only from attorneys engaged as counsel in cases, but also from attorneys not engaged in a pending case. Further, Brennan acknowledged that statements might be more worthy of censure depending on the context and timing in which they are made but argued that if the problem with a statement is obstructing justice, then an attorney should be charged with obstructing justice. Notably, *Sawyer* was decided five years before *Sullivan* and *Garrison*, which is reinforced by Brennan's statement that Judge Wiig would "remain[] equally protected from statements impugning him."[286] The Court had yet to declare that the Constitution prohibited punishment for speech regarding government officials unless the *Sullivan* standard is met. But the Court refused to reach this constitutional issue in *Sawyer*. Brennan's opinion should be read as saying that if impugning judicial integrity is, of itself, a constitutionally valid basis for punishing and restricting speech (an issue the Court does not reach), then it is sanctionable regardless of when made. On the other hand, if the speech is sanctionable for some other reason—obstructing justice, interfering with the trial or jury venire, etc.—the state needs to punish the lawyer's speech on that basis.

The thrust of Brennan's opinion, and certainly its effect on Sawyer, was to allow speech by an attorney (even one engaged in a trial before the criticized judge) and to define permissible speech broadly. Ironically, it has been interpreted to constitutionally enshrine punishment of speech critical of the judiciary even for attorneys not engaged in a pending case.[287]

Justice Frankfurter's dissent reached the constitutional issue, but he took care to limit his argument to the specific facts at issue.[288] Frankfurter contended that

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285. *Sawyer*, 360 U.S. at 636 (emphasis added).

286. *Id.*

287. Stewart's concurrence, discussed below, is frequently interpreted to mean that attorneys have no constitutional right to free speech. Yet Stewart's concurrence cannot be authority as to the protections of the Constitution. *See infra* section III.B. Black wrote a concurrence and joined Brennan's decision. Black's cryptic concurrence is almost never cited. The gist of it seems to be that Hawaii could not have a law (constitutionally) that prohibited an attorney from impugning the integrity of a court. *See Sawyer*, 360 U.S. at 646 (Black, J., concurring).

288. *Id.* at 653 (Frankfurter, J., dissenting). Frankfurter emphasized Sawyer's role in the then-pending trial and other "severely aggravating circumstances"—including that motions were still pending regarding the very evidence Sawyer castigated, the speech was advertised to the public, accounts of the speech were included in newspapers, the jury was still open and receptive to media

Sawyer's speech was "a plainly conveyed attack on the conduct of a particular trial, presided over by a particular judge"[289] and thus fell within the charge against her.[290] While Frankfurter argued that the Constitution did not protect Sawyer's conduct, he emphasized that "[w]hat we are concerned with is the specific conduct, as revealed by this record, of a particular lawyer, and not whether like findings applied to an abstract situation relating to an abstract lawyer would support a suspension."[291]

Finally, even if *Sawyer* had held that statements about a judge could be punished, that holding would need to be reevaluated in light of *Sullivan* and *Garrison*. It is quite likely that Justice Brennan, who authored the *Sullivan* and *Garrison* opinions, thought that the constitutional question left open in *Sawyer* was answered in *Garrison* when the Court held in the very context of lawyer speech regarding the judiciary that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."[292]

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accounts of the speech, and the day after the speech the judge "felt called upon to defend his conduct of the trial in open court." *Id.* at 664.

289. *Id.*

290. Justice Frankfurter concluded his opinion by stating:

> Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says but he imparts to his attack inflaming and warping significance. He says that the very court-room into which he walks to plead his case *is a travesty*, that the procedures and reviews established to protect his client from such conduct *are a sham*. 'We are a society governed by law, whose integrity *it is the lawyer's special role to guard and champion.*'

Id. at 669 (quoting *In re* Howell, 89 A.2d 652, 653 (N.J. 1952)) (emphasis added). Despite the initial opener that sounded quite liberal as to the ability and even duty of lawyers to "fearless[ly]"engage in criticism of the judiciary, Frankfurter ends by saying that a lawyer such as Sawyer has a duty to guard and champion the law. *Id.* But again, context matters. And the *Sawyer* context is also that of an attorney defending clients convicted for knowing and learning about communism. Sawyer could have prejudiced the jury or the trial by her conduct, and to that extent her conduct likely should not be condoned. *But see* Chemerinsky, *supra* note 42, at 887 (arguing that even regarding pretrial statements to the press, only knowingly false or reckless statements should be prohibited). Nevertheless, the substance of Sawyer's speech needed to be published at some point—if not during trial, then afterwards. The Smith Act prosecutions at issue were "a travesty" and "a sham." *Sawyer*, 360 U.S. at 669 (Frankfurter, J., dissenting). And there is no good reason to prohibit lawyers from so saying or to require lawyers "to guard and champion" the law, *id.* (quoting *In re* Howell, 89 A.2d 652, 653 (N.J. 1952)), when the law at issue is contrary to basic rights guaranteed by our Constitution.

291. *Id.* at 667–68. In widely quoted language, the Seventh Circuit has said of *Sawyer*: "[A]ll of the Justices assumed or stated that a lawyer's false accusations of criminal conduct directed against named judges may be the basis of discipline." *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995). It is hard to construe any basis in *Sawyer* for this statement. Brennan, for four of the Justices, did not reach the Constitution and thus did not reach what "may [or may not] be the basis of discipline." *Id.* Further, Frankfurter's dissent did not talk in terms of whether the accusations about the judiciary were true or false or were of criminal conduct or lesser gravity, but whether the statements were made by an attorney in the midst of a pending trial. *See Sawyer*, 360 U.S. at 668 (Frankfurter, J. dissenting).

292. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

The Court's next discussion of attorney speech critical of the judiciary occurred a quarter century later in *In re Snyder*.[293] Snyder made repeated unsuccessful attempts to be paid for having performed indigent defense work in the Eighth Circuit.[294] Frustrated, Snyder wrote a letter to the district court in which he said he was "appalled by the amount of money which the federal court pays for indigent defense work" and complained that he had "to go through extreme gymnastics even to receive th[ose] puny amounts."[295] He closed his letter saying he was "extremely disgusted by the treatment" he had received from "the Eighth Circuit in this case" and asked to have his name removed from the list of attorneys willing to do indigent criminal defense work.[296] Snyder was suspended from the practice of law in the Eighth Circuit for six months for refusing to apologize for writing the letter.[297] The Supreme Court reversed but did not reach the constitutional issue of whether Snyder could be punished for criticizing the Eighth Circuit's administration of the Criminal Justice Act.[298] Rather, because Snyder was disciplined by the en banc Eighth Circuit under Federal Rule of Appellate Procedure (FRAP) 46,[299] the Supreme Court held as a matter of federal law interpreting the reach of FRAP 46 that Snyder's "criticism of the [Criminal Justice] Act or criticism of inequities in assignments under the Act" did not warrant "discipline or suspension."[300] Nevertheless, rather than point out how excessive it was for the Eighth Circuit to suspend an attorney for writing a private letter to a court to complain about real administrative problems—and which letter actually led to "a study of the administration of the [CJA]" in the Eighth Circuit and to improvements in the way the Act was administered[301]—the Supreme Court instead chastised Snyder for the "tone" of his letter (the harshest portions of which are quoted above) and recognized, in dicta, a "duty of courtesy" owed by "[a]ll persons involved in the judicial process . . . to all other participants."[302] The Court further stated, "The necessity for civility in the *inherently contentious setting of the adversary process* suggests that members of the bar *cast criticisms of the system* in a professional and civil tone."[303] The Court failed to explain why the "inherently contentious setting of the adversary process" required that attorneys cast criticisms *of the*

293. *In re* Snyder, 472 U.S. 634 (1985).
294. *Id.* at 636.
295. *Id.* at 637.
296. *Id.*
297. *Id.* at 640–42. Judge Donald Lay, who was then the Chief Judge of the Eighth Circuit, commented on Snyder's refusal to apologize for his letter, stating: "'If a federal court asked me to apologize, I'd crawl on my knees from New York to Boston to do it.'" *See* Rieger, *supra* note 42, at 74, n. 14 and 71 (quoting John Riley, *An Irate Letter Triggers a Clash over Principles*, NAT'L L. J., July 9, 1984, at 47).
298. *See In re Snyder*, 472 U.S. at 647.
299. FED. R. APP. P. 46 (1985).
300. *In re Snyder*, 472 U.S. at 646.
301. *Id.*
302. *Id.* at 647.
303. *Id.* (emphasis added).

judicial system (rather than just criticisms of persons who are contending adversaries such as opposing counsel, opposing parties, or witnesses) in a professional and civil tone or how the contentious nature of adversary proceedings was even relevant in a situation where no case was pending and the criticism was made outside of that setting in a private letter to a court. While the Court's actual holding as to what cannot warrant suspension from federal courts under FRAP 46 was not binding on States, its decision to chastise Snyder for his tone and to admonish attorneys to "cast criticisms of the system in a professional and civil tone" signaled to state courts approval of attorney discipline for speech critical of or disrespectful to their judiciaries.

Even though the *Snyder* Court did not reach the First Amendment, *Snyder* is additionally problematic because the underlying criticisms of the Eighth Circuit apparently were true and justified, as demonstrated by the fact that the letter formed the basis for subsequent changes made in the Eighth Circuit's administration of the CJA. The *Snyder* Court's failure to cite or mention *Garrison* or *Sullivan* as squarely prohibiting Snyder's suspension implied their inapplicability. The Court also failed to acknowledge that Snyder's statements constituted core political speech requiring the highest level of protection. These omissions further implied to state courts that attorney speech is somehow exempted from the restrictions placed on punishing core political speech criticizing government. However, it is important to recognize that the *Snyder* Court did not purport to reach, rely on, or look to any constitutional case law or principles and thus cannot be authority for what is and is not constitutionally permitted.

Sawyer and *Snyder* are the only two United States Supreme Court opinions addressing attorney discipline for speech critical of the judiciary or impugning judicial integrity. Yet neither reached the Speech Clause issues raised in both. Unfortunately, state courts look to both decisions as intimating an answer to the constitutional question and assume that the pair constitutionally authorizes disciplining attorneys for speech that impugns judicial integrity or is overly discourteous.

3. Recognizing Inapplicability of Cases Implicating Other Interests

State and federal courts have also erred by relying on cases that involve significant state interests or lower level speech interests as compared to the interests at issue in disciplining attorney speech that impugns judicial integrity.[304]

For example, the plurality opinion in *Gentile v. State Bar of Nevada* is generally cited for the following statement, which was joined by a majority of the Court:

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304. *See, e.g.*, *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995) (arguing in support of punishing speech impugning judicial integrity that "given cases such as *Gentile* and *Went For It* the Constitution does not give attorneys the same freedom as participants in political debate").

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed . . . . Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer* observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.[305]

This statement is generally construed by states as authorizing nearly any punishment of attorney speech (both inside and outside of judicial proceedings) without analysis of the interests involved. But that is not what the *Gentile* Court held, and it ignores entirely the extremely important interests at stake in *Gentile*. As emphasized by the *Gentile* Court majority, the case involved the sensitive context of pretrial publicity by an attorney to the press outlining the theory of a pending criminal case and publicly impeaching the government's witnesses.[306] The Court explained that it "express[ed] no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made."[307] The Court held, "When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question."[308] The *Gentile* Court did not summarily determine that the balancing test had been satisfied, but instead examined the validity of the state's asserted interests and the relevance of those interests to the restrictions at issue.[309] Finally, the *Gentile* Court for a majority concluded:

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305. Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991) (citation omitted).

306. *Id.* at 1064. *Gentile* involved pretrial statements to the press by criminal defense attorney Dominic Gentile setting forth the theory of the defense that the crime was committed by a police officer who would be a primary witness at trial. *Id.* at 1044–45. Gentile was disciplined with a private reprimand for violating Nevada's rule forbidding pretrial publicity that has "a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 1033. The Court held that the standard employed by Nevada—which is arguably less stringent than the "clear and present danger" standard applied for punishing statements about a case made by the press—was constitutionally permissible for attorneys, but as interpreted by the Nevada Supreme Court the rule was "void for vagueness." *See id.* at 1048 (Kennedy, J., majority opinion in part); *id.* at 1070–71, 1078 (Rehnquist, J., majority opinion in part); *id.* at 1081–82 (O'Connor, J., concurring). Justices Kennedy and Rehnquist each authored parts of the Court's opinion, with Justice O'Connor joining as the fifth vote. Justice Kennedy's majority opinion held, in part, that the rule as applied was void for vagueness, and Justice Rehnquist's majority opinion held, in part, that attorneys could be held to a lower standard than that required by the Constitution for pretrial publicity by the press. *See id.* at 1082 (O'Connor, J., concurring).

307. *Id.* at 1073 n.5 (Rehnquist, J., majority opinion in part).

308. *Id.* at 1075.

309. The State asserted that pretrial publicity limitations are "aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." *Id.* at 1075. In holding that these state interests outweighed the free speech interests at stake, the Court explained that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id.*

> The restraint on speech is narrowly tailored to achieve those objectives. The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial.[310]

Thus, despite its statements indicating lesser protection owed to attorney speech, the *Gentile* Court did not grant states free reign. Rather, the Court upheld the restriction in *Gentile* because: 1) it was narrowly tailored to the "substantial state interest" of preserving due process rights to a fair trial; 2) it only applied to statements that would have a "materially prejudicial effect" on judicial proceedings; 3) it was viewpoint neutral; and 4) it only had the effect of postponing speech until after the trial was completed.

Such analysis is completely foreign in the context of attorney speech critical of the judiciary. Even in the rare situations where courts recognize some need to "balance" the free speech interests of the attorney with the interests of the state, the actual "balancing" is empty. For example, in *In re Wilkins* the Indiana Supreme Court claimed to be applying a balancing test where it examined "the factual setting . . . in light of the affected State interest and measured against the limitation placed on the freedom of expression."[311] Yet the Court suspended Wilkins from the practice of law for making the following statement in a footnote of an appellate brief: "[T]he Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."[312]

Upon balancing the state interest "in preserving the public's confidence in the judicial system and the overall administration of justice" with Wilkin's free speech interests, the court concluded, "Without evidence, *such statements should not be made anywhere*. With evidence, they should be made to the Judicial Qualifications Commission."[313] Such "balancing" completely denies both the attorney's right to speak and the public's right to receive speech.[314] Indiana's balancing act is a far cry from *Gentile*, where it was noted that speech was not suppressed but merely postponed until after trial, and where the court required that the speech materially prejudice a proceeding.[315] Nor did the Indiana Supreme Court have any support or evidence for the validity of its state interest—the court assumed that preserving public confidence in the judiciary

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310. *Id.* at 1076.

311. *In re* Wilkins, 777 N.E.2d 714, 717 (Ind. 2002) (per curiam), *modified*, 782 N.E.2d 985, 987 (Ind. 2003).

312. *Id.* at 715–16 n.2. Wilkins's suspension was later reduced to a public reprimand. *See In re* Wilkins, 782 N.E.2d 985 (Ind. 2003).

313. *In re Wilkins*, 777 N.E.2d at 717 (emphasis added).

314. *See supra* section II.B.

315. *See Gentile*, 501 U.S. at 1076.

was a state interest worthy to suppress speech, which, as shown above, it is not.[316] The situation is not like *Gentile* where the state's interest was preserving the integrity of jury trials, an interest of compelling constitutional magnitude. Indeed, state courts consistently equate the state interests in *Gentile* with the dubious interest in protecting public perception of judicial integrity.[317]

The cases that follow *Gentile* and "balance" the interests at stake when the state interest is preserving the integrity of the court inevitably balance in favor of the state and against speech, regardless of the forum where the speech is made (in briefs, to the public, in a private letter), regardless of whether the attorney is actively engaged in a case or not, regardless of the possible impact of the speech on the asserted interest of preserving public perception of judicial integrity, and without any discussion of the strength or validity of the state interest of preserving the public perception of judicial integrity.[318]

Courts that undertake "balancing" in this situation additionally fail to recognize that the Supreme Court already balanced the relative interests between preserving governmental reputation and free speech, and that balancing resulted in the *Sullivan* and *Garrison* decisions. As explained by Melville Nimmer, the *Sullivan* rule was one of constitutional balancing at a definitional level.[319] The Court did not adopt an ad hoc balancing rule whereby in each case the value of the speech would be "balanced" with the value of preserving the face of government. Rather, in *Sullivan* and *Garrison*, the Court balanced the interests for all subsequent cases involving the punishment of speech for harming the reputation of government officials and determined that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal

316. *See Wilkins*, 777 N.E.2d at 717–18.

317. *See In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); *In re* Shearin, 765 A.2d 930, 938 (Del. 2000); Idaho State Bar v. Topp, 925 P.2d 1113, 1116 (Idaho 1996); *In re* Cobb, 838 N.E.2d 1197, 1211 (Mass. 2005). *But see* Standing Comm. on Discipline for the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995) (explaining the differences between the interests in *Gentile* and interest in preserving judicial integrity).

318. For example, in *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), the Kentucky Supreme Court explained that it would balance the state's interests with the right of the free speech and concluded its balancing by surmising that "free speech does not give an attorney the right to openly denigrate courts in the eyes of the public"—even when done by an attorney not engaged in the underlying case. *Id.* at 168.

In its opinion for *Arnold*, 56 P.3d 259 (Kan. 2002), the Kansas Supreme Court recognized the need to balance attorney speech with the need to protect the public perception of judicial integrity and then found sanctionable a private letter sent to a judge after the attorney had been disqualified from a case before that judge, telling the judge he should retire. The insult was entirely personal to the judge and was published to no one but the judge. And it was not an ex parte communication because it was written by an attorney who was no longer on the case and not acting in a representative capacity. *See id.* at 263, 265. In *Idaho State Bar v. Topp*, the State of Idaho claimed to perform the balancing required by *Gentile* by applying an objective standard but then placing the burden to prove falsity on the state. But the court applied its standard to basically nullify the state's burden while strictly requiring Topp to prove the truth of his statement. *See Topp*, 925 P.2d at 1116 n.2.

319. Melville B. Nimmer, *The Right To Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942–48 (1968).

sanctions."[320]

Finally, courts have relied on cases such as *Florida Bar v. Went For It, Inc.*, in which the Court upheld a restriction on targeted lawyer advertising, as allowing curtailment of attorney speech.[321] Such reliance fails to recognize the relative weight of the competing interests in that context. Notably, *Went For It* and similar cases involve commercial speech, which, while protected, does not have nearly the same constitutional value as political speech regarding the qualifications of government officials. The *Went For It* Court even explained, "We have always been careful to distinguish commercial speech from speech at the First Amendment's core."[322] Thus, the relative weight of the constitutional protection for the speech at issue was significantly less in *Went For It* than it is in cases involving political speech regarding judicial integrity.[323] Further, on the state interest side of the scale, *Went For It* involved interests not at play with speech regarding the judiciary. Specifically, *Went For It* involved interests in protecting "the personal privacy and tranquility of [Florida's] citizens."[324] Thus, *Went For It* does not demonstrate that courts can freely regulate attorney speech. Rather, it only demonstrates that the regulations at issue were constitutionally permissible (that is, regulations in the context of lesser protected commercial speech with heightened state interests in protecting the public from harassment and duress).[325]

B. A CONSTITUTIONAL CONDITION OF THE PRIVILEGE OF PRACTICING LAW

The vast majority of the decisions regarding punishing attorney speech critical of the judiciary do not rely on any *Gentile*-style balancing. Rather, they hold, usually relying on Stewart's concurrence in *Sawyer* or statements by Justice Rehnquist in *Gentile*, that attorneys have given up their free speech rights in exchange for the privilege of being an attorney. As stated in its classic

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320. Garrison v. Louisiana, 379 U.S. 64, 74 (1964); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

321. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995).

322. *Id.* at 623.

323. The Court in *Went For It* specifically noted the problem inherent in failing to recognize the relative weight of speech. It observed that "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *See id.* at 623 (citation omitted). When courts, such as the Seventh Circuit in *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995), rely on *Went For It* as allowing prohibitions on public speech critical of the judiciary, they create this kind of leveling—they dilute protection for political speech by relying on authority to suppress forms of commercial speech.

324. *Went For It*, 515 U.S. at 630 (citation omitted).

325. The four-Justice dissent in *Went For It* argued that under the Court's prior cases on attorney speech, the regulation at issue—even in the context of commercial speech with the interests alleged by the state—was unconstitutional. *See id.* at 637–40 (Kennedy, J., dissenting). Both the majority and the dissent applied the regular constitutional test for restrictions on the commercial speech of regulated industries set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). *See, e.g.*, *Went For It,* 515 U.S. at 623–24; *id.* at 636 (Kennedy, J., dissenting). Neither applied a "special" test because attorney regulation was involved.

Cardozian formulation: "Membership in the bar is a privilege burdened with conditions."[326] The idea is that no one has a "right" to be an attorney—an idea that is called into question by Supreme Court case law[327]—and in return for granting a person the "privilege" of being an attorney, the state can impose otherwise unconstitutional conditions on lawyers.[328] Further, commentators, including Wendel, have argued that constitutional conditions and a privilege/rights distinction are useful in the attorney speech context.[329] This doctrine is often stated in the reverse as "unconstitutional conditions," and is used to protect rights by prohibiting government from coercing people to give up constitutional rights through creating a condition on the receipt of a benefit.[330]

The doctrine is also used, as it is in the area of attorney free speech, to justify the constitutionality of conditions that are placed on benefits. State courts cite constitutional conditions ideas to justify restrictions on and punishment of attorney speech. The Missouri Supreme Court summarized the view thus, "[A]n attorney's voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary."[331] The Supreme Court of Kansas explained in 2007 that "[u]pon admission to the bar of this state, attorneys assume certain duties," including "the duty *to maintain the respect due to the courts*" and an attorney is bound thereby "*whether he is acting as an attorney or not*."[332] In sum, the idea

326. *In re* Rouss, 221 N.Y. 81, 84 (1917). The Michigan Supreme Court recently phrased the idea in perhaps its most absurd formulation when it explained that an attorney could not make denigrating comments about courts, which "gave [the attorney] the high *privilege*, *not as a matter of right*, to be a priest at the altar of justice." *See* Grievance Adm'r v. Fieger, 719 N.W. 2d 123, 144 (Mich. 2006) (emphasis added), *cert. denied*, 549 U.S. 1205 (2007).

327. *See, e.g.*, Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 n.5 (1957) (noting that "a person *cannot be prevented from practicing [law]* except for valid reasons" as "[c]ertainly the practice of law *is not a matter of the State's grace*" (emphasis added)); *see also* Baird v. State Bar, 401 U.S. 1, 8 (1971) (stating that "[t]he practice of law *is not a matter of grace, but of right* for one who is qualified by his learning and his moral character" (emphasis added)).

328. The idea of the importance of separating rights from privileges was expounded by Wesley Hohfeld in his influential article, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 35 (1913).

329. Wendel, *supra* note 43, at 372–79.

330. Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (explaining that the unconstitutional conditions doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether").

331. *In re* Westfall, 808 S.W.2d 829, 834 (Mo. 1991); *see also In re* Shearin, 765 A.2d 930, 938 (Del. 2000) (holding that "there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer's constitutional right to freedom of speech," and thus, "members of the Delaware Bar are subject to disciplinary sanctions for speech consisting of intemperate and reckless personal attacks on the integrity of judicial officers," and defining "reckless" as an objective standard requiring attorneys to have a reasonable factual basis "before the First Amendment protections for such speech can apply"); *In re* Frerichs, 238 N.W.2d 764, 767 (Iowa 1976); Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (per curiam); *In re* Raggio, 487 P.2d 499, 499, 501 (Nev. 1971) (per curiam); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 429 (Ohio 2003) (per curiam) ("Thus attorneys may not invoke the federal constitutional right of free speech to immunize themselves from evenhanded discipline for proven unethical conduct.").

332. *In re* Pyle, 156 P.3d 1231, 1243 (Kan. 2007) (per curiam) (emphasis added) (quoting *In re* Johnson, 729 P.2d 1175 (Kan. 1986)).

propounded is that attorneys implicitly agree when admitted to the bar to forfeit their rights to free speech, and thus the state can constitutionally punish such speech without violating the First Amendment.[333]

To the extent that the state courts rely on the idea of "constitutional conditions" as supporting nearly all restrictions on attorney speech, they find support in language from Supreme Court opinions—although not from a majority of the Court. The primary source for the theory is the concurrence of Justice Stewart from *Sawyer*.[334] Justice Stewart wrote:

> If . . . there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.[335]

The problem with this formulation is apparent from the opening line—it is practically limitless. Justice Stewart claims that if there has been "even-handed discipline for proven unethical conduct"—which apparently means a proven violation of any rule of professional conduct enacted by a state—then a lawyer cannot "invoke the constitutional right of free speech" as a defense.[336] Stewart assumes that *all* "inherited standards of propriety and honor" or "ethical precepts" are necessary to the practice of law and must be conformed to, even though they "may require abstention" from free speech rights.[337] If a state has created a restriction on the practice of law (whether as a matter of "ethical precepts" or from "inherited standards"), that restriction is, therefore, permissible, and the regulated attorney *cannot* "invoke the constitutional right of free speech" but "must conform" and "[o]be[y]."[338]

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333. *See also* Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 519 (Iowa 1996) (stating that "a lawyer's right of free speech does not include the right to violate the statutes and canons proscribing unethical conduct"); *In re* Erdmann, 301 N.E.2d 426, 428 (N.Y. 1973) (Burke, J., dissenting) (explaining that statements by attorney for article in *Life* magazine "violate restrictions placed on attorneys which they impliedly assume when they accept admission to the Bar").

334. *See, e.g.*, *In re Pyle*, 156 P.3d at 1247 (quoting as authoritative Stewart's concurrence in *In re Sawyer*); *Ronwin*, 557 N.W.2d at 518 (same); *In re Frerichs*, 238 N.W.2d at 769 (same); *Heleringer*, 602 S.W.2d at 167–68 (same); Grievance Adm'r v. Fieger, 719 N.W.2d 123, 247, 259 (Mich. 2006) (same), *cert. denied*, 549 U.S. 1205 (2007); *In re Westfall*, 808 S.W.2d at 835 (same); *Gardner*, 793 N.E.2d at 429 (same).

335. *In re* Sawyer, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring).

336. *See also Gardner*, 793 N.E.2d at 429 (concluding from Stewart's concurrence that "attorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct").

337. *In re Sawyer*, 360 U.S. at 647.

338. *Id.*

Stewart's statement was perhaps justifiable at the time he wrote it because the Supreme Court had never stricken as violative of the First Amendment any state rule regarding attorney conduct.[339] Even prior to *Sawyer*, however, the Court recognized some limitations within the Due Process Clause on the state's regulation of attorneys by holding that states could not deny an applicant admission to the bar on the basis of former membership in the communist party.[340] In so holding, the Court noted that "a person cannot be prevented from practicing [law] except for valid reasons" as "[c]ertainly the practice of law is not a matter of the State's grace."[341]

Of course, it did not take long for Justice Stewart's formulation to be proven utterly untrue even as to rules applicable to all attorneys rather than denials of individual applications to the bar. In ensuing years, the Supreme Court struck down several state rules regulating attorney conduct as violative of the First Amendment. In 1963, the court struck down restrictions that prohibited political associations like the NAACP from soliciting clients.[342] Throughout the 1970s and 1980s the Court repeatedly struck down as violative of the Speech Clause state bans and restrictions on attorney advertising.[343] Most recently, in *Republican Party of Minnesota v. White*, the Court struck down Minnesota's announce clause, a rule of professional conduct that prohibited attorney candidates for judicial positions from expressing their views on certain political issues, as violating the Speech Clause.[344] In each of these cases, the Court did not determine that the restrictions were constitutional because they satisfied the Stewart criteria of either being historically accepted as necessary and honorable (like solicitation bans) or containing some "ethical precept." Indeed, in both *White* and *In re Primus*, the Court subjected the state's restrictions to strict scrutiny because *White* involved "speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public

339. The *Sullivan* Court noted that Madison believed that states (the primary licensing authority for attorneys) had the power to restrict speech. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 274–75 (1964). Thus, traditional licensing of attorneys by the states could constitutionally restrict speech. It has since been recognized that the Fourteenth Amendment eliminated that state power. But it was not until *Gitlow v. New York*, 268 U.S. 652 (1925), that the Speech Clause was incorporated by the Fourteenth Amendment to restrict state power. *Id.* at 666. Further, even at the time of *Sullivan*, as evidenced by that opinion itself, there was considerable question as to whether—despite incorporation—the states retained greater power to restrict speech than did the federal government. *See Sullivan*, 376 U.S. at 276–77. Thus, Stewart's belief that states' regulations of attorney conduct were not subject to attack as abridging free speech had some contemporary and historical support.

340. *See* Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 246–47 (1957).

341. *Schware*, 353 U.S. at 239 n.5.

342. *See* NAACP v. Button, 371 U.S. 415, 470 (1963).

343. *See* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 655–56 (1985) (striking rule of professional conduct restrictions on advertising); *In re* R.M.J., 455 U.S. 191, 207 (1982) (same); *In re* Primus, 436 U.S. 412, 439 (1978) (striking rule of professional conduct prohibiting direct solicitation by non-profit groups like the ACLU); Bates v. State Bar, 433 U.S. 350, 384 (1977) (striking rule of professional conduct consisting of traditional ban on all attorney advertising).

344. Republican Party of Minn. v. White 536 U.S. 765, 788 (2002).

office"[345] and because *Primus* involved "limitations on core First Amendment rights,"[346] given that the ACLU was engaged in a "form of political expression" in its solicitation of clients.[347]

Unfortunately, in the context of speech critical of the judiciary, the Stewart idea of constitutional conditions is still widely cited and quoted as the law—despite the subsequent precedent of the Court demonstrating otherwise. Indeed, state courts wishing to uphold restrictions on attorney speech often just cite the Stewart statement as the conclusive analysis for any free speech challenge raised by disciplined attorneys.[348]

Regrettably, Stewart's concurrence has been given renewed life through Chief Justice Rehnquist's opinion in *Gentile*. Rehnquist quoted Stewart's formulation in reviewing the *Sawyer* case, explaining that Stewart "provided the fifth vote for reversal of the sanction" and consequently characterizing Stewart's statement as representing a "majority" view.[349] Rehnquist is not the first to make the assertion that Stewart's opinion was for a majority—either because Stewart provides the fifth vote for reversal, or because, ostensibly, Stewart's statement is in line with the four dissenters, thus creating a majority.[350] But neither the *Sawyer* dissent nor the plurality adopted Stewart's broad view of constitutional conditions or permissible punishment of attorney speech, and so it cannot provide a "fifth vote" for either side. Indeed, the majority did not reach the constitutional question,[351] and the dissent limited its discussion to the precise facts.[352] In the end, Stewart's concurrence is for exactly one member of the court and is dicta at that because Stewart joined Brennan's holding that Sawyer did not impugn the integrity of the court (which makes the constitutional question disappear).[353]

Lamentably, in addition to citing Stewart's formulation, Rehnquist, speaking for only four justices, concluded his *Gentile* opinion as follows:

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345. *Id.* at 774 (internal quotations omitted); *see also id.* at 781 ("'[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedom,'" (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222–23 (1989))).

346. *Primus*, 436 U.S. at 428.

347. *Id.* at 432.

348. *See supra* notes 331–34 and accompanying text.

349. Gentile v. State Bd. of Nev., 501 U.S. 1030, 1071 (1991).

350. *See, e.g.*, *In re* Frerichs, 238 N.W.2d 764, 769 (Iowa 1976) (stating that Stewart "clearly was speaking for at least five members of the Court"); Ky. Bar Ass'n v. Heleringer, 602 S.W.2d 165, 167–68 (Ky. 1980) (per curiam) (stating that Stewart "was speaking for five members of the court" in his concurrence).

351. *See supra* note 271.

352. *In re* Sawyer, 360 U.S. 622, 667–68 (1959) (Frankfurter, J., dissenting); *see also id.* at 666 (stating that the "problem raised by this case" was whether "*the particular conduct* in which *this* petitioner engaged constitutionally protected from the disciplinary proceedings of courts of law" (emphasis added)); *id.* at 667 (stating that a criminal defense attorney does not have "a constitutionally guarded freedom to conduct himself *as this petitioner has been found to do*" (emphasis added)).

353. *See id.* at 646–47 (Stewart, J., concurring).

> When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that "I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court." *The First Amendment does not excuse him from that obligation*, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.[354]

This constitutional conditions formulation is even more unworkable than Stewart's concurrence for several reasons. First, it is patently untrue. As noted above, the Supreme Court has in fact excused attorneys from obligations imposed by rules of professional conduct (and attendant discipline) based on First Amendment guarantees.[355] Thus, the Supreme Court's own case law—including the opinion joined by Rehnquist in *Republican Party v. White*[356]—refutes the proposition that attorneys agree to any and all restrictions on their conduct no matter how unconstitutional because the attorneys were admitted under oath or were provided the privilege of being an attorney. Second, Rehnquist's formulation is even more limitless than Stewart's. Stewart's statement was at least grounded in necessity and based on historic practice or ethical precepts for a given rule. But Rehnquist's version means that if a state requires attorneys to promise upon admission to uphold any regulation the state has made or *will yet make* (as Nevada and certainly other states in fact do), then the attorney cannot be relieved from this obligation and has no constitutional argument against any existing or future regulation enacted by the state. If this system works, then rules of professional conduct can never be stricken as unconstitutional.

Of course, as with any regulated industry,[357] states can and do place restric-

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354. *Gentile*, 501 U.S. at 1081 (Rehnquist, J.) (emphasis added) (citation omitted).

355. *See supra* notes 340–44.

356. Rehnquist joined the majority in *Republican Party of Minnesota v. White*, 536 U.S. 765, 766 (2002), and allowed the attorney to be relieved of his obligation to abide by the announce clause, a rule of professional conduct, on the basis that the regulation was unconstitutional. *Id.* at 788.

357. Some have argued that attorney speech issues are analogous to restrictions on the speech of public employees rather than restrictions on regulated industries. *See, e.g.*, Comm. on Legal Ethics of the W. Va. State Bar v. Douglas, 370 S.E.2d 325, 331–32 (W. Va. 1988) (analogizing attorney speech to public employee speech cases); Day, *supra* note 43, at 187–90; Roberts, *supra* note 42, at 846–54 (analogizing attorney speech to speech of federal employees as restricted by the Hatch Act); Wendel, *supra* note 43, at 375–76 (arguing to a limited extent that "there are some appealing analogies between the public employee cases and lawyer-speech issues"). But even for public employees, the Supreme Court has stated, "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 568 (1968) (citation omitted).

Nevertheless, the public employee analogy to attorney speech is unpersuasive. Notably, public employees, unlike attorneys, are paid by the government and often are hired to deliver a specific government message. *See, e.g.*, Garcetti v. Cebellos, 547 U.S. 410, 423 (2006) ("Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."). In contrast, in *Legal Services Corp. v.*

tions and conditions (including educational, character and fitness conditions, and other requirements) on attorneys, and attorneys agree to abide by those conditions in exchange for their license to practice law. But those restrictions must be constitutional. For example, as actually held in *Gentile*, the restriction on pretrial publicity was constitutional because: (1) it was narrowly tailored to a "substantial state interest" (preserving due process rights to a fair trial); (2) it only applied to statements that would have a "materially prejudicing effect" on judicial proceedings; (3) it was viewpoint neutral; and (4) it only had the effect of postponing speech until after the trial was completed.[358] Similarly, in the context of restrictions on attorney commercial speech, the Court has required states to satisfy the constitutional test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[359] as the state would be required to do in restricting the commercial speech of any other regulated industry.[360]

Velazquez, 531 U.S. 533 (2001), the Supreme Court held that attorney speech relating to the representation of individual clients (even when the attorney's representation is funded in part by the federal government) was not government speech that was intended to promote a specific governmental message. *See id.* at 540–42. Thus, in *Velazquez*, Congress could not condition the receipt of federal funds for legal aid on the basis that attorneys would not challenge the validity of welfare legislation. *See id.* at 548. The Court repeatedly stated that speech related to advocating on behalf of private clients was private rather than government speech. *See, e.g.*, *id*. at 542 ("[A]n LSC [federally]-funded attorney speaks on the behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government's speaker. The attorney defending the decision to deny benefits will deliver the government's message in the litigation. The LSC lawyer, however, speaks on behalf of his or her private, indigent client."); *id.* at 542–43 ("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."). If this is so when the government in fact pays part of the attorney's fees, it is certainly true where the attorney is paid by private clients. Additionally, the *Velazquez* Court cited a prior case for the proposition that "there is an 'assumption that counsel will be free of state control.'" *See id.* at 542 (quoting Polk County v. Dodson, 454 U.S. 312, 321–22 (1981)). Certainly that assumption does not generally exist for public employees.

Another important distinction bears on the right to become an attorney in contrast to the lack of a right to become a public employee. States admit all qualified individuals who comply with the requirements to become licensed as attorneys but do not and could not hire all qualified persons who apply for a particular government job. *See, e.g*, Baird v. State Bar, 401 U.S. 1, 8 (1971) (holding that state could not deny a woman license as an attorney based on her failure to answer a question regarding membership in the communist party and stating that "[t]he practice of law *is not a matter of grace, but of right* for one who is qualified by his learning and his moral character" (emphasis added)). In like manner, when a state employer fires a public employee, that public employee can (at least theoretically) get another job in the same field in the private sector. But where the state suspends or disbars an attorney, the attorney does not lose her job, but her vocation. She is stripped of her ability to practice law anywhere. Thus, the effect of decisions regarding an attorney's license is vastly different from hiring and firing government employees for a specific job.

358. *Gentile*, 501 U.S. at 1076.

359. Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

360. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623–24 (1995) (analyzing constitutionality of restriction on lawyer advertisements under *Central Hudson*); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 472 (1988) (same); Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 637–44 (1985) (same); *In re* R.M.J., 455 U.S. 191, 203–06 (1982) (same); Bates v. State Bar of Ariz., 433 U.S. 350, 365 (1977) (relying on *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976), the precursor to *Central Hudson*).

Similarly, in the context of speech critical of the judiciary, the fact that a citizen obtains a license from the state to practice law does not change the fact that the Supreme Court held in *Garrison*—in the context of punishment of attorney speech impugning judicial integrity—that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions."[361] Nor does it change the fact that the states' alleged justification for these restrictions on attorney speech critical of the judiciary is an interest the Supreme Court has repeatedly discounted entirely,[362] or the fact that the restrictions are viewpoint based.[363] Yet, relying on the erroneous Stewart and Rehnquist formulations of constitutional conditions, courts do not even address or acknowledge these significant constitutional stumbling blocks but assume that any condition that is placed on attorneys is automatically constitutional. Thus, the problem with the idea of constitutional conditions in the context of speech critical of the judiciary is not that states cannot constitutionally place conditions on those who practice law, but that the formulations of constitutional conditions articulated by Rehnquist and Stewart are contrary to the actual state of the law[364] and are useless in that they fail to provide any method for delineating when a regulation on attorney speech is or is not constitutional. The formulations serve only as an excuse, allowing states to forgo any analysis of the constitutionality of their attorney conduct rules, and indeed, allowing states to ignore the reality that such a regulation can be unconstitutional.

C. DIFFERENT INTERESTS UNDERLYING DEFAMATION AND PROFESSIONAL MISCONDUCT

Finally, states offer several arguments in an attempt to distinguish *Sullivan* and *Garrison* legally and factually from attorney discipline for statements impugning judicial integrity. First, courts contend that the purposes underlying defamation law are different from the purposes behind professional conduct rules.[365] True enough, but upon closer scrutiny, irrelevant. The First Amend-

361. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

362. *See supra* notes 167–73 and accompanying text (examining Supreme Court cases discussing the validity of the state interest in preserving the perception of judicial integrity).

363. *See supra* notes 192–96 and accompanying text (noting the constitutional prohibition on viewpoint based restrictions on speech).

364. *See supra* notes 340–44 and accompanying text.

365. Fla. Bar v. Ray, 797 So. 2d 556, 558–59 (Fla. 2001) (per curiam). In *Ray*, the Court rejected the *Sullivan* subjective, actual malice standard despite the language of Rule 8.2 because "of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct" and explaining that the "purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another's defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice." *Id.*

See also Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995) ("[T]here are significant differences between the interests served by

ment gloss on defamation found in *Sullivan* and its progeny was never intended to promote the underlying purposes of the tort of defamation. Indeed, the First Amendment gloss directly detracts from the purposes of defamation law and allows harm to reputation for government officials in all but fairly extreme circumstances. Rather, the reason the First Amendment comes into play in the defamation context is because, at its core, the First Amendment protects certain speech from being repressed or chilled—particularly speech regarding government officials (such as judges). Thus the reason for the First Amendment gloss is the same in both the defamation and attorney discipline scenario. In both, the judiciary punishes a person for speech regarding a public figure. Indeed, in the MRPC 8.2 context—as the rule applies only to speech regarding the "qualifications or integrity" of a judge[366]—the speech, by definition, is core First Amendment speech. Thus the same concerns regarding the need for breathing room that prompted the *Sullivan* Court also exist for speech critical of the judiciary.[367]

Further, while defamation and attorney discipline in the abstract aim at different ends, in this particular context, both harms are entirely reputational—defamation protects the reputation of the individual and discipline for criticism of the judiciary protects judicial reputation.[368] As noted, courts claim that the interest served by punishing speech critical of the judiciary is the need "to

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defamation law and those served by rules of professional ethics."); *In re* Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam) ("The Respondent is charged with professional misconduct, not defamation. The societal interests protected by these two bodies of law are not identical."); *In re* Cobb, 838 N.E.2d 1197, 1213 (Mass. 2005) (same, quoting *Terry*); *In re* Graham, 453 N.W.2d 313, 322 (Minn. 1990); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam) (same); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 432 (Ohio 2003) (per curiam) (same).

Wendel similarly cites this distinction as a persuasive reason to reject *Sullivan* in the attorney discipline context. *See* Wendel, *supra* note 43, at 427–28.

366. ANN. MODEL RULES OF PROF'L CONDUCT R. 8.2 at 581 (2003).

367. Ironically, courts enforcing MRPC 8.2 have seen it precisely the other way around—namely, that because the speech regards the "qualifications or integrity" of a judge, the *Sullivan* and *Garrison* rules do not apply.

For example, in *Ray*, the court said that because "the statements at issue concerned 'the qualifications or integrity of a judge'," there was "no error in the burden then shifting to Ray to provide [or prove] a factual basis in support of the statements." *Ray*, 797 So. 2d at 558 n.3. In other words, if the subject matter of the speech is the qualifications or integrity of a judge, the attorney speaker must prove or substantiate his statements to avoid liability. Similarly, in *In re Shearin*, the court held that "there must be some factual basis for the lawyer's accusations of judicial dishonesty *before* the First Amendment protections for such speech can apply"—thus an attorney must first prove a factual basis before the First Amendment becomes applicable. *In re* Shearin, 765 A.2d 930, 938 (Del. 2000) (emphasis added) (relying on *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995)).

Prior to the Model Rule approach, but after *Sullivan* and *Garrison* were decided, the Florida Supreme Court responded to an assertion of First Amendment protection thus: "On the contrary it appears to us that if the Bench . . . were being assaulted from all angles, with or without justification, it would be the duty of the lawyer above all others to exercise every measure of care and caution to avoid creating any justification for the suspicions." *In re* Shimek, 284 So. 2d 686, 689 (Fla. 1973) (per curiam) (quoting State *ex rel.* Fla. Bar v. Calhoon, 102 So. 2d 604, 608 (Fla. 1958)).

368. Nevertheless, judges are concerned with their private reputations as well. In *In re Shimek*, the court said when disciplining an attorney for speech made in a brief, "Nothing is more sacred to man and, particularly, to a member of the judiciary, than his integrity. Once the integrity of a judge is in doubt the efficacy of his decisions are[sic] likely to be questioned." *In re Shimek*, 284 So. 2d at 688.

preserve public confidence in the fairness and impartiality of our system of justice."[369] As the Fourth Circuit stated, "the public interest and the administration of the law demand that *the courts should have the confidence and respect of the people*," and "[u]njust criticism, insulting language and offensive conduct toward the judges" from attorneys "tend[s] to bring the courts and the law into *disrepute and to destroy public confidence in their integrity.*"[370] Of course, keeping someone from being brought "into disrepute" in order to preserve the public's respect for or confidence in that person is what it means to protect that person's *reputation*.

Second, courts make the argument that defamation provides a personal remedy for "a private wrong," while ethical rules "are designed to preserve public confidence in the fairness and impartiality of our system of justice."[371] But this argument cannot form a principled distinction between the *Sullivan* and *Garrison* context and the context of attorney criticism of the judiciary—indeed no such distinction can be seriously made. In both situations, the relevant context *is* criticism of government officials. Neither *Sullivan* nor *Garrison* dealt with private defamation lawsuits by private citizens whose actions did not reflect on government. Rather, *Sullivan* involved speech that exaggerated wrongs of governmental officials in Alabama, and *Garrison* involved severe accusations regarding members of the Louisiana judiciary by an attorney. Consequently, the harm sought to be remedied through the defamation actions at issue in *Sullivan* and *Garrison* was far more than simply a private wrong; rather, the actions were specifically aimed at preserving the face of government officials in performing their official duties and, therefore, the reputation of that arm of the government. Indeed, if preservation of public confidence in our government were a valid reason for suppressing speech contrary to the requirements of *Sullivan*, the *Sullivan* rule itself could not exist. The whole idea of the *Sullivan* rule is that speech regarding public or government officials cannot be suppressed in the name of preserving the reputation of either the specific public official or of the government more broadly. *Sullivan* and *Garrison* expressly contemplated that protected speech would "include vehement, caustic, and sometimes unpleas-

369. *Yagman*, 55 F.3d at 1437; *see also supra* notes 161–65 and accompanying text.

370. *In re* Evans, 801 F.2d 703, 707 (4th Cir. 1986) (emphasis added).

371. *Ray*, 797 So. 2d at 558–59; *see also Yagman*, 55 F.3d at 1437 (explaining that "[d]efamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community," while "[e]thical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice"); *In re* Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam) (stating that "[d]efamation is a wrong directed against an individual and the remedy is a personal redress of this wrong," while "[p]rofessional misconduct, although it may directly affect an individual, 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"); *In re* Cobb, 838 N.E.2d 1197, 1213 (Mass. 2005) (same, quoting *Terry*); *In re* Graham, 453 N.W.2d 313, 322 (Minn. 1990) (same, quoting *Terry*); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam) (same, quoting *Terry*); Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 432 (Ohio 2003) (per curiam) (same, quoting *Terry*).

antly sharp attacks on government and public officials" as well as "erroneous statement," but that such was necessary to establish "uninhibited, robust, and wide-open" debate on public issues and to provide "the breathing space" that free debate needs to survive.[372] Further, the *Sullivan* Court recognized that a speaker "[t]o persuade others to his own point of view . . . at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state" and that there would be "excesses and abuses."[373] But the Court found such probabilities an insufficient basis to chill speech about government officials.

The *Sullivan* Court directly addressed the concern of government reputation, stating that "[i]njury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error."[374] Indeed, the Court goes on to explain that the judiciary cannot protect its public reputation, and so neither can other branches:

> Where judicial officers are involved, this Court has held that *concern for the dignity and reputation of the courts does not justify the punishment* as criminal contempt of criticism of the judge or his decision . . . . This is true even though the utterance contains 'half truths' and 'misinformation.' . . . If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials, such as elected city commissioners. Criticism of their *official conduct* does not lose its constitutional protection merely because *it is effective criticism* and hence *diminishes their official reputations*.[375]

The Court contemplates that statements regarding public officials will in fact hurt their official reputation and thus the reputation of their branch of government—but does not give this distinction any weight. Instead, the Court invites other branches of government to follow the judiciary's example and undergo such criticism. Ironically, state and federal courts have since interpreted *Sullivan* and *Garrison* as inapplicable to attorney statements about the judiciary.

Allowing an exception to the *Sullivan* rule on the basis of protecting the official reputation of a government officer would require a rule exactly opposite of that found in *Sullivan*—instead of more breathing room where statements regard government officials, there would need to be less breathing room and greater restrictions.[376] Such restrictions would eat at the core of the First

372. Garrison v. Louisiana, 379 U.S. 64, 75 (1964); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270, 271–72 (1964).

373. *Sullivan*, 376 U.S. at 271.

374. *Id.* at 272.

375. *Id.* at 272–73 (emphasis added) (citations omitted).

376. Courts consistently pay lip service to the idea that they are not engaging in any sort of authoritative selection and that attorneys are free to criticize courts, but this liberality is belied by the fact that the courts then refuse to apply the *Sullivan* standard, often requiring the attorney to establish the truth or basis for his statements and presuming the falsity of statements impugning their integrity.

Amendment and would hearken back to the Sedition Act castigated by the *Sullivan* and *Garrison* Courts.[377] Further, as shown above, it would be antithetical to democracy itself and the American view of sovereignty in the people.

A related distinction made by courts to justify rejection of the *Sullivan* rule is that defamation protects a private interest in reputation while ethical restrictions protect the public interest in the reputation (or integrity) of the judicial system as a whole. But this distinction is also unconvincing. In these cases, the comments made and for which attorneys are sanctioned invariably regard the actions of a specific judge or panel and not the judicial system as a whole. Certainly a comment about one senator cannot be read as being subject to suppression because it brings all of Congress into disrepute and thus can shake the foundation of the entire legislative branch. Similarly, negative statements regarding a particular CEO of one company do not amount to destroying the entire free market system or undermining capitalism. Even if comments regarding an individual judge (or senator or CEO) could be seen as affecting the public's perception of the overall integrity of the system, how does that make it speech worthy of suppression under *Sullivan* and *Garrison*? Like the argument regarding private versus official reputation, if speech is punishable as long as one can characterize comments made about one government official as affecting the reputation of that entire branch of government, then the *Sullivan* rule can never be applied to statements made about government officials. No good reason is offered as to why imputation of the flaws of one bad apple to the entire branch would be more problematic for the judiciary than for other branches of government.

Courts have similarly rejected the applicability of *Sullivan* and *Garrison* on the slight distinction that *Sullivan* dealt with civil penalties and *Garrison* dealt with criminal penalties, but neither dealt with quasi-criminal penalties such as

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See supra section I.C. Indeed, some courts have directly qualified their statements allowing liberal criticism with exceptions that in large part swallow the allowance of critical speech. For example, several courts continue to rely on the ABA's former Ethical Consideration 8-6, which requires an attorney to "be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system." MODEL CODE OF PROF'L RESPONSIBILITY EC 8-6 (1980). Further, the Iowa Supreme Court has stated, "An attorney has the right to criticize the courts of this state, *so long as* his criticisms are made in good faith and in respectful language, and with no design to willfully or maliciously misrepresent the position of the courts, or bring them into disrepute or lessen the respect due them." *See In re* Glenn, 130 N.W.2d 672, 676 (Iowa 1964) (quoting State Bar Comm'n *ex rel.* Williams v. Sullivan, 131 P. 703, 707 (Okla. 1912)) (emphasis added). Attorneys are left in a quandary about how to possibly provide effective criticism of a public institution without bringing that institution into disrepute or lessening the respect given it.

377. As noted in *Sullivan*, the Sedition Act of 1798 punished "any false scandalous and malicious writing or writings against the government of the United States," Congress, or the President that would bring them "into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States." *Sullivan*, 376 U.S. at 273–74 (quoting Sedition Act of 1798).

attorney discipline.[378] Both *Sullivan* and *Garrison* address this argument. In *Sullivan* it was argued that a civil lawsuit for libel was private and not equivalent to criminal prosecution from the state and thus the Constitution did not prohibit civil lawsuits by public officials. The Court in *Sullivan* responded:

> [T]he Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute . . . . The test is not the form in which state power has been applied, but *whatever the form, whether such power has in fact been exercised*.[379]

Certainly disciplining attorneys is the exercise of state power and comes within prohibitions on such power to restrict free speech. Further, in *Garrison*, the Court explained that "even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area *preclude attaching adverse consequences* to any except the knowing or reckless falsehood."[380] Again, the use of state power to discipline attorneys constitutes "attaching adverse consequences" to speech critical of public officials.

Finally, an argument proffered in some cases is that attorney speech critical of the judiciary must be restricted beyond *Sullivan* because judges do not generally make public responses to accusations against them. For example, the Seventh Circuit has stated, "[J]udges do not take to the talk shows to defend themselves, and few litigants can separate accurate from spurious claims of judicial misconduct"—therefore, the *Sullivan* standard is inappropriate for attorney statements regarding the judiciary.[381] The most obvious problem with this as a distinction of *Sullivan*, as noted above, is that the *Sullivan* Court expressly contemplated and the *Garrison* Court actually held that the *Sullivan* standard applied to statements regarding the judiciary.[382] At first blush, it may seem unfair to hold the judiciary to the *Sullivan* standard if they truly lack the same degree of media access held by other public officials.[383] Yet, as the Supreme Court explained in *Gertz v. Robert Welch, Inc.*, there is a "compelling normative consideration underlying the distinction between public and private defamation

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378. *See, e.g.*, *In re* Westfall, 808 S.W.2d 829, 833 (Mo. 1991) (noting that neither civil nor criminal penalties can be imposed on attorneys for derogatory statements about the judiciary under *Sullivan* and *Garrison* but holding that attorney discipline does not fall within that rule).

379. *Sullivan*, 376 U.S. at 265 (emphasis added); *see also id.* at 277 (explaining that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel").

380. Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (emphasis added).

381. *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995).

382. *See supra* notes 100–11 and accompanying text.

383. Although as a matter of history and propriety the judiciary does not generally make use of the media, judges are not like private defamation plaintiffs who cannot get airtime. If members of a state or federal judiciary wanted to make public statements responding to criticism, they would likely have access to the press in like manner to other public officials.

plaintiffs" that is "[m]ore important" than any difference in media access to rebut false statements.[384] Namely:

> An individual who decides to seek governmental office *must accept certain necessary consequences of that involvement in public affairs*. He *runs the risk of closer public scrutiny* than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties . . . [as] the public's interest extends to *anything* which might touch on an official's fitness for office . . . [including] dishonesty, malfeasance, or improper motivation . . . .[385]

Like private individuals who "thrust themselves to the forefront of . . . public controversies" and thereby "invite attention and comment" despite lacking media access, "public officials and public figures [including judges] have *voluntarily exposed themselves* to increased risk of injury from defamatory falsehood" and, therefore, are subject to the *Sullivan* standard.[386] This rationale seems particularly appropriate in the thirty-three states where some or all of the state judiciary runs for office in popular elections[387] but would equally hold for judges who accept appointments to office. Judges in both systems voluntarily thrust themselves into the world of public controversy and debate by "assum-[ing] an influential role in ordering society."[388]

Additionally, the fact that the judiciary as a matter of propriety generally does not publicly respond to criticism (although courts and judges have in fact publicly responded to accusations made against them[389] and have the opportunity in published opinions to explain the reasons for their decisions) does not reduce, in a democracy, the importance of the uninhibited, robust public debate regarding all public officials that the *Sullivan* and *Garrison* Courts found

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

385. *See id.* at 344–45 (emphasis added) (citations omitted).

386. *Id.* at 345 (emphasis added).

387. *See supra* note 55 and accompanying text.

388. *See Gertz*, 418 U.S. at 345.

389. An interesting example is found in the Louisiana Supreme Court's response to a law review article published in the *Tulane Law Review* in 2008 that argued, based on an empirical study later found to be flawed, that judges in Louisiana ruled in favor of contributors to their campaigns. *See* Vernon Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Election*, 82 TUL. L. REV. 1291 (2008). The Court used its website to post its own response to the article as well as other criticisms of the article. *See* Louisiana Supreme Court, http://www.lasc.org/ (last visited Feb. 9, 2009) (containing links to a response to the article dated June 12, 2008 by Chief Justice Pascal F. Calogero, Jr. of the Louisiana Supreme Court, two critiques of the *Tulane Law Review* article, a letter of apology from the Tulane Law School Dean, and an announcement from the court regarding the Dean's apology). The authors of the article admitted some miscalculations and flaws in the alleged empirical study but, in an interview with the press, stated that "with all the mistakes now corrected . . . the study's conclusions, broadly speaking, are the same." *See* Dan Slater, *Dean Apologizes to Louisiana Supremes for Errors in Law Review Article*, The Wall Street Journal Law Blog, http://blogs.wsj.com/law/2008/09/18/dean-apologizes-to-louisiana-supremes-for-errors-in-law-review-article) (Sept. 18, 2008, 9:20 EST).

necessary for proper self-government. As Justice Goldberg explained in his *Sullivan* concurrence, "In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized."[390] Indeed, well after *Sullivan* and *Garrison* were decided the Supreme Court explained in a related context:

> Although *it is assumed that judges* will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition *will not respond to public commentary*, the law gives '[j]udges as persons, or courts as institutions . . . *no greater immunity from criticism than other person or institutions*.' . . . The operations of the courts and the judicial conduct of judges are *matters of utmost public concern*.[391]

IV. PERMISSIBLE NARROWLY TAILORED REGULATION OF ATTORNEY SPEECH

States assuredly have the power to regulate attorney speech, however, they do not have carte blanche to do so. Courts are required to follow *Sullivan* and *Garrison* in punishing attorney speech on the basis that the speech impugned judicial integrity, was discourteous to the judiciary, or reduced the respect owed the judiciary. Avoidance of the *Sullivan* standard on the basis of the allegedly "compelling" or "significant" governmental interest in preserving the public's perception of judicial integrity should have the same weight that it has been given in other contexts—none.[392] That non-weight is appropriate. As was the case in *Landmark Communications, Inc.*, courts offer "little more than assertion and conjecture to support" this interest—often hypothesizing a parade of horribles where judicial authority becomes meaningless if speech is allowed.[393] Further, allowing punishment beyond the realm of *Sullivan* under the guise of this interest would undo *Sullivan* entirely. For surely the protection of the integrity of any branch of government in the eye of that branch would be so important as to justify an exception to the *Sullivan* rule. Moreover, the *Sullivan* rule as applied to statements regarding the judiciary is essential to democratic governance by the people of the United States. It is they who hold the ultimate sovereignty, even over the judiciary. In many states the judges are elected and the public must be informed to exercise their electoral powers. Where the judiciary is appointed, the judiciary must remain in the scrutiny of the public so that abuses and incompetence can be checked and, where necessary, steps can be taken to remove judges.

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390. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 299 (1964) (Goldberg, J., concurring).

391. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838–39 (1978) (quoting Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting)) (emphasis added).

392. *See* Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 841–42 (1979); *Sullivan*, 376 U.S. at 272 (providing no extra weight for "injury to official reputation"); Bridges v. California, 314 U.S. 252, 270–71 (1941).

393. *See Landmark Commc'ns, Inc.*, 435 U.S. at 841; *supra* notes 167–73 and accompanying text.

Requiring the judiciary to adhere to *Sullivan* when the basis for punishment is impugning judicial integrity does not deny courts the ability to regulate attorney speech on the basis of other important state interests. Notably, the state can curb attorney speech that has the potential to interfere with a criminal defendant's right to an impartial jury trial. *Sawyer* itself is an example.[394] If Hawaii had punished Sawyer's speech on the basis of attempting to improperly influence the jury or interfere with the administration of justice, it could have done so. Similarly, where attorneys make statements in court filings, the state has a legitimate and significant interest in assuring that pleadings, motions, and briefs contain relevant allegations that have a reasonable basis in fact. The state can require attorneys to adhere to such standards that are inextricably tied to the just and fair resolution of disputes—as long as the state does not employ a harsher standard for statements regarding the judiciary (and thus punish the statements for impugning judicial integrity as opposed to being irrelevant or not having a sufficient basis in fact). Other significant state interests justify a vast number of regulations of attorney speech, including confidentiality rules, candor rules, rules regarding ex parte communications with judges in pending cases, rules regarding the collection of fees, many advertising rules, pretrial publicity rules, unauthorized practice of law rules, and the like.[395]

What is needed is far greater precision in regulating and punishing lawyer speech aimed at the judiciary. When speech is punished and that speech regards the judiciary, close examination needs to be made as to whether the punishment is merely a protection of judicial reputation (in which case, *Sullivan* controls) or whether the punishment is based on another valid state interest unrelated to suppressing speech that impugns judicial integrity.

CONCLUSION

Speech concerning government (including judicial) officials, their competence, their integrity, the wisdom or folly of their decisions, their biases and political aims, and their overall fitness for office is, as the *Garrsion* Court claimed, "more than self-expression; it *is* the essence of self-government."[396] When courts punish speech to protect their own reputation and that of the judges of lower courts, it does not just damn truth—as problematic as that may be. It also damns self-governance, robust public debate, the unique sovereignty of the American people, and the ability of the people to check and define the abuse of judicial power and to call upon democratic correctives to fix such

394. *See In re* Sawyer, 360 U.S. 622 (1959).

395. *Gentile v. State Bar of Nevada* provides a guideline for other restrictions on attorney speech not based on preserving judicial reputation. The Court in *Gentile* noted that the restriction on pretrial publicity was "narrowly tailored" to significant government interests, "applie[d] only to speech that is substantially likely to have a materially prejudicial effect" on a judicial proceeding, was "neutral as to points of view," and "merely postpone[d] the attorneys' comments until after the trial." Gentile v. State Bar, 501 U.S. 1030, 1076 (1991).

396. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (emphasis added).

abuses. In short, it damns democracy. It chills speech from the very class of persons with the knowledge and exposure to have informed opinions about the judiciary—denying the public that information. Further, it clogs the wheels of political change, allowing for self-entrenchment—keeping the ins in and the outs out.[397] And all of it is done in the name of preserving our government by preserving the public perception of its integrity.

Paul LeBel, in discussing *Sullivan*, posited:

> Perhaps the fragility of a government is too easily forgotten in this country since we have managed to escape the turbulence and unrest that causes governments to fall with predictable regularity in much of the rest of the world . . . . [I]t is at least possible that one of the techniques that is successfully used to diffuse the revolutionary spirit in this country is . . . the effect of the imposition of limits on what the government can do *to* its critics. Viewed from this perspective, *Sullivan* emerges as a decision that was at least as much protective of the fundamental stability of the existing government structures as it was of the free speech interests of the defamation defendants in that case.[398]

Even the best governments have officials who are incompetent or corrupt. Some officials may not start out corrupt but may become corrupt as they exercise power.[399] One method of preserving public confidence in government is to shield this fact from the citizenry. But our American form of government combined with the First Amendment's guarantee of free speech compels an alternate solution: "'[S]unlight is the most powerful of all disinfectants.'"[400]

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397. *See* ELY, *supra* note 48, at 103.

398. LeBel, *supra* note 59, at 291–92; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring) (quoting Chief Justice Hughes in *DeJorge v. Oregon*, 299 U.S. 353, 365 (1973), on the "imperative" need to preserve free speech "in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and *that changes*, if desired, *may be obtained by peaceful means*. *Therein lies the security of the Republic*, the very foundation of constitutional government." (emphasis added)).

399. Blasi, *supra* note 48, at 538 (noting that political thinkers at the time of the Founding believed it necessary to "check[] the *inherent tendency* of government officials to abuse the power entrusted to them" (emphasis added)).

400. *Sullivan*, 376 U.S. at 305 (Goldberg, J., concurring) (quoting Justice Brandeis) (citation omitted).

A Call to Action: Threats to Judicial Independence Risk Fair & Impartial Justice-

By Judge Barbara A. Kronlund, Superior Court San Joaquin County &
Michael C. Kronlund, Immediate Past-President of ADC & ABOTA Member

Importance of a Fair and Impartial Judiciary

There are three separate but equal branches of government, as set forth by our Constitution and that make up America's democracy. The legislative branch makes laws; the executive branch enforces laws; the judicial branch, interprets laws. The point of creating three separate but equal branches is a separation of powers so one branch does not get too powerful and become oppressive.

Judges are under a legal duty to follow the rule of law. A judge must be free from the pressures of public opinion and from the influence of special interest groups so that justice can be based on the rule of law and not determined by the highest or most popular bidder. Judges may not promise to rule on certain cases in certain ways and can in fact be removed from judicial office for showing favoritism.

A strong and impartial, independent judiciary is critical to America's form of democracy. Judges must have the courage to do what they believe is correct under the rule of law, even when it is unpopular and even against obvious public outcry, protest and dissent. It is their job and sworn duty which ultimately results in a fair and impartial judicial system for everyone.

In the event a judge is errant or errs in a particular case, there is a system to challenge the judge's actions. (1) The appellate or reviewing court can review and overturn an incorrect legal decision or sentence; (2) The Commission on Judicial Performance can discipline and even remove a judge from office for judicial misconduct which violates the Judicial Code of Ethics. It is by one or both of these routes that a judge's rulings and conduct are properly reviewed.

For our system of government to work to protect all of our rights as promised by the Constitution, judges simply can't be afraid to make an unpopular ruling; judges can't take a poll of the public or voters and then put out a ruling pleasing to the majority. To bow to public pressure or census would cause our system of justice to collapse, and in such a system we can all forget our Constitutional rights because they will be gone. Once justice bends and bows, you do not have a democracy and the very structure of the Constitution is in danger.

This is precisely what happed in Nazi Germany. In 1934, all judges were made Nazi party members and became partisan. They were under oath to follow Hitler’s orders and thereby became instruments of the Executive branch of government. Judges were no longer independent and the judicial branch was subsumed into the other branches of government. What this meant is that individuals’ rights and liberties were gone. There was no recourse to the courts to challenge government’s actions. There was no longer any institution to protect individuals.

Threats to An Independent Judiciary

Approximately 10 years ago, a judge in Sacramento made an unpopular ruling in a same-sex rights case. Within 24 hours of the decision, there was a Recall effort launched and an appeal filed. The judge in that case and the appellate court received a clear message that if the appellate court did not reverse the decision, both the trial judge and appellate justices would all face the same fate- a recall election. This tactic was deemed to be an act of extortion by many legal scholars of the day, and the recall attempt was roundly rejected thanks to the bench and bar coming together to fight the attack.

Just last year, an Orange County judge imposed an unpopular sentence in a child molest case, which the D.A. appealed. A recall effort was launched based on disagreement with the sentence. The judge in that case was a 15-year jurist who previously prosecuted gang murders as a deputy D.A. That recall effort failed when the proponents failed to get enough signatures to put the recall on the ballot.

Around the same time as the failed recall effort against the Sacramento judge, a group came from out of state with ideas to reform California. The group launched an initiative called, "Jail For Judges." Under the initiative, judges would be stripped of their judicial immunity, meaning they could be sued every time they made a ruling! Judges would be subject to criminal charges and civil damages, including going to jail, for their judicial decisions.

A recent recall effort has been initiated by a Stanford Law Professor, Professor Dauber, against Judge Aaron Persky of the Superior Court of Santa Clara County following a sentencing ruling the judge made in the case of People of the State of California v. Brock

Turner. After presiding over the criminal sexual assault case of the Stanford student, the judge followed the recommendation in the Probation Report from the County's Probation Department, and then sentenced Turner for the crimes of which he was convicted. The law professor who started the recall effort against the judge is a friend of the victim who believed the sentence was too light, thereby taking her "case" for the recall of the judge to social media which ignited the recall effort.

At this time, the promoters of the recall effort have formed a political action committee (PAC), they have appeared in the media and have heavily criticized Judge Persky in the social media, and they've launched a website to fundraise for the PAC and gather signatures to promote their recall effort.

This recall effort against Judge Persky, a jurist for 12 years who previously served as a prosecutor of sex crimes, was launched solely because of one sentencing decision that the judge made in one case. It is not our intention to comment on the facts of the underlying Turner case.

If a recall against a judge is successful, not only does the judge get fired, the judge typically loses his or her pension under the current judicial retirement system. A recall effort against any judge carries serious consequences against not just the judge who is facing a recall, but for the entire American judicial system. We are treading on very dangerous ground.

There Has Been Notable Opposition to the Recall Efforts Against Judge Persky

Recent graduates of Stanford Law School, totaling 2/3 of the graduating class penned a poignant letter to Professor Dauber to drop the recall effort against Judge Persky. The students point out that they are troubled by the idea that any judge could be fired over sentencing decisions that the public thinks are too lenient and that judicial independence is a cornerstone of due process and an essential prerequisite of a fair criminal justice system.

Likewise, 46 leading law school professors issued a letter opposing Judge Persky's recall pointing out, "the recall movement seeks to make Judge Persky and all other California judges fear the wrath of voters if they exercise their lawful discretion in favor of lenience. This poses a serious threat to the rule of law…".

The SF Chapter of ABOTA, American Board of Trial Advocates wrote a letter to denounce the Recall efforts. ABOTA stated, " SF ABOTA strongly denounces efforts to recall any judge based solely on the unpopularity of a single decision…preservation of an independent judiciary is an integral and essential component of our system of justice and the proper functioning of our democracy…This is not a new concept. It dates back to the foundation on which this country was built, and our Constitution."

Call to Action

The public's confidence in the judicial system is based on one thing, that a person will get a fair hearing before an impartial judge. This ill-advised attack on Judge Persky is a threat to the independence

of the judiciary which ultimately is a threat to the rule of law, and sets a dangerous precedent. This is an attack on our entire system of justice.

Judge Kronlund has developed a Power-Point to educate the community about the importance of an independent judiciary and how it is critical to a fair and impartial justice system. It has been used extensively in presentations to civic groups and college classes. She invites you to use this Power-Point to educate your communities. Please contact her via e-mail so she can share her Power-Point with you. Bak@sjcourts.org

Judge in Stanford rape case asks for move to civil cases

PAUL ELIAS and ANDREW DALTON Associated Press

UPDATED 9:13 PM PDT Aug 25, 2016

Judge Aaron Persky. File Photo

SAN FRANCISCO (AP) — A California court said Thursday that a judge who was harshly criticized and subjected to a recall campaign for the leniency of a six-month jail sentence for a former Stanford University swimmer who sexually assaulted an unconscious woman will no longer hear criminal cases, a move that came at his own request.

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Santa Clara County Presiding Judge Rise Pichon said she has granted the request for reassignment of Judge Aaron Persky.

"While I firmly believe in Judge Persky's ability to serve in his current assignment, he has requested to be assigned to the civil division, in which he previously served," Pichon said in a statement. "Judge Persky believes the change will aid the public and the court by reducing the distractions that threaten to interfere with his ability to effectively discharge the duties of his current criminal assignment."

The move is not necessarily permanent. The assignment is subject to an annual review and takes effect Sept. 6.

Pichon said that another judge's desire to transfer to Palo Alto has made a quick swap with Persky possible. Normally such changes don't happen until a new year.

Persky ordered the six-month sentence for Brock Turner, a Dayton, Ohio, resident who had been attending Stanford on a swimming scholarship. The judge cited a probation department recommendation and the effect the conviction will have on Turner's life.

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Authorities say Turner sexually assaulted the girl while she was passed out near a trash bin.

The case sparked a national debate on college drinking and sexual assault and led to a recall effort against the judge.

Michelle Dauber, the Stanford law professor behind the recall effort, said that while the move from Persky is welcome, the recall attempt will continue, in part because Persky "can still transfer back to hearing criminal cases any time he chooses."

"The issue of his judicial bias in favor of privileged defendants in sex crimes and domestic violence still needs to be addressed by the voters of Santa Clara County," Dauber said in an email. "In our opinion, Judge Persky is biased and should not be on the bench."

Dauber and other organizers have said they will begin collecting signatures in April to qualify the issue for the November 2017 ballot.

Persky had already departed from two sex-crimes cases since his June sentencing of the 20-year-old Turner exploded in national media.

On Monday he formally recused himself from deciding whether to reduce a San Jose plumber's felony child pornography charges to misdemeanors.

That came two months after the district attorney's office removed Persky from a different sexual assault case, saying "we lack confidence" in the judge's ability to decide it impartially.

In addition to his supervising judge, attorneys who have argued in front of Persky cite his abilities. Santa Clara County deputy public defender Gary Goodman in June called him a "solid and respected judge," while defense attorney Barbara Muller said he's "one of the fairest judges" in the county.

A jury convicted Turner, a former Olympic hopeful, of sexually assaulting the young woman he met at a campus fraternity party in January 2015 after she passed out behind a trash bin.

The sentence along with the long and much-shared statement the victim read in court made the case a national rallying cry for a reconsideration of how rape is handled by the law.

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Opinion

Prosecutor Marilyn Mosby Just Accused Police of Another Crime Without Any Evidence

by Chris White | 5:57 pm, July 27th, 2016 303

When Baltimore State's Attorney **Marilyn Mosby** spoke about the death of **Freddie Gray** during a press conference last year she was widely criticized for making many inappropriate remarks. She appears to have learned

nothing from that experience over the past year.

On Wednesday, Mosby was back in front of the cameras where she made extraordinary shocking allegations against the Baltimore Police Department, again. A defiant Mosby refused to take any accountability for her rush to judgment in charging the six police officers just over one year ago. Instead, she chose to blame the Baltimore police investigators for her inability to sustain a single criminal charge against the accused officers. Mosby accused investigators of intentionally trying to harm the state's ability to bring charges, even going so far as to claim investigators committed a felony by manufacturing evidence in the case. Yes, that's basically what she said.

Mosby's astonishing accusation was buried in the middle of the lengthy statement she read in front of cameras on Wednesday morning. It was made amid the portion of her remarks where she railed against what she saw as an inadequate investigation by the Baltimore police department.

"Lead detectives that were completely uncooperative and started a counter-investigation to disprove the state's case," Mosby said, shortly followed by the main accusation.

"Creating videos to disprove the state's case without out knowledge. Creating notes that were drafted after the case was launched to contradict the medical examiner's conclusion," she said.

The suggestion could not be more clear. Mosby just accused Baltimore police investigators of creating or manufacturing evidence in an effort to sabotage the prosecution of the six police officers. Keep in mind, Mosby was reading from a prepared statement, so it is unlikely that the accusation was some unfortunate slip of the tongue.

A police investigator who manufactures evidence in a criminal prosecution is guilty of a felony. Yet, Mosby made no mention of bringing charges against the investigator(s) who allegedly committed this offense. Why not? The most likely conclusion is that Mosby has absolutely no evidence to support such a claim, especially with respect to the statement about "creating videos."

Rather than accepting responsibility her own failings as a prosecutor, Mosby is again trying to pin everything on the Baltimore police

department. This is nothing more than a desperate attempt to save her career in public service and it should not come as a surprise to anyone who has been paying attention. It is simply the latest example in a pattern of shameless behavior that began last year when she prematurely announced the charges against the six police officers. As a result, she has now almost certainly poisoned whatever relationship she may still have with the Baltimore police department – all amid a huge spike in murders in the city. What a disaster.

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Freddie Gray, police, Baltimore, Marilyn Mosby

The New York Times | http://nyti.ms/292ZnkP

U.S.

In Freddie Gray Trials, Baltimore Judge Sets High Bar for Prosecution

By JESS BIDGOOD JUNE 24, 2016

BALTIMORE — Barry G. Williams knows how to make a strong case against a police officer. He spent eight years working for the civil rights division of the Justice Department, where he investigated, tried and convicted officers accused of brutality and civil rights violations.

Legal experts say that left him uniquely qualified to find himself at the center of the sprawling prosecution of the six officers charged in the fatal arrest of Freddie Gray — but perhaps not in the way some might have expected.

On the one hand, his background reflects an unquestioned sensitivity to the issues of police behavior and the rights of individuals who come in contact with them, like Mr. Gray, the 25-year-old black man whose death from a spinal cord injury that occurred while in police custody caused riots and chaos a year ago. But experts say it has also made Judge Williams a meticulous evaluator of a prosecution case that was in trouble even before his Thursday ruling acquitting Officer Caesar R. Goodson Jr. of seven charges, including second-degree murder, because he knows the burden of proof all too well.

"He has an understanding of what police can and cannot do," said Barry Kowalski, who prosecuted the Los Angeles officers accused of beating Rodney King and worked with Judge Williams at the Justice Department. "And at the same time, he has an understanding that the government must have evidence that proves guilt beyond a reasonable doubt."

Judge Williams's ruling and an earlier acquittal from the bench of Officer Edward M. Nero have made it clear that a man who has put together winning prosecutions against police officers has not seen a convincing case against those two officers.

"As a trier of fact," Judge Williams wrote, in his ruling Thursday, "the Court cannot simply let things speak for themselves."

Judge Williams, who is African-American, has to an unusual degree become the nucleus of the proceedings. He is both presiding over the cases and has ruled from the bench in two of the three tried so far. (A jury deadlocked in the first case of Officer William G. Porter.)

That has made the judge both the sole fact finder and the person whose rulings have shaped the case both for the world and for the lawyers arguing the case.

A graduate of the University of Maryland School of Law, where he is remembered as being well prepared to answer professors' questions, Judge Williams spent eight years as an assistant state's attorney in Baltimore before he joined the Department of Justice, where he prosecuted cases against police officers and prison guards accused of brutality.

"He dedicated himself to making sure that people in power did not victimize those who did not have power, and that was something very important to him," Mr. Kowalski said.

In the federal system, it takes months, if not years to build a case — far longer than the 12 days after Mr. Gray's death that it took prosecutors here to announce charges against the six police officers involved in Mr. Gray's arrest — and Judge Williams knew when not to bring one.

"I remember conversations where I detected that he was eager to try to bring a prosecution, but ultimately, in the course of our discussion, we both recognized the evidence was just not sufficient to make the wrong that we perceived into a criminal act," Mr. Kowalski said. "And we both went, 'Doggone it.' "

Still, Judge Williams tried and won cases like one, in Florida, involving a police officer accused of pistol-whipping a drug dealer who was already on the ground.

"He worked in, I would say, a methodical but effective style," said Douglas Molloy, a former federal prosecutor who worked with Judge Williams on that case. "Instead of focusing on the more dramatic aspects of cases, he concentrated on the elements of the crime."

That could explain the tenor of Judge Williams's rulings — which deliberately lay out the charges and the evidence — and his brusque questioning of the prosecutors who alleged Mr. Gray had a "rough ride," a dramatic term that he would find they did not substantiate in court.

"The state said to the world, it was a rough ride," said Judge Williams, interrupting a prosecutor's rebuttal statement at the end of the trial, before unleashing a torrent of questions about the prosecution's allegations. "Where's your evidence?" Judge Williams asked.

But some here have wondered if Judge Williams's experience investigating police officers at the federal level has made it harder to convince him of a strong case here.

"When you work for D.O.J., your standards of prosecution are exceedingly high," said Douglas Colbert, a professor of law at the University of Maryland who is supportive of the prosecution. As a result, Mr. Colbert said, the judge could be looking for something more persuasive "to meet the burden of proof than is ordinarily required in state prosecutions."

Judge Williams, 54, was appointed to the city's Circuit Court in 2005 and now holds an elected position.

Most mornings, he appears on the bench 15 minutes or so after he scheduled proceedings to begin, fortified by a giant mug of tea. Sharp-witted and acerbic, Judge Williams can be as quick to crack jokes from the bench as he can be to admonish the individuals in front of him for acting outside the neatly drawn lines of his expectations.

There was the moment when he eviscerated prosecutors for failing to disclose a piece of "classic exculpatory information" to defense lawyers before Officer Goodson's trial. "If your office doesn't get that, I don't know where we are at this point, counsel," Judge Williams said.

A few days later, he rebuked a witness, Dr. Morris Marc Soriano, calling him "sarcastic" under questioning from a defense lawyer.

"Sir, don't say anything right now," Judge Williams snapped.

He has taken unusual measures to limit the flow of information from the courtroom, ostensibly to prevent the proceedings in one of the six cases from tainting a jury pool for another, like conducting the questioning of potential jurors out of earshot of the public, and by speaking quietly with lawyers at the bench, instead of in open court, even when there was no jury.

There has been some speculation as to whether Judge Williams' familiarity with the case could prompt either prosecutors or defense lawyers to doubt his ability to continue considering the cases independently — a must for judges — and seek his recusal from future trials, although legal experts said it was unlikely to happen without signs of obvious bias.

Still, Judge Williams nodded to that possibility himself last month, during closing arguments in the trial of Officer Nero, when a prosecutor made a reference to a future trial in the proceedings.

He answered with a quick aside, which elicited laughter in the court but could have been wishful thinking: "I probably won't be involved," he said.

Sheryl Gay Stolberg contributed reporting from Washington. Alain Delaquérière contributed research from New York.

A version of this article appears in print on June 25, 2016, on page A13 of the New York edition with the headline: Judge in Baltimore Sets High Bar for Prosecution in Police Misconduct Trials.

1 Cal.App.5th 892
Court of Appeal,
Fourth District, Division 3, California.

The PEOPLE, Petitioner,
v.
The SUPERIOR COURT of Orange County,
Respondent;
Rito Tejeda, Real Party in Interest.

G052932
|
Filed 7/25/2016

Synopsis
Background: Defendant was charged with murder. The People filed a peremptory challenge to the trial judge. The Superior Court, Orange County, No. 14ZF0338, Richard M. King, J., denied the motion. The People petitioned for writ of mandate.

[Holding:] The Court of Appeal, O'Leary, P.J., held that district attorney office's **blanket** use of peremptory challenges against judge did not violate separation of powers.

Petition granted.

Aronson, J., filed concurring opinion.

Thompson, J., filed dissenting opinion.

West Headnotes (10)

[1] **Judges**
Objections to Judge, and Proceedings Thereon

The statute authorizing a peremptory challenge of a judge allows for the disqualification of judges based upon the mere "belief of a litigant" that he cannot have a fair trial before the assigned judge, and actual prejudice is not a prerequisite to invoking the statute. Cal. Civ. Proc. Code § 170.6(a).

Cases that cite this headnote

[2] **Judges**
Sufficiency of objection, affidavit, or motion

Peremptory challenges under the statute authorizing a peremptory challenge of a judge are presented in the form of a motion, but they fall outside the usual law and motion procedural rules, and are not in the typical case subject to a judicial hearing. Cal. Civ. Proc. Code § 170.6.

Cases that cite this headnote

[3] **Judges**
Objections to Judge, and Proceedings Thereon

Within its circumscribed limits, the statute authorizing a peremptory challenge of a judge authorizes parties or their attorneys, rather than courts, to unilaterally decide whether a judge is "prejudiced." Cal. Civ. Proc. Code § 170.6.

Cases that cite this headnote

[4] **Constitutional Law**
To non-governmental entities
Judges
Objections to Judge, and Proceedings Thereon

The statute authorizing a peremptory challenge of a judge based upon the mere "belief of a litigant" that he cannot have a fair trial is not an unconstitutional delegation of legislative and judicial powers to litigants and their attorneys; nor is it an unwarranted interference with the powers of the courts. Cal. Civ. Proc. Code § 170.6.

Cases that cite this headnote

[5] **Appeal and Error**
Relating to place, time, or conduct of trial
Mandamus
Acts and proceedings of courts, judges, and judicial officers

An order denying a peremptory challenge to the judge is not an appealable order and may be reviewed only by way of a petition for writ of mandate, and thus there is no adequate remedy at law for a rejected peremptory challenge to the judge. Cal. Civ. Proc. Code § 170.6(d).

Cases that cite this headnote

[6] **Mandamus**
Persons Entitled to Relief
Mandamus
Specific acts

Even assuming the People were required to establish irreparable harm to bring their statutory petition for writ of mandate challenging denial of their peremptory challenge to the judge, such harm was obvious in the context of judicial disqualification, even though the People did not prove that the judge could not have been removed for cause or that the disqualification motion would actually make a difference in the outcome of the case. Cal. Civ. Proc. Code §§ 170.3, 170.6.

Cases that cite this headnote

[7] **Courts**
Highest appellate court

A trial court has no discretion to refrain from following binding Supreme Court authority.

Cases that cite this headnote

[8] **Courts**
Previous Decisions as Controlling or as Precedents

The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion.

Cases that cite this headnote

[9] **Courts**
Dicta

When the Supreme Court has conducted a thorough analysis of the issues and such analysis reflects compelling logic, its dictum should be followed.

Cases that cite this headnote

[10] **Constitutional Law**
Prosecutors
Judges
Objections to Judge, and Proceedings Thereon

District attorney office's use of peremptory challenges against a particular judge in 46 of the 49 murder cases that were assigned to the judge for trial did not violate the constitutional separation of powers doctrine, even if the reason for the peremptory challenges against the judge was that the judge had disqualified the district attorney's office from a case based on *Brady* violations. Cal. Civ. Proc. Code § 170.6.

See 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 133.

Cases that cite this headnote

****202** Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Richard M. King, Judge. Petition granted. (Super. Ct. No. 14ZF0338)

Attorneys and Law Firms

Tony Rackauckas, District Attorney, Stephan Sauer and Brian F. Fitzpatrick, Deputy District Attorneys, for Petitioner.

Schonbrun Seplow Harris & Hoffman and Paul L. Hoffman; Erwin Chemerinsky, Venice, for Respondent.

Sharon Petrosino, Public Defender, and David Dworakowski, Assistant Public Defender, for Real Party in Interest.

OPINION

O'LEARY, P.J.

***895** Nearly 40 years ago, our Supreme Court reaffirmed "that Code of Civil Procedure section 170.6, which provides for the disqualification of trial judges on motion supported by an affidavit of prejudice, does not violate the doctrine of the separation of powers or impair the independence of the judiciary."[1] (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 186–187, 137 Cal.Rptr. 460, 561 P.2d 1148 (*Solberg*).) It did so after considering "experience with the statute [in the preceding] decades and as applied ... in a criminal context." (*Id*. at p. 187, 137 Cal.Rptr. 460, 561 P.2d 1148.) The *Solberg* court reasoned, "to the extent that abuses persist in the utilization of section 170.6 they do not, in our judgment, 'substantially impair' or 'practically defeat' the exercise of the constitutional jurisdiction of the trial courts. Rather, it may be helpful to view them as a relatively inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6. The statute thus remains a reasonable—and hence valid—accommodation of the competing interests of bench, bar, and public on the subject of judicial disqualification. We do not doubt that should future adjustments to this sensitive balance become necessary or desirable, the Legislature will act with due regard for the rights of all concerned." (*Solberg, supra,* 19 Cal.3d at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148.)

***896** Although we question the wisdom of the *Solberg* holding in light of the complexities of modern court administration, we are bound to follow Supreme Court authority. For reasons we explain anon, we urge the Supreme Court to revisit the issue of **blanket papering** to determine whether the impact of an abusive use of Code of Civil Procedure section 170.6, such as demonstrated in this record, can be viewed as inconsequential on a trial court in the performance of its duty to administer justice.

No fundamental adjustments to this balance have been made by either the Legislature or the Supreme Court in the ensuing 39 years. Respondent Superior Court of Orange County (respondent court), however, refused to grant a section 170.6 motion filed on behalf of petitioner, the People of the State of California, because the Orange County District Attorney (district attorney) invoked an improper **blanket** challenge to a particular judge that substantially disrupted the respondent court's operations. As interpreted by respondent court, *Solberg* did not foreclose a separation of powers challenge to the executive branch's apparent abuse of section 170.6 under the circumstances of this case.

In our view, however, *Solberg* anticipated circumstances very similar to those faced here. Rightly or wrongly, the *Solberg* court concluded the peremptory challenge ****203** at issue would not constitute a separation of powers violation. Because we are bound by the reasoning in *Solberg,* we must grant the petition for writ of mandate.

PROCEDURAL HISTORY

In December 2014, real party in interest Rito Tejeda was charged with murder. (Pen. Code, § 187, subd. (a).) On December 3, 2015, respondent court assigned Tejeda's case to Judge Thomas Goethals for all purposes and set the matter for a pre-trial hearing in Judge Goethals' courtroom. That same day, petitioner moved to disqualify Judge Goethals pursuant to section 170.6. The motion was supported by a declaration executed under penalty of perjury by an attorney with the district attorney's office. The declaration represented that Judge Goethals "is prejudiced against the party or the party's attorney, or the interest of the party or party's attorney, such that the declarant cannot, or believes that he/she cannot, have a fair and impartial trial or hearing before the judicial officer."

Later that day, respondent court denied the motion to disqualify Judge Goethals, "without prejudice to the People's or the defendant's right to seek reconsideration of this order, should they choose to do so." Notice of entry of the order was served by mail.

***897** On December 17, 2015, petitioner sought writ relief from this court. (§ 170.3, subd. (d).) This court issued an order to show cause on February 11, 2016, and subsequently set the matter for oral argument.

FACTUAL RECORD DEVELOPED BY RESPONDENT COURT

The factual record in this matter is unusual. Petitioner did not submit evidence (other than the standard form § 170.6 declaration) with its motion. Tejeda did not oppose the motion, with evidence or otherwise. Instead, respondent court took judicial notice of facts and events outside the scope of this particular case in supporting its conclusions (1) the district attorney's office was engaged in improper " '**blanket papering**' " of Judge Goethals in murder cases, and (2) the effect of the **blanket** challenge was to "substantially disrupt[ ] the orderly administration of criminal justice in Orange County." We summarize the lengthy recitation of facts from respondent court's order.

Judge Goethals practiced criminal law for more than 20 years, both as a member of the district attorney's office and as a private attorney representing criminal defendants. Since his appointment to the bench in 2003, Judge Goethals has presided over exclusively criminal matters, including "long cause cases" (the most complicated murder cases). "Judge Goethals has prosecuted capital cases, defended capital cases, and ... presided over capital cases...."

In January 2012, Judge Goethals was assigned the long cause case of *People v. Dekraai*, Superior Court Orange County (2012) No. 12ZF0128. In January 2013, Judge Goethals granted a defense discovery request pertaining to an inmate informant to whom defendant Dekraai had allegedly made incriminating statements. After receiving discovery materials, the defense filed three motions in January and February 2014 (to dismiss the death penalty allegations, to disqualify the district attorney's office based on an alleged conflict of interest, and to exclude from evidence any statements made by Dekraai to the informant). These motions were based on defense allegations that members of the district attorney's office and law enforcement officers had engaged in misconduct (perjury, subornation of perjury, intentional violation of criminal defendants' ****204** constitutional rights, and obstruction of justice) in connection with the use of informants. Judge Goethals refused the prosecution's request to deny the motions without an evidentiary hearing.

Judge Goethals began hearing evidence on all three motions on March 18, 2014. On August 4, 2014, Judge Goethals made factual findings that (1) law enforcement officers intentionally moved informants at the jail in an attempt to obtain incriminating statements, and (2) prosecutors had committed negligent violations of ***898** *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Judge Goethals ruled that Dekraai's statements should be excluded from evidence, but denied the other two motions.[2] However, after new evidence was presented by the defense pertaining to the existence of a computerized system for handling informants, Judge Goethals granted the motion to disqualify the district attorney's office on March 12, 2015.

In the wake of these rulings, the district attorney's use of peremptory challenges against Judge Goethals changed dramatically. The raw numbers are stark. "For over three years, from December 7, 2010 through February 24, 2014, Judge Goethals was assigned 35 murder cases for trial and was disqualified once by the People. From February 25, 2014 through September, 2015, a period of [18] months, Judge Goethals was assigned 49 murder cases for trial and was disqualified 46 times by the People." (Emphasis omitted.) The pattern continued with this case and others assigned to Judge Goethals in December 2015.

Respondent court's order then turned to the consequences of the district attorney's repeated disqualification of Judge Goethals. "Six months after the People began disqualifying Judge Goethals, the negative impact became readily apparent: the four other long cause judges had significantly more murder cases than Judge Goethals. This raised concerns because ... Penal Code section 1050 requires the judiciary to have courts available for trial at the earliest time possible. Furthermore, ... the purpose of having a long cause judge—one with a low-enough caseload to allow a seasoned judge to give sufficient time to a murder trial—was being defeated."

Respondent court's multiple efforts to reassign murder cases to Judge Goethals were all rebuffed by section 170.6 challenges from the district attorney's office. "By April, 2015, [respondent court] was in a crisis. New murder cases were being added to its inventory, which included unresolved murder cases. In addition, a backlog of hundreds of other felony cases was becoming a

significant problem. Short cause judges were unavailable to try the shorter felony cases because they were presiding over two-to-three-week murder trials. To solve this problem, long cause judges were assigned short cause cases, taking away the time necessary to be devoted to long cause murder cases."

Assignments were shuffled between the various judicial officers at respondent court, in the hope that the **blanket** challenge phenomenon would be temporary. But it continued unabated through the autumn of 2015.

"[T]he effect of the People's '**blanket**' disqualification of Judge Goethals has caused murder cases and other felony cases to languish unnecessarily. It ***899** has caused strain in misdemeanor operations. As a result, the court's responsibility to ensure the orderly administration of justice has been severely impacted."

****205** The court observed that it could simply reassign Judge Goethals, but declined to do so: "The very thought of this option is offensive. To allow a party to manipulate the court into removing a judge from hearing certain criminal cases—when that judge, in the performance of his judicial duties, has conducted a hearing which exposed that same party's misconduct—not only goes against the very cornerstone of our society: the rule of law, but would be a concession against judicial independence." (Emphasis omitted.)

DISCUSSION

Peremptory Challenges Under Section 170.6

[1]"[S]ection 170.6 provides that no superior court judge shall try any civil or criminal action involving a contested issue of law or fact when it is established that the judge is prejudiced against any party or attorney appearing in the action." (*The Home Ins. Co. v. Superior Court* (2005) 34 Cal.4th 1025, 1031, 22 Cal.Rptr.3d 885, 103 P.3d 283 (*Home Ins. Co.*); see § 170.6, subd. (a)(1).) Of course, "actual prejudice is not a prerequisite to invoking the statute." (*Solberg, supra*, 19 Cal.3d at p. 193, 137 Cal.Rptr. 460, 561 P.2d 1148.) Instead, section 170.6 allows for the disqualification of judges based upon the mere " 'belief of a litigant' that he cannot have a fair trial before the assigned judge." (*Solberg, supra*, 19 Cal.3d at p. 193, 137 Cal.Rptr. 460, 561 P.2d 1148; see § 170.6, subd. (a)(2).)

[2] [3]Peremptory challenges under section 170.6 "are presented in the form of a motion, but they fall outside the usual law and motion procedural rules, and are not [in the typical case] subject to a judicial hearing." (*Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 408, 132 Cal.Rptr.3d 602.) Within its circumscribed limits, section 170.6 authorizes parties (or their attorneys), rather than courts, to unilaterally decide whether a judge is "prejudiced." (*Home Ins. Co., supra*, 34 Cal.4th at p. 1032, 22 Cal.Rptr.3d 885, 103 P.3d 283 [section 170.6 permits party to obtain disqualification of judge for prejudice based solely upon sworn statement without having to establish prejudice as matter of fact to satisfaction of court].) Courts must honor procedurally sufficient, timely presented section 170.6 motions. (§ 170.6, subd. (a)(4) ["If the motion is duly presented, and the affidavit of declaration ... is duly filed ..., thereupon and without any further act or proof, the judge supervising the master calendar ... shall assign some other judge ... to try the cause or hear the matter"]; *Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 59, 116 Cal.Rptr.2d 616.)

[4]The atypical power conferred upon parties (and their attorneys) by section 170.6 is not "an unconstitutional delegation of legislative and judicial powers ***900** to litigants and their attorneys"; nor is it "an unwarranted interference with the powers of the courts." (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 696, 329 P.2d 5 (*Johnson*) [affirming facial constitutionality of § 170.6, which applied only to civil cases at the time].)

Appellate Court Review of Order Denying Peremptory Challenge

[5] [6]"An order denying a peremptory challenge is not an appealable order and may be reviewed only by way of a petition for writ of mandate." (*Daniel V. v. Superior Court* (2006) 139 Cal.App.4th 28, 39, 42 Cal.Rptr.3d 471; see § 170.3, subd. (d).) Hence, there is no adequate remedy at law for rejected section 170.6 motions—filing a writ petition is "the exclusive means of appellate review of an unsuccessful peremptory challenge motion." (****206** *People v. Hull* (1991) 1 Cal.4th 266, 276, 2 Cal.Rptr.2d 526, 820 P.2d 1036; see § 1086 [writ of mandate appropriate "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law"].) Even assuming petitioner is required to establish irreparable harm in bringing this statutory writ petition,[3] such harm is obvious in the context of judicial disqualification. (§ 170.6, subd. (a)(1) ["A judge ... shall not try a ... criminal action ... of any kind ... when it is established as provided in this section that the judge ... is prejudiced"].) As explained above, a party can disqualify a judge by executing a sworn statement indicating a belief that the party cannot have a fair trial before the assigned

judge. Section 170.6 would ring hollow if the moving party were required to prove in a writ petition that the disqualification motion would actually make a difference in the outcome of the case (an inherently speculative enterprise) or that the moving party could not successfully move to disqualify the trial judge for cause under section 170.3 (a showing that would undermine § 170.6 by requiring the party to disclose the specific reason for believing the judge was not fair and impartial and to explain why evidence could not be marshaled to disqualify the judge for cause).

***901** It has often been stated that courts review an order denying a section 170.6 motion for an abuse of discretion. (E.g., *Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 523, 108 Cal.Rptr.2d 825.) This standard of review has meaning in some cases, when there are factual questions that must be sorted out by trial courts before the motion can be granted or denied. For instance, section 170.6, subdivision (a)(4), limits "each side" of a case to one peremptory challenge. It may be unclear in some cases whether "joined parties (e.g., codefendants) are on the same side." (*Orion Communications, Inc. v. Superior Court* (2014) 226 Cal.App.4th 152, 159, 171 Cal.Rptr.3d 596.)

[7]But a trial court has no discretion to refrain from following binding Supreme Court authority. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455–456, 20 Cal.Rptr. 321, 369 P.2d 937; *People v. Franc* (1990) 218 Cal.App.3d 588, 593, 267 Cal.Rptr. 109 ["Although stare decisis doctrine retains some flexibility, it permits only the California Supreme Court, not a lower court, to depart from Supreme Court precedent"].) As acknowledged in respondent court's order, the paramount legal question in this case is the reach of *Solberg, supra,* 19 Cal.3d 182, 137 Cal.Rptr. 460, 561 P.2d 1148: "As a decision of the state's highest court, the holding in *Solberg* must be followed by all inferior California courts. [Citations.] [¶] But is *Solberg*'s holding so broad that it requires all trial courts to grant all timely **blanket** challenges regardless of the circumstances?" ****207** Our review is de novo with regard to the question of whether *Solberg* precludes an inquiry by respondent court into the district attorney's use of section 170.6.

In our view, petitioner is entitled to writ relief because *Solberg* cannot be "fairly distinguished" (*Trope v. Katz* (1995) 11 Cal.4th 274, 287, 45 Cal.Rptr.2d 241, 902 P.2d 259) from the factual scenario presented here. Under these circumstances, we conclude *Solberg* precluded respondent court from assessing the motivations and weighing the consequences of the district attorney's peremptory challenges as a basis for denying a section 170.6 motion on separation of powers grounds.

Solberg—Factual and Procedural Context

The factual and procedural context of *Solberg, supra,* 19 Cal.3d 182, 137 Cal.Rptr. 460, 561 P.2d 1148, is complicated, with a technical wrinkle that potentially bears on its authoritative power. In four prostitution matters, the deputy district attorney exercised his section 170.6 right to disqualify the assigned municipal court judge prior to hearings scheduled to entertain dismissal motions. The municipal court judge declined to disqualify herself. (*Solberg, supra,* 19 Cal.3d at pp. 187–188, 137 Cal.Rptr. 460, 561 P.2d 1148.) At superior court writ proceedings initiated by the district attorney, counsel for the municipal court offered to prove that the disqualification motions "were '**blanket** challenges' motivated by prosecutorial discontent with [the municipal court judge's] prior rulings of law." (*Id.* at p. 188, 137 Cal.Rptr. 460, 561 P.2d 1148.) ***902** The superior court judge "denied the offer as immaterial" and "quashed subpoenas against the district attorney and his staff for the purpose of eliciting such proof." (*Ibid.*) The superior court judge issued writ relief compelling disqualification of the municipal court judge. This judgment was appealed and the California Supreme Court later granted review. (*Id.* at pp. 188–189, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Before the superior court judge issued his writ of mandate, two of the four real parties in interest (i.e., the defendants accused of prostitution) filed section 170.6 motions to disqualify the superior court judge. (*Solberg, supra,* 19 Cal.3d at p. 188, 137 Cal.Rptr. 460, 561 P.2d 1148.) The superior court judge denied the motions on two grounds: (1) he was acting as an appellate judge in the matter at issue; and (2) the challenges were filed by real parties in interest (not true parties). (*Id.* at p. 189, 137 Cal.Rptr. 460, 561 P.2d 1148.) Real parties filed a writ petition with the Court of Appeal to challenge the superior court judge's denial of their section 170.6 motions; "that proceeding [was brought before the Supreme Court] on an alternative writ issued by the Court of Appeal." (*Solberg, supra,* 19 Cal.3d at p. 189, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Thus, the *Solberg* court had before it two distinct but related matters—the judgment (a writ of mandate compelling the disqualification of the municipal court judge), and a writ proceeding (seeking a writ of mandate compelling the disqualification of the superior court judge). The *Solberg* opinion disposed of both disputes.

As to the writ proceeding, the Supreme Court rejected the superior court judge's grounds for refusing to honor

section 170.6 motions filed by real parties. (*Solberg, supra*, 19 Cal.3d at pp. 189–190, 137 Cal.Rptr. 460, 561 P.2d 1148.) "A writ of mandate will therefore lie to compel [the superior court judge] to vacate his order denying the motion for disqualification. [¶] All orders made thereafter by [the superior court judge] in these proceedings are likewise void, including the judgment directing issuance of a peremptory writ commanding ****208** [the municipal court judge] to disqualify herself in the criminal matters." (*Id*. at p. 190, 137 Cal.Rptr. 460, 561 P.2d 1148.) The last paragraph of the opinion ordered with regard to the writ proceeding: "[L]et a peremptory writ of mandate issue as prayed." (*Id*. at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Having determined the superior court judge's orders were void, including the writ of mandate compelling the disqualification of the municipal court judge, the *Solberg* court was not obligated to review the merits of the judgment. Indeed, the disposition of the appeal in the last paragraph of the opinion was the following: "the appeal is *dismissed*." (*Solberg, supra*, 19 Cal.3d at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148, italics added.) There was no need to affirm or reverse the ***903** judgment; there was no longer any judgment to review. The opinion could have ended on its fifth page.[4]

Instead, the majority opinion continued for 14 additional pages, composed of an in depth review of the constitutionality of section 170.6. The court explained, "the issues presented by the appeal from that judgment will doubtless arise on remand, and we therefore proceed to address their merits." (*Solberg, supra*, 19 Cal.3d at p. 190, 137 Cal.Rptr. 460, 561 P.2d 1148.)

It is the 14 pages of, strictly speaking, unnecessary analysis that pertains to the separation of powers issue raised in this case. Is this portion of *Solberg* composed solely of dicta? Can it be deemed a holding, despite the fact that it was not necessary to the disposition of the appeal?

[8]" 'Only statements necessary to the decision are binding precedents....' [Citation.] 'The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might be included in an opinion.' " (*Gogri v. Jack In The Box Inc.* (2008) 166 Cal.App.4th 255, 272, 82 Cal.Rptr.3d 629 [declining to follow dicta of California Supreme Court].) Of course, "it is often difficult to draw hard lines between holdings and dicta." (See *United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 834, 209 Cal.Rptr. 16 (*United Steelworkers*).) In *United Steelworkers*, the appellate court treated a prior Supreme Court's "broad answers to the questions raised by all parties" for guidance "on remand" as a holding. (*Ibid*.) Similarly, in *Solberg* the court intended to instruct the lower court on remand and provided a full account of its reasoning in providing those instructions.

[9]Moreover, " '[e]ven if properly characterized as dictum, statements of the Supreme Court should be considered persuasive. [Citation.]' [Citation.]" (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169, 78 Cal.Rptr.2d 819.) "When the Supreme Court has conducted a thorough analysis of the issues and such analysis ****209** reflects compelling logic, its dictum should be followed." (*Ibid*.)

***904** In sum and on balance, we are bound by *Solberg* in our examination of the separation of powers issue presented. Even if rightly considered dicta, the 14 pages of analysis included in *Solberg* on the separation of powers issue cannot simply be discarded by an inferior court. We need not decide whether the unusual procedural features of *Solberg* would affect our Supreme Court's application of stare decisis principles should it choose to review the instant case.

Solberg's Separation of Powers Analysis

As presented to the Supreme Court, the *Solberg* appellants' principal contention was "that section 170.6 is unconstitutional because it violates the doctrine of separation of powers [citation] and impairs the independence of the judiciary [citation]." By not requiring any reasons for disqualification to be stated, "the statute in effect delegates ... the judicial power to determine whether [a ground for disqualification] exists in the particular case in which it is invoked." (*Solberg, supra*, 19 Cal.3d at pp. 190–191, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Solberg rejected appellants' contentions, reaffirming the continuing vitality and applicability to criminal cases of *Johnson, supra*, 50 Cal.2d 693, 329 P.2d 5, which held 19 years earlier that section 170.6 was constitutional. Point by point, *Solberg* rejected critiques of section 170.6 and *Johnson*. (*Solberg, supra*, 19 Cal.3d at pp. 191–193, 137 Cal.Rptr. 460, 561 P.2d 1148.) After stating actual prejudice is not required to invoke section 170.6, *Solberg* characterized section 170.6 as " 'an extraordinary right to disqualify a judge.' " (*Solberg, supra*, 19 Cal.3d at p. 193, 137 Cal.Rptr. 460, 561 P.2d 1148.) Much of the initial analysis discussed asserted abuses of section 170.6 that had only become known after *Johnson*, e.g., judge-shopping (including to avoid a judge whose legal

views are not helpful to one's case), use for tactical advantage (including to delay a case, particularly in single-judge courtrooms or single-judge specialty courts), and false swearing of affidavits. (*Solberg, supra,* 19 Cal.3d at pp. 194–200, 137 Cal.Rptr. 460, 561 P.2d 1148.)

The appeal was not limited to generalities. It was contended "that the case at bar [was] an example of" the abuses engaged in by counsel. The municipal court judge "dismissed a number of prostitution cases after ruling that the defendants therein were the victims of discriminatory law enforcement practices based on the suspect classification of sex because in each instance only the female prostitute, and not her male customer, was arrested and prosecuted.... [P]rostitution charges against the individual real parties in interest herein came before [the municipal court judge] for the purpose of setting a date to hear their motions to dismiss on the same ground. The People moved to disqualify her under section 170.6 allegedly because of a perceived inability to have a fair trial 'in cases of these kinds in this court' [citation]. Appellants assert that the circumstances and wording of the motion ***905** show it was primarily based on the People's dissatisfaction with [the municipal court judge's] prior legal ruling on discriminatory law enforcement." (*Solberg, supra,* 19 Cal.3d at p. 194, fn. 11, 137 Cal.Rptr. 460, 561 P.2d 1148.)

The *Solberg* court assumed the charges of abuses were true. It did "not condone such practices, nor [did it] underestimate their effect on the operation of our trial courts." (*Solberg, supra,* 19 Cal.3d at p. 195, 137 Cal.Rptr. 460, 561 P.2d 1148.) But the existence of abuses did not result in the court declaring section 170.6 to be ****210** unconstitutional, either in general or as applied to the specific case before it. (*Solberg, supra,* 19 Cal.3d at pp. 192–200, 137 Cal.Rptr. 460, 561 P.2d 1148.)

In addressing the appellants' challenge to the statute, the court did not indicate whether it viewed the challenge to be a "facial" or an "as applied" challenge. Reviewing the discussion, we conclude the court considered it as both. Reliance on *Johnson, supra,* 50 Cal.2d 693, 329 P.2d 5, suggests a facial challenge analysis. The court also recognized the significant delay in a single-judge court and the inevitable delay in even a multi-judge court that will result from the filing of an affidavit. (*Solberg, supra,* 19 Cal.3d at p. 195, 137 Cal.Rptr. 460, 561 P.2d 1148.) It acknowledged that in multi-branch courts, a disqualification may also result in a desired change in the place as well as the date of trial and "in courts with specialized departments—such as a psychiatric or juvenile department—the statute has been used to remove the judge regularly sitting in that department in the hope of benefiting from the substitution of a less experienced judge." (*Ibid.*) And lastly, the court recognized the statute could be "invoked to intimidate judges generally and in certain cases even to influence the outcome of judicial election campaigns [citation]." (*Ibid.*) After consideration of these various potential abuses, the court concluded it would not hold the statute invalid as applied. (*Ibid.*)

Most pertinent to the petition before us is *Solberg*'s analysis of the contention that *Johnson* was distinguishable because it was a civil case. "The argument is that in all criminal actions the plaintiff and its attorney remain the same, i.e., the People of the State of California represented by the district attorney; the defendant is different in each case, but in most instances is represented by the same counsel, the public defender. This uniformity of either party or counsel assertedly permits the 'institutionalization' of many of the abuses discussed herein, and in particular the abuse known as the '**blanket** challenge.' The practice occurs when as a matter of office policy a district attorney or a public defender instructs his deputies to disqualify a certain disfavored judge in all criminal cases of a particular nature ... or in all criminal cases to which he is assigned. The former policy will prevent the judge from hearing any cases of that type, while the latter policy will force his removal from the criminal bench and his reassignment to a civil department." (*Solberg, supra,* 19 Cal.3d at pp. 201–202, 137 Cal.Rptr. 460, 561 P.2d 1148, fn. omitted.)

***906** *Solberg* flatly rejected the notion that the concerns particular to criminal law made any difference. "[T]his contention is different not in kind but only in degree from the arguments rejected in *Johnson*, and [ ] the difference does not warrant a contrary result." (*Solberg, supra,* 19 Cal.3d at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148.) "[T]he possibility of the filing of '**blanket** challenges' does not distinguish the present criminal proceeding from *Johnson*, and the reasoning of that decision is equally applicable to the current version of the statute, governing both civil and criminal cases." (*Id.* at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Solberg rested its analysis regarding **blanket** challenges on two supports. First, it recalled the "self-limiting aspects of abuse of section 170.6"—i.e., both the technical limits in the statute itself (only one challenge is available to a party and it must be used in a timely fashion) and the offsetting practical concerns of district attorneys (not antagonizing the bench and not delaying the administration of justice and the real possibility the substitute judge who entered the case may be even ****211**

less satisfactory to the lawyer or his client than the judge whom they disqualify). (*Solberg, supra,* 19 Cal.3d at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148.) Second, *Solberg* described its prior analysis of **blanket** challenges in a judicial misconduct opinion (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 116 Cal.Rptr. 260, 526 P.2d 268, overruled on other grounds *in Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799 & fn. 18, 119 Cal.Rptr. 841, 532 P.2d 1209 (*McCartney*)). In *McCartney*, the court was critical of **blanket** challenges but did not indicate that such an abuse "vitiates" section 170.6. (*Solberg, supra,* 19 Cal.3d at p. 203, 137 Cal.Rptr. 460, 561 P.2d 1148.)[5]

In a footnote, *Solberg* specifically addressed the prospect of a **blanket** challenge forcing a court to remove a judge from a criminal assignment. *Solberg* held that even "this radical consequence" is still distinguishable from cases outside the section 170.6 context in which separation of powers violations were found. (*Solberg, supra,* 19 Cal.3d at p. 202, fn. 22, 137 Cal.Rptr. 460, 561 P.2d 1148.) "The effect of [section 170.6] is at most to remove the individual *judge* assigned to ***907** the case or the department, but not to deprive the *court* of the power to hear such cases by assignment of another judge." (*Solberg, supra,* 19 Cal.3d at p. 202, fn. 22, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Nothing in *Solberg* indicates that its analysis was limited to circumstances in which only four challenges were at issue (or that if the *Solberg* appellants had proven that the municipal court judge had been excluded 50 times and that this undermined court operations, such a showing would have been sufficient). Indeed, nothing in *Solberg* leaves room for the consideration of evidence or a different result if the evidence is substantial enough.

Instead, *Solberg* rejected the separation of powers challenge, concluding that abuses committed under the authority of the statute were an "inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6." (*Solberg, supra,* 19 Cal.3d at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148.) *Solberg* also denied a motion to appoint a referee to take evidence concerning abuses of section 170.6; such evidence "is not material to the disposition" of the appeal because the court assumed the abuses it described were true. These abuses did not render the statute "invalid as applied." (*Solberg, supra,* 19 Cal.3d at p. 195, fn. 12, 137 Cal.Rptr. 460, 561 P.2d 1148.) *Solberg* implicitly, if not explicitly, suggests that courts should not conduct evidentiary hearings (or otherwise marshal evidence on their own, as happened ****212** here) to determine the extent of the abuses committed by parties utilizing section 170.6 challenges. Instead, courts should grin and bear this "reasonable—and hence valid—accommodation of the competing interests of bench, bar, and public on the subject of judicial disqualification." (*Solberg, supra,* 19 Cal.3d at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148.) Any adjustments to this balance should be made by the Legislature. (*Ibid.*)

[10]*Solberg* is binding authority. *Solberg* anticipated the circumstances presented here, and its reasoning, as described above, prevents respondent court or this court from entertaining the argument the district attorney's use of peremptory challenges resulted in a separation of powers violation. A writ of mandate must issue compelling respondent court to vacate its order and to assign this case to a different judge.

The Supreme Court Should Revisit Solberg

After considering "experience with the statute [in the preceding] decades and as applied ... in a criminal context" (*Solberg, supra,* 19 Cal.3d at p. 187, 137 Cal.Rptr. 460, 561 P.2d 1148), the *Solberg* court determined the statute did not " 'substantially impair' or 'practically defeat' the exercise of the constitutional jurisdiction of the trial courts." (*Id.* at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148.) But the court acknowledged future adjustments to this sensitive balance of the competing interests of bench, bar, and public on the subject of judicial disqualification may become necessary or desirable. (*Ibid.*)

***908** Circumstances within our justice system have changed dramatically in the nearly four decades since *Solberg* was decided. Public safety and the constitutional rights of the accused remain primary concerns as courts grapple with increased caseloads, a steady stream of statutory changes, and reduced funding. Examples of statutory changes that have had major impacts on court operations include the Safe Neighborhoods and Schools Act of 2014, the California Criminal Realignment Act of 2011, and the Gang Violence and Juvenile Crime Prevention Act of 1998.

Solberg may be "good law," in the sense that it is a binding case that has not been abrogated or reversed, but we question its efficacy in the context of the current reality of the justice system.[6] Broadly speaking, *Solberg* leaves no room to remedy extraordinary abuses like those apparently perpetrated in the instant case. The holding in *Solberg* (i.e., the exercise of a peremptory challenge under § 170.6 never results in a separation of powers violation, regardless of the extent of the abuse) arguably conflicts with the direction of its separation of powers jurisprudence. (See *Steen v. Appellate Division of*

Superior Court (2014) 59 Cal.4th 1045, 1053, 175 Cal.Rptr.3d 760, 331 P.3d 136 [one branch may not "defeat or materially impair the inherent functions of another"]; Carillo and Chou, *California Constitutional Law: Separation of Powers* (2011) 45 U.S.F. L. Rev. 655, 678–681 [California Supreme Court generally approaches separation of powers issues by determining if a core power has been materially impaired].) We ****213** posit that the judiciary's core power " 'to control its order of business' " and safeguard " 'the rights of all suitors' " (*Lorraine v. McComb* (1934) 220 Cal. 753, 756, 32 P.2d 960) can be materially impaired if a **blanket** challenge goes too far.

Case law from another type of constitutional claim shows that the provisions of section 170.6 are not absolute. A section 170.6 challenge made on the basis of the judge's race is subject to an equal protection claim. (See *People v. Superior Court* (*Williams*) (1992) 8 Cal.App.4th 688, 10 Cal.Rptr.2d 873 (*Williams*).)

In *Williams, supra,* 8 Cal.App.4th at page 695, 10 Cal.Rptr.2d 873, a criminal defendant alleged that the prosecutor had exercised a peremptory challenge against the (black male) judge based on group bias against blacks. The *Williams* trial judge denied the section 170.6 challenge. (*Williams, supra,* 8 Cal.App.4th at p. 695, 10 Cal.Rptr.2d 873.) The appellate court issued writ relief requiring the disqualification of ***909** the trial judge because the petitioner complied with the "procedural requisites." (*Id.* at pp. 698–699, 10 Cal.Rptr.2d 873 ["peremptory challenge was thus timely and in proper form, and recusal of [j]udge was mandatory"].) But in doing so, *Williams* expressed the view that "[s]ection 170.6 cannot be employed to disqualify a judge on account of the judge's race. A fortiori, section 170.6 cannot be implemented in such a way as to preclude inquiry into whether the statute has been employed to disqualify a judge on account of race." (*Williams, supra,* 8 Cal.App.4th at p. 707, 10 Cal.Rptr.2d 873.) Section 170.6 challenges based on group bias, a violation of the equal protection clause of the United States Constitution, cannot reasonably be grouped in among the abuses deemed to be mere nuisances in *Solberg, supra,* 19 Cal.3d 182, 137 Cal.Rptr. 460, 561 P.2d 1148. (*Williams, supra,* 8 Cal.App.4th at pp. 706–707, 10 Cal.Rptr.2d 873.) "[A]ny party charging that his adversary has used a section 170.6 challenge in a manner violating equal protection bears the burden of proving purposeful discrimination. [Citation.]" (*Williams, supra,* 8 Cal.App.4th at p. 708, 10 Cal.Rptr.2d 873.) A prima facie showing of purposeful discrimination was not made in *Williams*. (*Id.* at p. 711, 10 Cal.Rptr.2d 873.)

If the procedural approach offered by *Williams*, or something similar, were to be adopted in separation of powers cases, only a prima facie showing of improper **blanket** challenges by a governmental entity would result in the governmental entity being required to justify its use of section 170.6. Respondent court's order reflects that approach to some extent, by offering petitioner the opportunity to present evidence at a hearing in which respondent court would reconsider its denial of the section 170.6 motion. Other states similarly have declined to make peremptory challenge rights absolute when **blanket papering** becomes a threat to judicial independence. (See *State v. City Court of City of Tucson* (1986) 150 Ariz. 99, 722 P.2d 267; *People ex rel. Baricevic v. Wharton* (1990) 136 Ill.2d 423, 144 Ill.Dec. 786, 556 N.E.2d 253; *State v. Erickson* (Minn. 1999) 589 N.W.2d 481.)

In addition to the rigid rule it laid down, we also find fault with the specific analysis of the *Solberg* court pertaining to **blanket** challenges. First, the *Solberg* court was convinced that "the self-limiting aspects of abuse of section 170.6" would come into play before a **blanket** challenge became a dire threat to the operation of courts. (*Solberg, supra,* 19 Cal.3d at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148.) But the experience of this case disproves the Supreme Court's deductive logic. For whatever reason, the district attorney appears to be ****214** unconcerned with blowback from the blizzard of affidavits filed by the People.

Second, the reasoning employed in *Solberg* is offensive to the judiciary. *Solberg* suggests that "unwarranted '**blanket** challenges' ... may well ... antagonize the remaining judges of the court...." (*Solberg, supra,* 19 Cal.3d at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148.) This line of thought implies judges will violate their ethical duties, including the duty to "perform the duties of judicial office impartially." (Cal. ***910** Code Jud. Ethics, canon 3.) It seems absurd to justify absolute deference to a statute presuming the good faith of attorneys in filing section 170.6 motions by assuming judges will react in bad faith to overuse of the statute.

Third, as to **blanket** challenges, *Solberg* can fairly be characterized as double dictum. As explained above in this opinion, the entire 14 pages of separation of powers analysis in *Solberg* is arguably dicta. Within the section of the opinion dealing specifically with **blanket** challenges, *Solberg* placed great stock in the prior analysis of section 170.6 in a *judicial ethics* opinion, *McCartney, supra,* 12 Cal.3d 512, 116 Cal.Rptr. 260, 526 P.2d 268, not an opinion procedurally situated to assess a separation of powers challenge to the use of a **blanket** challenge. (*Solberg, supra,* 19 Cal.3d at p. 202, 137 Cal.Rptr. 460,

561 P.2d 1148 [deeming its discussion of *McCartney* to be the "more important[ ]" of its two lines of argument].) As noted by respondent court in this case, "the broad pronouncement in *McCartney*, on which *Solberg* relied, is, at best, *dictum*."

In sum, we agree with the dissenting view of Justice Tobriner: "the use of '**blanket**' challenges under section 170.6 to disqualify a judge because of his judicial philosophy or his prior rulings on questions of law seriously undermines the principle of judicial independence and distorts the appearance, if not the reality, of judicial impartiality.... [We] do not believe that the judiciary [should be] helpless to prevent such an abuse of the section 170.6 disqualification procedure, particularly in a case—such as the present one—in which the improper basis of the disqualification motion clearly appears on the face of the record." (*Solberg, supra*, 19 Cal.3d at p. 205, 137 Cal.Rptr. 460, 561 P.2d 1148, dis. opn. of Tobriner, J.)

As described by respondent court, the disruption to the operations of that court is not an " 'inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6.' " Years of budget cuts to the California trial courts have taken their toll on all court operations. The chaos that has resulted from the abuse of section 170.6 affidavits is all the more troubling because of the judicial branches current funding reality. Like all trial courts, the Orange County Superior Court struggles to perform its constitutional and statutorily mandated functions. As courts work to keep doors open and to provide timely and meaningful access to justice to the public, the extraordinary abuse of section 170.6 is a barrier to justice and its cost to a court should be reconsidered. Like at least one court before us (*Autoland, Inc. v. Superior Court* (1988) 205 Cal.App.3d 857, 861–862, 252 Cal.Rptr. 662), we call on our Supreme Court to reexamine *Solberg*.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent court (1) to vacate its order denying petitioner's section 170.6 motion and (2) to issue a ***911** new and different order assigning this case to a judge other than Judge Goethals. The order to show cause is discharged.

I CONCUR:

ARONSON, J.

****215** ARONSON, J., Concurring:

As an intermediate appellate court we must follow Supreme Court precedent. This axiom is often misunderstood by the general public, which may assume we are free to decide each case based on our innate sense of what is "right" or what we believe the law should be. In reality, the outcome of many appeals depends on whether an earlier Supreme Court decision covers the matter before us or fairly may be distinguished. Because I conclude the Supreme Court's opinion in *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 137 Cal.Rptr. 460, 561 P.2d 1148 (*Solberg*) resolves the issues raised here, I join Justice O'Leary's lead opinion that *Solberg* compels us to grant the petition by the People of the State of California (petitioner) for a peremptory writ of mandate directing respondent Superior Court of Orange County (respondent court) to vacate its order denying petitioner's disqualification motion under Code of Civil Procedure section 170.6.[7]

Respondent court denied petitioner's section 170.6 motion because it concluded the motion was part of the Orange County District Attorney's (district attorney) coordinated campaign to "**blanket paper**" Judge Thomas Goethals to prevent him from hearing murder trials in retaliation for Judge Goethals's rulings in three earlier murder cases. As described more fully in both the lead and dissenting opinions, Judge Goethals found the district attorney's office repeatedly engaged in misconduct in violation of the defendants' constitutional rights, and in one of the cases he found the misconduct created a conflict of interest requiring the office's recusal. Respondent court found the campaign to prevent Judge Goethals from hearing long cause murder trials substantially interfered with the court's ability to administer criminal justice in Orange County, and thereby violated the separation of powers doctrine.

In *Solberg*, however, the Supreme Court concluded **blanket papering** does not constitute a violation of the separation of powers doctrine even if the widespread misuse of section 170.6 prevents a judge from hearing all or certain types of cases. (*Solberg, supra*, 19 Cal.3d at pp. 201–204, 137 Cal.Rptr. 460, 561 P.2d 1148.) In particular, *Solberg* established the validity of section 170.6 "as applied ... in a criminal context," despite the fact that institutional parties like the district attorney or public defender may engage in **blanket papering**.

(*Solberg*, at p. 187, 137 Cal.Rptr. 460, 561 P.2d 1148.)

***912** Although I reach a different result, I agree with several observations Justice Thompson makes in his dissent. For example, I agree *Solberg* did not inoculate section 170.6 against all conceivable separation of powers challenges, but rather left room for future as applied challenges. The nature of every as applied challenge is that it must be evaluated on its own merits. I also agree substantial evidence supports respondent court's conclusion the district attorney engaged in **blanket papering** of Judge Goethals and did so to retaliate and punish a widely respected and experienced jurist the district attorney previously accepted on a routine basis. Nonetheless, I cannot agree with the dissent's conclusion *Solberg* does not control the outcome here.

The dissent views *Solberg* as dealing only with a facial challenge to section 170.6, but acknowledges "[e]ven if *Solberg* implied section 170.6 was constitutional as applied to the facts of that case, it is only binding precedent with reference to those facts." (Dis. opn. at p. 227, fn. 14.) The ****216** dissent also distinguishes the "character and magnitude" of the **blanket** challenges here from the four challenges lodged in *Solberg*. (Dis. opn. at pp. 229–31.) I read *Solberg* differently. *Solberg* found a quantitative difference in the number of challenges did not violate the separation of powers doctrine, and its broad discussion of **blanket** challenges shows the Supreme Court did not intend to limit the precedential value of its decision to cases involving few challenges. *Solberg* acknowledged **blanket** challenges by the district attorney or public defender might "force" the judge's removal from the criminal bench, presumably because the number of challenges would interfere with the court's operations by diverting more cases to other judges (*Solberg, supra*, 19 Cal.3d at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148), but *Solberg* concluded this posed no separation of powers violation because reassignment did not deprive the court of the power to hear the case (*id*. at p. 202, fn. 22, 137 Cal.Rptr. 460, 561 P.2d 1148). Nor did *Solberg* see **blanket** challenges as a threat to judicial independence, even if "invoked to intimidate judges generally" or used "to influence the outcome of judicial election campaigns." (*Id*. at p. 195, 137 Cal.Rptr. 460, 561 P.2d 1148.)

In sum, Justice Thompson's analysis may have formed the basis for our decision if we were writing on a clean slate. *Solberg*, however, anticipated the circumstances we face in this case and found that **blanket** challenges under section 170.6 did not violate the separation of powers doctrine.[8] As explained in the lead opinion, *Solberg* is binding on this court, and therefore compels us ***913** to grant the petition because respondent court abused its discretion in failing to follow *Solberg*'s dictates. (See *People v. Superior Court (Brim)* (2011) 193 Cal.App.4th 989, 991, 122 Cal.Rptr.3d 625 ["Failure to follow the applicable law is an abuse of discretion"].)

Not only do I agree with Justice O'Leary's conclusion *Solberg* compels us to grant the petition, I also agree with her criticism of *Solberg*'s analysis. I write separately to discuss my further reservations about *Solberg*'s reasoning. Because *Solberg* defined **blanket** challenges as nothing more than " 'bad faith claims of prejudice' " under section 170.6, I question how ****217** *Solberg* nevertheless could conclude **blanket papering** by a district attorney passes constitutional muster. (*Solberg, supra*, 19 Cal.3d at p. 203, 137 Cal.Rptr. 460, 561 P.2d 1148.) Not only is *Solberg* internally inconsistent in ratifying bad faith prejudice claims barred by section 170.6, it also conflicts with the Supreme Court's earlier jurisprudence on the constitutionality of statutes allowing peremptory challenges to individual judges. Based on the district attorney's use of **blanket papering** in this case and similar tactics in other jurisdictions, this may be an opportune time for the Supreme Court to clarify the constitutional analysis in evaluating whether institutionalized **blanket** challenges violate the separation of powers doctrine.

The Predecessor Statute and the Court's Earlier Judicial Disqualification Decisions

California law long has allowed a party to disqualify the judge assigned to hear a case based on an evidentiary showing and independent judicial determination of bias, prejudice, interest, or other disqualifying characteristic. (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 696–697, 329 P.2d 5 (*Johnson*); *Austin v. Lambert* (1938) 11 Cal.2d 73, 75–76, 77 P.2d 849 (*Austin*).) In 1937, however, the California Legislature enacted section 170.5 allowing a party to remove a judge from a case without establishing a disqualifying characteristic or an independent judicial determination. Section 170.5 required the presiding judge to assign a new judge to hear a case when ***914** a litigant simply filed a written "peremptory challenge" to the assigned judge. The statute did not require the litigant to state the ground for his or her challenge or to declare under oath that any disqualifying characteristic existed. (*Austin*, at pp. 74–75, 77 P.2d 849.) As *Austin* noted, "Nothing is said in the new section about bias, prejudice, interest or any other recognized ground for disqualification." (*Id*. at p. 76, 77 P.2d 849.)

In *Austin*, the Supreme Court held section 170.5 unconstitutional as an "unwarranted and unlawful interference with the constitutional and orderly processes of the courts" because it made "the exercise of judicial power, duty and responsibility subject to the whim and caprice of a lawyer or litigant." (*Austin, supra*, 11 Cal.2d at pp. 76, 79, 77 P.2d 849.) Although it acknowledged the Legislature's authority to establish reasonable regulations concerning the disqualification of a judge (*id*. at pp. 75–76, 77 P.2d 849), the Supreme Court nonetheless explained that placing "in the hands of a litigant uncontrolled power to dislodge without reason or for an undisclosed reason, an admittedly qualified judge from the trial of a case in which forsooth the only real objection to him might be that he would be fair and impartial in the trial of the case would be to characterize the statute not as a regulation but as a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department" (*id*. at p. 79, 77 P.2d 849). The court explained this crossed constitutional boundaries because a judge takes an oath to discharge the duties of his office, including the obligation to "determine causes presented to him." (*Id*. at p. 75, 77 P.2d 849.) A judge must discharge that duty absent "good cause." (*Ibid*.)

Austin recognized that several other states had upheld the constitutionality of statutes that allowed a "so-called 'peremptory challenge' " to a judge, but it distinguished those statutes on the ground they uniformly required the party seeking to disqualify the judge to file a declaration under oath asserting the judge was biased or prejudiced against the party, even though many of the statutes did not allow judicial inquiry into the basis for that assertion. (****218** *Austin, supra*, 11 Cal.2d at p. 76, 77 P.2d 849.) As the Supreme Court explained, "Such an *ex parte* proceeding has been upheld on the ground that the charge of bias or prejudice under oath is at least an imputation of such disqualification sufficient to save the statute from successful attack on constitutional grounds." (*Id*. at p. 76, 77 P.2d 849.)

Nearly 20 years later, the California Legislature enacted section 170.6 modeled after the statutes from other states discussed in *Austin*. (*Solberg, supra*, 19 Cal.3d at p. 195, 137 Cal.Rptr. 460, 561 P.2d 1148.) As originally enacted, section 170.6 only applied to civil actions, but otherwise allowed a party to disqualify a judge in the same manner as the current statute—by filing a declaration under oath asserting the " 'party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge.' " (*Johnson, supra*, 50 Cal.2d at p. 701, 329 P.2d 5; see *id*. at pp. 695–696, 329 P.2d 5.)

***915** Just a year after the statute's enactment, the Supreme Court upheld the facial constitutionality of section 170.6, rejecting a claim the statute violated the separation of powers doctrine and impermissibly interfered with core judicial functions by allowing a litigant or attorney to disqualify a judge for prejudice without requiring a statement identifying the reasons the litigant or attorney believed the judge was prejudiced, without proof of prejudice, and without a judicial determination of the judge's prejudice. (*Johnson, supra*, 50 Cal.2d at pp. 695–696, 329 P.2d 5.) *Johnson* explained the Legislature has the authority to establish reasonable regulations concerning judicial disqualification, and bias or prejudice long has been a recognized ground for disqualification. *Johnson* also concluded section 170.6 established a permissible means of disqualifying a judge for prejudice, explaining the Legislature's decision to give litigants an opportunity to disqualify a judge solely based on a sworn statement professing the litigant's belief in the judge's prejudice was necessary to insure confidence in the judiciary and avoid the suspicion that might arise in cases where it may be difficult or impossible for the litigant to establish actual prejudice to the satisfaction of a judicial body. (*Johnson*, at p. 697, 329 P.2d 5.)

Because section 170.6 does not require proof of prejudice, the Supreme Court recognized a litigant may abuse the statute by disqualifying a judge to obtain a perceived litigation benefit, such as a trial continuance while a new judge is assigned or the assignment of a new judge the litigant believes may be more favorable. *Johnson* concluded this potential for abuse did not render the statute unconstitutional because the Legislature determined the statute's benefits outweighed the potential problems caused by these abuses, and the Legislature also included several safeguards in the statute to minimize its abuse, including a requirement the party or its attorney show good faith by declaring under oath that the judge is prejudiced.[9] The Supreme Court found this good faith requirement to be an effective safeguard because the court could not "assume that there will be a wholesale making of false statements under oath." (*Johnson, supra*, 50 Cal.2d at p. 697, 329 P.2d 5.) Later, the Supreme Court explained *Johnson* "relied heavily" on these statutory safeguards in upholding section 170.6's constitutionality. (****219** *McClenny v. Superior Court* (1964) 60 Cal.2d 677, 685–686, 36 Cal.Rptr. 459, 388 P.2d 691.)

One year after *Johnson*, the Legislature amended the statute so that it also would apply to criminal actions. (See *Solberg, supra*, 19 Cal.3d at p. 201, fn. 20, 137 Cal.Rptr. 460, 561 P.2d 1148.)

***916** Solberg*'s Analysis of Section 170.6*

In *Solberg*, the Supreme Court revisited section 170.6's constitutionality, and again affirmed the statute's validity. (*Solberg, supra,* 19 Cal.3d at p. 187, 137 Cal.Rptr. 460, 561 P.2d 1148.) As in *Johnson*, the court concluded section 170.6 did not violate the separation of powers doctrine or impair the judiciary's independence because the statute and the declaration procedure it established was a reasonable exercise of the Legislature's authority to regulate the disqualification of judges. *Solberg* emphasized the declaration under section 170.6 did not establish actual prejudice, nor was actual prejudice required to disqualify a judge under the statute. Rather, section 170.6 merely required the litigant to hold a good faith belief in the judge's prejudice, and the good faith of that belief was established by the litigant declaring the belief under oath. (*Solberg,* at p. 193, 137 Cal.Rptr. 460, 561 P.2d 1148; *id.* at p. 200, 137 Cal.Rptr. 460, 561 P.2d 1148 ["we have repeatedly held that the [section 170.6] motion ... 'requires a *good faith* belief in the judge's prejudice,' " and that good faith is established by declaring that belief under oath because " 'the objective of a verification is to insure good faith in the averments of a party' "].)

Solberg also considered the courts' experience with section 170.6 during the two decades following *Johnson* to determine whether the statute's actual operation rendered it unconstitutional as applied based on various abuses. (*Solberg, supra,* 19 Cal.3d at p. 194, 137 Cal.Rptr. 460, 561 P.2d 1148.) The Supreme Court acknowledged this experience revealed litigants had invoked section 170.6 for a wide variety of reasons *other than* disqualifying a judge they believed was prejudiced, including removing a judge solely based on the judge's views on the law, delaying a hearing or trial, changing venue, obtaining a less experienced judge, intimidating judges, and even influencing judicial election campaigns. The court also acknowledged these abuses impacted the operation of California's trial courts as they rescheduled and reassigned cases to accommodate the parties' right to have a new judge assigned. (*Solberg,* at pp. 194–195, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Nonetheless, *Solberg* concluded the impact of these abuses on the courts did not render section 170.6 unconstitutional as applied for two reasons. First, the Supreme Court was aware of these abuses when it first upheld the statute's constitutionality in *Johnson*, and the experience with section 170.6 in the decades following *Johnson* merely "added quantitatively but not qualitatively to [the court's] understanding of the problem." (*Solberg, supra,* 19 Cal.3d at p. 196, 137 Cal.Rptr. 460, 561 P.2d 1148.) As the court had explained in *Johnson*, the Legislature considered these potential abuses of the statute when it enacted section 170.6 and concluded the statute's benefits outweighed the potential problems these abuses posed to the courts. Second, as *Johnson* also explained, the Legislature included safeguards in section 170.6 to minimize these abuses, including requiring the litigant or attorney to show good faith by declaring under oath ***917** that the judge is prejudiced. (*Solberg,* at pp. 196–197, 137 Cal.Rptr. 460, 561 P.2d 1148.) The Supreme Court again observed it would not " 'assume that there will be wholesale making of false statements under oath.' " ****220** (*Id.* at p. 197, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Of particular relevance to this case, *Solberg* also considered the constitutionality of section 170.6 as applied in a criminal context and an abuse of the statute unique to criminal cases: the " '**blanket** challenge.' " (*Solberg, supra,* 19 Cal.3d at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148.) As defined by *Solberg*, a **blanket** challenge "occurs when as a matter of office policy a district attorney or a public defender instructs his deputies to disqualify a certain disfavored judge in all criminal cases of a particular nature—such as those involving prostitution or illegal narcotics—or in all criminal cases to which he is assigned." (*Ibid.*) Because the district attorney is the counsel for the plaintiff in all criminal cases and the public defender is the counsel for the defendant in many criminal cases, a **blanket** challenge can have a much broader impact than other potential abuses under section 170.6 by preventing a judge from hearing any cases of a certain type or even causing the judge's removal from the criminal bench if the district attorney or public defender challenge the judge in nearly every case. (*Solberg,* at pp. 201–202, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Quoting from an earlier judicial misconduct case involving a judge's intemperate reaction to the public defender's policy challenging the judge in every case, *Solberg* explained a **blanket** challenge lacks the good faith belief in prejudice that section 170.6 requires in each individual case: " 'The "**blanket**" nature of the written directive issued by the public defender arguably contravened this requirement of *good faith* by withdrawing from each deputy the individual decision whether or not to appear before [Judge McCartney]. To phrase it another way, the office policy predetermined that prejudice would be claimed by each deputy without regard to the facts in each case handled by the office, thereby transforming the representations in each affidavit into bad faith claims of prejudice.' " (*Solberg, supra,* 19 Cal.3d at p. 203, 137 Cal.Rptr. 460, 561 P.2d 1148, quoting *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 538, fn. 13, 116

Cal.Rptr. 260, 526 P.2d 268, disapproved on other grounds in *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799, fn. 18, 119 Cal.Rptr. 841, 532 P.2d 1209.)

Although *Solberg* recognized entirely removing a judge from the criminal bench was a "radical consequence" of a **blanket** challenge, the court concluded the impact of a **blanket** challenge "is different not in kind but only in degree" from the abuses considered in *Johnson*, "and that difference does not warrant a contrary result." (*Solberg, supra,* 19 Cal.3d at p. 202 & fn. 22, 137 Cal.Rptr. 460, 561 P.2d 1148.) The Supreme Court condemned **blanket** challenges, but nonetheless concluded that abuse of section 170.6 did not "vitiate [ ] the statute" because " 'the Legislature clearly foresaw that the peremptory challenge procedure would be ***918** open to such abuses but intended that the affidavits be honored notwithstanding misuse. [Citation.]' In short, the possibility of the filing of '**blanket** challenges' does not distinguish the present criminal proceeding from *Johnson*, and the reasoning of that decision is equally applicable to the current version of the statute, governing both civil and criminal cases." (*Solberg,* at pp. 203–204, 137 Cal.Rptr. 460, 561 P.2d 1148fn.omitted.)

Finally, *Solberg* suggested that the potential for misuse of section 170.6 in the criminal context was limited by the nature of the district attorney's and public defender's practice. Because the district attorney's and public defender's entire practice is concentrated before the same criminal judges, they must "realize that ****221** ... if [they or their] deputies file unwarranted '**blanket** challenges' against a particular judge the effect may well be to antagonize the remaining judges of the court, one of whom will be assigned to replace their unseated colleague, and the presiding judge, who will make that assignment."[10] (*Solberg, supra,* 19 Cal.3d at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Solberg*'s Inconsistencies*

Solberg concluded there was no meaningful distinction between the abuses of section 170.6 considered in *Johnson* and the abuse created by institutionalized **blanket** challenges in criminal cases, and therefore *Johnson*'s analysis regarding section 170.6's constitutionality compelled the conclusion the statute also was constitutional as applied to a **blanket** challenge. (*Solberg, supra,* 19 Cal.3d at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148.) The court's earlier analysis in *Johnson* and *Solberg*'s definition of a **blanket** challenge as a bad faith claim of prejudice appear at odds with *Solberg*'s conclusion that **blanket** challenges in criminal cases do not violate the doctrine of separation of powers.

As explained above, *Johnson* and *Solberg* found section 170.6 constitutional because the Legislature may establish reasonable regulations concerning the disqualification of judges, prejudice or bias is a permissible ground for disqualifying a judge, and section 170.6 establishes a reasonable procedure for disqualifying a judge based on prejudice because the statute requires the litigant or attorney to show a good faith belief in the judge's prejudice by stating that belief under oath. (*Solberg, supra,* 19 Cal.3d at pp. 191–193, 137 Cal.Rptr. 460, 561 P.2d 1148.)

In *Austin*, the Supreme Court found the predecessor to section 170.6 unconstitutional because it allowed a party to disqualify a judge without ***919** specifying a recognized basis for disqualification or making a showing of any kind. (*Austin, supra,* 11 Cal.2d at pp. 75–76, 79, 77 P.2d 849.) Providing the Legislature with a roadmap to the elements of a constitutional statute, the *Austin* court explained that peremptory disqualification statutes in other states survived constitutional attack because requiring the party to allege bias or prejudice under oath at least imputed a recognized and well-accepted ground for disqualification. (*Id.* at pp. 76–78, 77 P.2d 849.)

Solberg defined a **blanket** challenge as a bad faith claim of prejudice because the claim is made based on a general policy determination by the district attorney or public defender rather than a good faith belief the judge is prejudiced in any particular case.[11] (****222** *Solberg, supra,* 19 Cal.3d at p. 203, 137 Cal.Rptr. 460, 561 P.2d 1148.) Under that definition, a **blanket** challenge to a judge lacks the good faith belief required by section 170.6 and the statute is unconstitutional as applied to that challenge. (See *School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal.App.4th 1126, 1136–1137, 68 Cal.Rptr.2d 612 [*Solberg*'s analysis suggests showing of bad faith invalidates section 170.6 motion].) Indeed, if a section 170.6 challenge is made in bad faith, then the statute as applied to that challenge is no different than the statute *Austin* found unconstitutional because the statute permits a litigant or attorney to disqualify an otherwise qualified judge for a reason other than the judge's bias, the only statutorily-recognized ground for disqualification. (See *Austin, supra,* 11 Cal.2d at p. 79, 77 P.2d 849; *Autoland, Inc. v. Superior Court* (1988) 205 Cal.App.3d 857, 861–862, 252 Cal.Rptr. 662 [section 170.6 "is nothing more nor less than the old unconstitutional statute recycled with an empty pretension of a sworn statement"].) Nonetheless, current law requires

a court to accept an affidavit of prejudice under section 170.6 even if the attorney lodging the challenge admits to the court the filing is a sham. (See *School Dist. of Okaloosa County*, at pp. 1136–1137, 68 Cal.Rptr.2d 612.)

Moreover, in both *Solberg* and *Johnson*, the Supreme Court rejected the challenges to section 170.6 based on the many forms of abuse other than a **blanket** challenge by stating the court would not assume " 'there will be a ***920** wholesale making of false statements under oath.' "[12] (*Solberg, supra*, 19 Cal.3d at p. 197, 137 Cal.Rptr. 460, 561 P.2d 1148; see *Johnson, supra*, 50 Cal.2d at p. 697, 329 P.2d 5.) But under *Solberg*'s definition of a **blanket** challenge, the wholesale making of false statements under oath occurs by definition.

Conclusion

The statutory scheme under section 170.6 prohibits a trial court from exploring the reasons a party filed a challenge to a particular judge. A court must accept the challenge, even if the court harbors a reasonable suspicion a party misused the procedure for an impermissible reason. (*Solberg, supra*, 19 Cal.3d at p. 198, 137 Cal.Rptr. 460, 561 P.2d 1148.) As *Solberg* explains, sound reasons support the Legislature's decision to prohibit hearings based on suspicion alone. (*Id.* at pp. 198–200, 137 Cal.Rptr. 460, 561 P.2d 1148.) But where substantial evidence, rather than reasonable suspicion, exists showing bad faith **blanket** challenges by the district attorney or public defender, a limited inquiry nonetheless may be warranted. I believe the important issues raised by this case deserve further scrutiny, by the Supreme Court, the Legislature, or both.

THOMPSON, J., Dissenting

I respectfully dissent. The court's decision today transforms ****223** Code of Civil Procedure section 170.6 (section 170.6) into "a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department." (*Austin v. Lambert* (1938) 11 Cal.2d 73, 79, 77 P.2d 849.) " ' "We cannot permit a device intended for spare and protective use to be converted into a weapon of offense and thereby to become an obstruction to efficient judicial administration." [Citation.]' " (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198, 137 Cal.Rptr. 460, 561 P.2d 1148 (*Solberg*).)

Judge King did not abuse his discretion by denying the district attorney's motion to disqualify Judge Goethals under section 170.6. Judge King found their motion ensued from Judge Goethals' misconduct rulings against them. Judge King concluded their motion violated the separation of powers doctrine and undermined the independence of the judiciary. Judge King's factual findings are supported by substantial evidence, his legal conclusion is correct, and his ruling was not arbitrary or capricious.

***921** *Solberg* does not compel a different conclusion. *Solberg* held section 170.6 is constitutional on its face, despite the potential for various types of abuses, including **blanket** challenge abuses. *Solberg* did not hold the statute was constitutional as applied, or that a district attorney's **blanket** challenge abuse of the statute cannot violate the separation of powers doctrine. And in any event, *Solberg* can be fairly distinguished from this case, both legally and factually.

STANDARD OF REVIEW

We review an order denying a section 170.6 peremptory challenge for abuse of discretion. (*Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 523, 108 Cal.Rptr.2d 825.) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712, 76 Cal.Rptr.3d 250, 182 P.3d 579, fns. omitted.)

DISCUSSION

1. Judge King Did Not Abuse His Discretion by Denying the District Attorney's Motion.

Judge King's factual findings are supported by substantial evidence, his legal conclusion is correct, and his application of the law to the facts was not arbitrary or capricious. Accordingly, Judge King did not abuse his discretion by denying the district attorney's motion to disqualify Judge Goethals.

a. Judge King's Factual Findings Are Supported by Substantial Evidence.

Judge King found: (1) the disparity between the district attorney's disqualifications of Judge Goethals before and after February 24, 2014 was not coincidental; and (2) the disparity ensued from Judge Goethals' rulings that prosecutors and police officers had committed misconduct. These factual findings are supported by substantial evidence, as set out below.

The evidence is undisputed.[13] In more than three years before February 24, 2014, ****224** Judge Goethals was assigned 35 murder cases and the district attorney ***922** disqualified him just once under section 170.6. In roughly 18 months after February 24, 2014, Judge Goethals was assigned 58 murder cases and the district attorney disqualified him 55 times under section 170.6.

This dramatic change in the district attorney's disqualifications of Judge Goethals under section 170.6 coincided with his misconduct rulings against them in three other cases. On February 24, 2014, in two "Mexican Mafia" cases, Judge Goethals found a deputy district attorney intentionally failed to comply with his discovery obligations under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, and announced a tentative decision to recuse that deputy district attorney from both cases as a discovery sanction.

Beginning in March 2014 and continuing through March 2015, Judge Goethals conducted a series of extraordinary hearings on defense motions in *People v. Dekraai*, Orange County Superior Court (2012) No. 12ZF0128. The motions alleged several deputy district attorneys and members of law enforcement conspired to commit perjury, suborn perjury, obstruct justice, and intentionally violate the defendant's constitutional rights under *Brady* and *Massiah v. United States* (1964) 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246.

The district attorney conceded the *Massiah* claims and Judge Goethals concluded substantial evidence supported the *Brady* claims. He found two jail deputies either lied or willfully withheld material information. Furthermore, he found the district attorney had an actual conflict of interest which had deprived the defendant of due process. Consequently, Judge Goethals excluded statements the defendant made to the jailhouse informant and recused the district attorney's office in *Dekraai*.

On February 25, 2014—the day after Judge Goethals issued his tentative ruling in the Mexican Mafia cases—the district attorney disqualified him for the first time in a gang murder case. Since then, the district attorney has disqualified him in every gang murder case assigned to him. Likewise, shortly after the *Dekraai* hearings began the district attorney started disqualifying Judge Goethals in nongang murder cases too. The district attorney has since disqualified him in all but three nongang murder cases.

***923** *b. Judge King's Legal Conclusion Is Correct.*

Judge King concluded a district attorney's abuse of section 170.6 can violate the separation of powers and independence of the judiciary clauses of the California Constitution. That is correct, based on basic constitutional principles.

"The California Constitution is 'the supreme law of our state' [citation], subject only to the supremacy of the United States Constitution. (Cal. Const., art. III, § 1.)" (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 250, 73 Cal.Rptr.3d 825.) It is axiomatic that all statutes, including section 170.6, must be applied in a manner which is consistent with the California and United States Constitutions.

The separation of powers clause of the California Constitution divides the powers of the state government into three branches, and dictates that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (****225** Cal. Const., art. III, § 3.) This clause "is violated when the actions of one branch defeat or materially impair the inherent functions of another." (*Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053, 175 Cal.Rptr.3d 760, 331 P.3d 136.)

"The focus in questions of separation of powers is 'the degree to which [the] governmental arrangements comport with, or threaten to undermine, either the *independence and integrity* of one of the branches ... or the ability of each to fulfill its mission in checking the others so as to preserve the *interdependence* without which independence can become domination.' [Citation.]" (*City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 398–399, 231 Cal.Rptr. 686.)

The independence of the judiciary clause (Cal. Const., art. VI, § 1) vests the judicial power of this State in the courts. "One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers and jurisdiction by constitutional provisions,

has been the right to control its order of business and to so conduct the same that the rights of all suitors before them may be safeguarded." (*Lorraine v. McComb* (1934) 220 Cal. 753, 756, 32 P.2d 960.)

Taken together, these basic constitutional principles compel the conclusion that the separation of powers clause prohibits the district attorney (an executive branch agency) from abusing section 170.6 in any manner which materially impairs the inherent powers of the judicial branch. (Cf. *Solberg, supra,* 19 Cal.3d at pp. 191–192, 137 Cal.Rptr. 460, 561 P.2d 1148 [powers of court "can in nowise be ***924** trenched upon, lessened or limited by the legislature"].) This conclusion is consistent with the rule that a district attorney cannot take any action under section 170.6 which violates any provision of the constitution. (Cf. *People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688, 10 Cal.Rptr.2d 873.) It is also consistent with the rule that the authority granted under section 170.6 " 'is not absolute and unlimited.' " (*Id.* at p. 698, 10 Cal.Rptr.2d 873.)

c. Judge King's Ruling Was Not Arbitrary or Capricious.

Judge King denied the district attorney's motion. He explained: "Due to the nature and the extent of this executive action, this Court has determined that the prosecution's consistent filing of section 170.6 motions in murder cases for more than 18 months is a substantial and serious intrusion into the province of the judiciary. It constitutes a threat to the independence of the Orange County judiciary and a violation of the Separation of Powers provision of the California Constitution."

Judge King's ruling applied the law to the facts. It was not arbitrary or capricious. It did not exceed the bounds of reason, all of the circumstances being considered, and it did not result in any miscarriage of justice. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, 86 Cal.Rptr. 65, 468 P.2d 193.) It was not an abuse of discretion.

2. Solberg Held Section 170.6 Is Constitutional on its Face.

In *Solberg*, the court reaffirmed in a criminal context, its earlier decision in *Johnson v. Superior Court* (1958) 50 Cal.2d 693, 329 P.2d 5 (*Johnson*), which held in a civil context, that section 170.6 is constitutional on its face.

Solberg was a consolidated proceeding which considered a petition for writ of mandate and an appeal. The court granted the petition and issued a writ of mandate on grounds not relevant to this proceeding. (****226** *Solberg, supra,* 19 Cal.3d at pp. 189–190, 204, 137 Cal.Rptr. 460, 561 P.2d 1148.) As a result, the appeal became moot, and the court ultimately dismissed it. (*Id.* at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148.) Nevertheless, because the issues raised by the appeal would "doubtless arise on remand," the court addressed them on their merits. (*Id.* at p. 190, 137 Cal.Rptr. 460, 561 P.2d 1148.)

The underlying facts in *Solberg* were undisputed. "[A] criminal complaint charging Tina Peoples with soliciting an act of prostitution ... came before Judge Ollie Marie–Victoire.... Defense counsel filed a motion to dismiss the charge.... At that point Deputy District Attorney Edward Rudloff ... asked to be sworn and made an oral motion to disqualify Judge Marie–Victoire pursuant to ... section 170.6. The judge declined to disqualify herself...." (*Solberg, supra,* 19 Cal.3d at p. 187, 137 Cal.Rptr. 460, 561 P.2d 1148, fn. omitted.)

***925** "On the same day criminal complaints charging Diana Solberg, Constance Black, and Javette Rollins with soliciting an act of prostitution also came before Judge Marie–Victoire. In each, defense counsel moved to dismiss; the judge set the matter for hearing in her own department ...; Rudloff summarily renewed his motion to disqualify; and the judge summarily denied it." (*Solberg, supra,* 19 Cal.3d at p. 187, 137 Cal.Rptr. 460, 561 P.2d 1148.)

"On the following day ... Rudloff filed a formal written motion under section 170.6 to disqualify Judge Marie–Victoire from hearing the foregoing four pending matters. The motion was supported by his declaration under penalty of perjury substantially in the form prescribed by the statute. Judge Marie–Victoire denied the written motion on the same ground as she had rejected the oral motions." (*Solberg, supra,* 19 Cal.3d at p. 188, 137 Cal.Rptr. 460, 561 P.2d 1148, fn. omitted.)

On appeal the appellants "principally contend[ed] that section 170.6 is unconstitutional because it violates the doctrine of separation of powers (Cal. Const., art. III, § 3) and impairs the independence of the judiciary (*Id.*, art. VI, § 1)." (*Solberg, supra,* 19 Cal.3d at pp. 190–191, 137 Cal.Rptr. 460, 561 P.2d 1148.) The *Solberg* court responded: "In [*Johnson*], we rejected these identical arguments in sustaining the constitutionality of the statute. We have reviewed the decision in the light of the points raised in the present appeal, and we are convinced the opinion of Chief Justice Gibson therein, properly understood, remains sound law. For the guidance of bench and bar, however, we undertake to restate his reasoning

and relate it to the concerns now urged upon us." (*Id*. at p. 191, 137 Cal.Rptr. 460, 561 P.2d 1148 fn.omitted.)

A lengthy discussion followed. At the outset, the *Solberg* court reiterated the basic principle of government underlying the decision in *Johnson*: "To put the matter affirmatively and more simply, the Legislature may regulate the exercise of the jurisdiction of the courts by all reasonable means." (*Solberg, supra,* 19 Cal.3d at p. 192, 137 Cal.Rptr. 460, 561 P.2d 1148.) It then observed, "Applying the foregoing principle in *Johnson*, we held that the disqualification of trial judges is an aspect of the judicial system which is subject to reasonable legislative regulation...." (*Ibid*.)

Next the *Solberg* court addressed the contention "that the experience of the courts with the actual operation of the statute during the past two decades reveals such widespread and persistent abuses thereof as to warrant reconsideration of the question and a holding that section 170.6 is now unconstitutional as applied." (*Solberg, supra,* 19 Cal.3d at p. 194, 137 Cal.Rptr. 460, 561 P.2d 1148.) The court ****227** described two principal categories of abuse. "First, section 170.6 has assertedly been invoked for the purpose of 'judge-shopping,' i.e., of removing the assigned judge from the case on grounds other than a belief that he is personally prejudiced within the meaning of the statute." (*Ibid*.) "Second, section 170.6 is said to have been invoked for a variety of purely tactical advantages." (*Id*. at p 195, 137 Cal.Rptr. 460, 561 P.2d 1148.)

***926** *Solberg* then declared: "We need not lengthen this recital by recounting further examples of asserted abuse of section 170.6.... For present purposes we assume the charges are true. We do not condone such practices, nor do we underestimate their effect on the operation of our trial courts. Nevertheless for a number of reasons we are not persuaded that we should reconsider *Johnson* on this ground and hold the statute invalid as applied." (*Solberg, supra,* 19 Cal.3d at p. 195, 137 Cal.Rptr. 460, 561 P.2d 1148.) The court explained "it is inaccurate to assert that we did not know of these abuses when we decided *Johnson*." (*Ibid*.) "Although we did not pause to catalog the various misuses of the statute, the practices now complained of were clearly within the contemplation of the court. The experience of the ensuing years has added quantitatively but not qualitatively to our understanding of the problem." (*Id*. at p. 196, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Solberg held: "[T]o the extent that abuses persist in the utilization of section 170.6 they do not, in our judgment, 'substantially impair' or 'practically defeat' the exercise of the constitutional jurisdiction of the trial courts. Rather, it may be helpful to view them as a relatively inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6. The statute thus remains a reasonable—and hence valid—accommodation of the competing interests of bench, bar, and public on the subject of judicial disqualification." (*Solberg, supra,* 19 Cal.3d at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148.)

3. Solberg Did Not Hold Section 170.6 Was Constitutional as Applied.

Solberg did not hold section 170.6 was constitutional as applied to the facts in that case. It is true the court used the words "as applied" three times. Yet a careful review reveals those words were not used in the sense they are relevant here.[14]

First *Solberg* stated: "In these consolidated proceedings we are called upon to reconsider [*Johnson*] in light of the experience with the statute during the intervening two decades and *as applied* here in a criminal context." (*Solberg, supra,* 19 Cal.3d at p. 187, 137 Cal.Rptr. 460, 561 P.2d 1148, italics added.) In this instance, the words "as applied" related to the fact that after *Johnson*, section 170.6 was amended to apply to both criminal and civil cases.

Later *Solberg* said: "It is earnestly contended, however, that *Johnson* is distinguishable [and] ... that the experience of the courts with the actual operation of the statute during the past two decades reveals such widespread and persistent abuses thereof as to warrant reconsideration of [*Johnson*] and a ***927** holding that section 170.6 is now unconstitutional *as applied*." (*Solberg, supra,* 19 Cal.3d at p. 194, 137 Cal.Rptr. 460, 561 P.2d 1148, italics added.) Here the court was merely summarizing a contention.

****228** Then *Solberg* rejected that contention. Specifically, the court held: "We do not condone such practices, nor do we underestimate their effect on the operation of our trial courts. Nevertheless for a number of reasons we are not persuaded that we should reconsider *Johnson* on this ground and hold the statute invalid *as applied*." (*Solberg, supra,* 19 Cal.3d at p. 195, 137 Cal.Rptr. 460, 561 P.2d 1148, fn. omitted, italics added.)

Thus, the court in *Solberg* used the words "as applied" only in reference to events and experiences which occurred after *Johnson*, and only in the process of reconsidering the holding of *Johnson*—that section 170.6

is constitutional on its face—and concluding it "should be reaffirmed." (*Solberg, supra*, 19 Cal.3d at p. 187, 137 Cal.Rptr. 460, 561 P.2d 1148.)

*4. Solberg Did Not Hold **Blanket** Challenges Cannot Violate the Separation of Powers.*

Solberg did not hold a district attorney's **blanket** challenge abuse of section 170.6 cannot violate the separation of powers doctrine (as between the executive branch and the judicial branch) and undermine the independence of the judiciary to such an extent that the statute is unconstitutional as applied. Nor could this ever be true. Again all statutes, including section 170.6, must be applied in a manner which is constitutional. So I do not agree with the conclusion that *Solberg* controls the outcome here.

Solberg only discussed **blanket** challenge abuses in rejecting the claim, "that *Johnson* is distinguishable because it ruled on the constitutionality of section 170.6 only in a civil setting, and that in a criminal context the statute should be declared invalid primarily because of an asserted difference in the nature of the parties and their counsel." (*Solberg, supra*, 19 Cal.3d at p. 201, 137 Cal.Rptr. 460, 561 P.2d 1148.) To understand this aspect of *Solberg*, we must look at the case it mainly relied upon, *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 116 Cal.Rptr. 260, 526 P.2d 268, disapproved on other grounds in *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 799, footnote 18, 119 Cal.Rptr. 841, 532 P.2d 1209 (*McCartney*).

McCartney considered a recommendation that a judge be removed, rather than censured, for various acts of misconduct. "One of those acts was to engage in angry and excited dialogues with deputy public defenders who filed affidavits of prejudice against him under section 170.6. [Citation.] Among the judge's proffered defenses was a claim that the affidavits were filed pursuant ***928** to a policy of the public defender's office to prevent him from presiding over criminal trials." (*Solberg, supra*, 19 Cal.3d at p. 203, 137 Cal.Rptr. 460, 561 P.2d 1148.)

McCartney said: "We find this 'defense' to be a slim reed.... [¶] [D]isrespect on the part of the public defender cannot serve to justify petitioner's injudicious response. As previously indicated, the Legislature clearly foresaw that the peremptory challenge procedure would be open to such abuses but intended that the affidavits be honored notwithstanding misuse. [Citations.]" (*McCartney, supra*, 12 Cal.3d at pp. 537–538, 116 Cal.Rptr. 260, 526 P.2d 268, citing, inter alia, *Johnson, supra*, 50 Cal.2d at p. 697, 329 P.2d 5.)

At this point, *McCartney* recited in a footnote: "The **blanket** nature of these filings, however, in itself reflects a measure of impropriety. As the objective of a verification is to insure good faith in the averments of a party [citation], the provision in ... section 170.6 for the showing of prejudice by affidavit requires a *good faith* belief in the judge's prejudice on the part ****229** of the individual party or counsel filing the affidavit in *each* particular case. [Citations.] The '**blanket**' nature of the written directive issued by the public defender arguably contravened this requirement of *good faith*...." (*McCartney, supra*, 12 Cal.3d at p. 538, fn. 13, 116 Cal.Rptr. 260, 526 P.2d 268.)

This footnote in *McCartney* became a subject of disagreement in *Solberg*. (Compare *Solberg, supra*, 19 Cal.3d at pp. 203–204, 137 Cal.Rptr. 460, 561 P.2d 1148 (maj. opn. of Mosk, J.), with *id*. at pp. 206–207, 137 Cal.Rptr. 460, 561 P.2d 1148 (conc. & dis. opn. of Tobriner, J.).) Regardless of what one thinks about that disagreement in *Solberg*, the constitutionality of **blanket** challenges was not an issue in *McCartney*, so at most the *McCartney* court's statements about them are persuasive dicta not binding rulings. (See *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169, 78 Cal.Rptr.2d 819.) Further, to the extent that *McCartney* said anything about the constitutionality of section 170.6, it merely reiterated the holding of *Johnson*—the statute, as enacted by the Legislature, is constitutional on its face, despite the potential for this type of abuse.

With these thoughts in mind, consider what *Solberg* actually said: "The argument is that in all criminal actions the plaintiff and its attorney remain the same.... This uniformity ... permits the 'institutionalization' of many of the abuses discussed herein, and in particular the abuse known as the '**blanket** challenge.' " (*Solberg, supra*, 19 Cal.3d at pp. 201–202, 137 Cal.Rptr. 460, 561 P.2d 1148, fns. omitted.) The court continued, "Upon close analysis we conclude this contention is different not in kind but only in degree from the arguments rejected in *Johnson*, and that the difference does not warrant a contrary result. To begin with, we do not believe the self-limiting aspects of abuse of section 170.6 discussed hereinabove are inoperative in the criminal context." (*Id*. at p. 202, 137 Cal.Rptr. 460, 561 P.2d 1148.) "More importantly, the issue of '**blanket** challenges' is not new to this court." (*Ibid*.)

***929** Then *Solberg* commented on the **blanket** challenge discussion in *McCartney*. "We acknowledged [citation]

that "the entire policy itself may have been an affront to the court's dignity if it stemmed from public defenders' dissatisfaction with [Judge McCartney's] "hard line" performance as a district attorney rather than a good faith belief in prejudice." (Italics deleted.) [¶] ... We felt compelled, nevertheless, to speak to the "**blanket**" nature of these filings." (*Solberg, supra,* 19 Cal.3d at p. 203, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Solberg concluded, "There is thus no doubt that in *McCartney* we strongly disapproved of the practice of '**blanket** challenges,' and we reaffirm that position herein. But it is also manifest from *McCartney* that we do not believe the practice vitiates the statute.... In short, the possibility of the filing of '**blanket** challenges' does not distinguish the present criminal proceeding from *Johnson*, and the reasoning of that decision is equally applicable to the current version of the statute, governing both civil and criminal cases. [Citation.]" (*Solberg, supra,* 19 Cal.3d at pp. 203–204, 137 Cal.Rptr. 460, 561 P.2d 1148.)

I see nothing in this discussion of **blanket** challenges which supports the lead opinion conclusion that *Solberg* "prevents respondent court or this court from entertaining the argument that the district attorney's use of peremptory challenges resulted in a separation of powers violation." That the practice does not vitiate the statute on its face does not mean it cannot result in a separation of powers violation as applied.

****230** *5. Solberg Can Be Fairly Distinguished From this Case, Both Legally and Factually.*

Unlike my colleagues, I believe *Solberg* can be "fairly distinguished" (*Trope v. Katz* (1995) 11 Cal.4th 274, 287, 45 Cal.Rptr.2d 241, 902 P.2d 259) from this case, both legally and factually. The analysis and comparison below reveals the separation of powers issues are different, and the character and magnitude of the **blanket** challenge abuses are different. These legal and factual differences warrant a different result, because the ratio decidendi of *Solberg* simply does not encompass the legal issue or the facts presented in this case. As a result, *Solberg* has little or no force as controlling precedent here. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 509, p. 572.)

a. The Separation of Powers Issues Are Different.

Solberg concerned the separation of powers between the legislative branch and the judicial branch. The question was: Did the Legislature violate the separation of powers doctrine when it enacted section 170.6 to regulate the judiciary? On this question *Solberg* reaffirmed the holding of *Johnson* that ***930** the statute, as enacted by the Legislature, did not violate the separation of powers doctrine, despite the potential for various types of abuses, including **blanket** challenges. (*Solberg, supra,* 19 Cal.3d at pp. 186–187, 137 Cal.Rptr. 460, 561 P.2d 1148.)

This case concerns the separation of powers between the executive branch and the judicial branch. The question is: Did the district attorney violate the separation of powers clause when it used section 170.6 to retaliate against a judge? *Solberg* did not consider this question. Again it only considered similar abuses in deciding they do not "vitiate[ ] the statute" as enacted by the Legislature. (*Solberg, supra,* 19 Cal.3d at p. 203, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Hence, I cannot agree with the lead opinion conclusion that: "In sum and on balance, we are bound by *Solberg* in our examination of the separation of powers issue presented." While the constitutional provisions at issue here and in *Solberg* are the same (Cal. Const., art. III, § 3, art. VI, § 1), the separation of powers questions are not.

*b. The Character of the **Blanket** Challenge Abuses Are Different.*

In *Solberg*, "the People's motions to disqualify Judge Marie–Victoire in the criminal actions were '**blanket** challenges' motivated by prosecutorial discontent with her prior rulings of law." (*Solberg, supra,* 19 Cal.3d at p. 188, 137 Cal.Rptr. 460, 561 P.2d 1148.) They disagreed with her "views on the legal issue relating to the discriminatory enforcement of prostitution laws." (*Id.* at p. 206, 137 Cal.Rptr. 460, 561 P.2d 1148.)

Here Judge King found the district attorney's motions to disqualify Judge Goethals were motivated by their discontent with his misconduct rulings against them. They were based on the fact he called them out on their misconduct, and they had "the appearance of attempting to intimidate, punish, and/or silence Judge Goethals, and to send a warning to the other local judges that similar rulings will produce a similar fate."

In short, the district attorney's disqualification motions were not "premised on the fact that 'the People don't feel that [they] can get a fair trial *in cases of these kinds* in [Judge Goethals'] court.' " (*Solberg, supra,* 19 Cal.3d at p. 206, 137 Cal.Rptr. 460, 561 P.2d 1148.) This is important because, as the court said in *Solberg*, "section

170.6 ****231** explicitly recognizes such belief as a sufficient ground for disqualification....” (*Id.* at p. 193, 137 Cal.Rptr. 460, 561 P.2d 1148.) It does not recognize the desire to intimidate, punish or silence as a sufficient ground for disqualification.

*c. The Magnitude of the **Blanket** Challenge Abuses Are Different.*

In *Solberg* the district attorney disqualified Judge Marie–Victoire in four prostitution cases. Here the district attorney disqualified Judge Goethals in 55 ***931** murder cases. This is noteworthy because while the small number of disqualifications in *Solberg* can be viewed “as a relatively inconsequential price to be paid for the efficient and discreet procedure provided in section 170.6” (*Solberg, supra,* 19 Cal.3d at p. 204, 137 Cal.Rptr. 460, 561 P.2d 1148), the same cannot be said of the comparatively large number of disqualifications here.

CONCLUSION

The district attorney’s systematic abuse of section 170.6 undermined the principle of judicial independence and violated the separation of powers doctrine. We are not powerless to stop it. The petition should be denied.

All Citations

1 Cal.App.5th 892, 205 Cal.Rptr.3d 200, 16 Cal. Daily Op. Serv. 7929, 2016 Daily Journal D.A.R. 7511

Footnotes

1 All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

2 In two other cases, Judge Goethals found *Brady* violations and disqualified one specific deputy district attorney by rulings announced in February and March 2014.

3 “Some courts may be more inclined to grant a statutory writ without requiring a factual showing of ‘inadequate legal remedy’ and ‘irreparable harm’ [citation] ... on the theory the Legislature has in effect determined these questions in the petitioner’s favor by authorizing the writ relief. But this approach is not uniformly adopted. Other courts require the petitioner to affirmatively establish these two prerequisites in all cases, notwithstanding statutory authority for the writ.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 15:87, p. 15–46.) Published cases holding that courts have wrongly denied section 170.6 motions do not include an explicit analysis of whether the petitioners in those cases would be irreparably harmed by a failure to provide relief. (See, e.g., *Manuel C. v. Superior Court* (2010) 181 Cal.App.4th 382, 104 Cal.Rptr.3d 787; *First Federal Bank of California v. Superior Court* (2006) 143 Cal.App.4th 310, 49 Cal.Rptr.3d 296; *Pandazos v. Superior Court* (1997) 60 Cal.App.4th 324, 70 Cal.Rptr.2d 669.) This suggests that irreparable harm is either presumed or considered to be unnecessary in section 170.6 writ petitions.

4 A contrary argument made by the district attorney at oral argument is that the remainder of the opinion was necessary to the court’s decision to issue the writ commanding the superior court judge to recuse himself. Before indicating a writ would issue, the court stated: “No question is raised as to either the timeliness or the formal sufficiency of the affidavit of disqualification filed by the real parties in interest; and as hereinafter appears, we have concluded that the statute is constitutional.” (*Solberg, supra*, 19 Cal.3d at p. 190, 137 Cal.Rptr. 460, 561 P.2d 1148, italics added.) But nothing in the *Solberg* opinion suggests that the constitutionality of section 170.6 was before it in the writ proceeding. And the court’s explanation of why it decided to address the merits of the appeal—because “the issues presented ... will doubtless arise on remand” (*ibid*.) was unnecessary if the constitutional analysis was necessary to the decision on the writ.

5 *McCartney* observed in a footnote: “The **blanket** nature of these filings ... in itself reflects a measure of impropriety. As the objective of a verification is to insure good faith in the averments of a party [citation], the provision in ... section 170.6 for the showing of prejudice by affidavit requires a *good faith* belief in the judge’s prejudice on the part of the individual party or counsel filing the affidavit in *each* particular case. [Citations.] The ‘**blanket**’ nature of the written directive issued by the public defender arguably contravened this requirement of *good faith* by withdrawing from each deputy the individual decision whether or not to appear before [a particular judge]. To phrase it another way, the office policy predetermined that prejudice would be claimed by each deputy without regard to the facts in each case handled by the office, thereby transforming the representations in each affidavit into bad faith claims of prejudice.” (*McCartney, supra,* 12 Cal.3d at p. 538, fn. 13, 116 Cal.Rptr. 260, 526 P.2d 268.) But in the text of the opinion, *McCartney*

observed, "the Legislature clearly foresaw that the peremptory challenge procedure would be open to such abuses but intended that the affidavits be honored notwithstanding misuse." (*Id*. at p. 538, 116 Cal.Rptr. 260, 526 P.2d 268.)

6 We confine our analysis in this section to the question of whether *Solberg* overreached in its separation of powers analysis with regard to the specific problem of **blanket** challenges in criminal law cases. We do not take issue with the facial constitutionality of section 170.6 or the desirability in general of section 170.6 as a matter of policy. (Cf. Burg, *Meeting the Challenge: Rethinking Judicial Disqualification* (1981), 69 Cal. L. Rev. 1445 [advancing thesis that peremptory challenges are an undesirable solution to problems of judicial disqualification].)

7 All statutory references are to the Code of Civil Procedure.

8 The dissent and respondent court distinguish *Solberg* on the ground it involved a separation of powers conflict between the legislative and judicial branches of government, but the district attorney's **blanket** use of section 170.6 in this case involves a conflict between the executive and judicial branches. I disagree.

> Respondent court does not challenge the district attorney's use or exercise of any executive power. Rather, the power or right at issue is one the Legislature created and delegated not only to the district attorney, but also to all litigants and attorneys in any civil or criminal action. Absent section 170.6, the district attorney has no inherent executive right or power to disqualify a judge based solely on a suspicion the judge would be biased. It is the express terms of the statute that create the potential for undermining court functions.
>
> Respondent court concluded the unconstitutional interference with its powers arose from the scope and basis for the district attorney's challenges, not from the fact that it was the district attorney making the challenges. Although the public defender is not a member of the executive branch, it too potentially could interfere with the court's powers in the same manner by lodging **blanket** challenges to a particular judge. Indeed, even a single law firm specializing in an area of civil law potentially could interfere with the court's powers by exercising a **blanket** challenge to the only judge hearing cases involving that area of the law.
>
> The separation of powers conflict at issue therefore arises between the legislative and judicial branches. Nonetheless, regardless how one views the separation of powers conflict, *Solberg* anticipated the circumstances presented in the present case and found **blanket** challenges by a district attorney would not create a separation of powers violation.

9 Other safeguards in section 170.6 include limiting each side in a case to one challenge, placing strict time limits on when to assert a challenge, limiting continuances based upon a request to disqualify a judge, and requiring prompt assignment of a new judge. (*Johnson, supra,* 50 Cal.2d at p. 697, 329 P.2d 5.)

10 I share Justice O'Leary's concern about the court's conclusion that wholesale misuse of section 170.6 would not occur because of the threat judges would retaliate against any attorney or office that misuses the statute. The constitutionality of a statute designed to minimize even the appearance of bias or prejudice cannot turn on the willingness of judges to violate their ethical duty to act impartially.

11 The Supreme Court's imputation of bad faith to **blanket** challenges may be over inclusive because under certain circumstances a **blanket** challenge to a judge could be brought in good faith if the district attorney or public defender reasonably believes the challenged judge is prejudiced against the entire office. That is not the case here, however. As explained above, substantial evidence supports respondent court's finding that the district attorney asserted its **blanket** challenge to Judge Goethals in retaliation for his legal conclusion in earlier cases that the district attorney engaged in misconduct or prosecutorial error under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 and *Massiah v. United States* (1964) 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246. Before those rulings, the district attorney routinely accepted Judge Goethals without question.

12 *Solberg* and *Johnson* also rejected the argument that the various abuses of section 170.6 unconstitutionally disrupted court operations, explaining the Legislature considered the abuses and associated problems in enacting the statute and concluded the statute's benefits outweighed those problems. (*Solberg, supra,* 19 Cal.3d at pp. 196, 203–204, 137 Cal.Rptr. 460, 561 P.2d 1148; *Johnson, supra,* 50 Cal.2d at p. 697, 329 P.2d 5.) Whether the Legislature considered these abuses and problems, however, should not be the governing standard for evaluating a separation of powers challenge. Rather, as *Solberg* recognizes, the appropriate inquiry is whether the statute on its face or in its application substantially impairs the constitutional powers of the courts or practically defeats their exercise. (*Solberg*, at p. 192, 137 Cal.Rptr. 460, 561 P.2d 1148.)

13 The evidence consists of facts in the case files and other records of respondent court, or facts that are not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Judge King properly took judicial notice of these facts. (Evid. Code, § 452, subds. (d) & (h);

People v. Thomas (1972) 8 Cal.3d 518, 520, fn. 2, 105 Cal.Rptr. 366, 503 P.2d 1374.)

14 Even if Solberg implied section 170.6 was constitutional as applied to the facts of that case, it is only binding precedent with reference to those facts. (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61, 67 Cal.Rptr.2d 868.)

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Lawmakers move to toughen sex assault penalties

Former Stanford student Brock Turner received six-month sentence for sexual assault

Bills would increase penalties for assaulting unconscious victims, redefine rape

Measures pass with bipartisan support

BY JEREMY B. WHITE
jwhite@sacbee.com

With the support of liberal Democrats who tend to oppose tougher crime laws, a California Senate panel moved Tuesday to fortify California's sexual assault penalties in response to the nationally watched case of a former Stanford swimmer who received a sentence widely criticized as too lenient.

After being convicted of sexually assaulting an unconscious woman, Brock Turner received a lighter sentence than what prosecutors sought. The outcome has fomented national outrage and fueled efforts to unseat the judge who said Turner merited the lesser penalty.

The political fallout continued to unfold Tuesday as the Senate Public Safety Committee advanced bills intended to subject future perpetrators in cases like Turner's to tougher penalties. One would mandate prison sentences for sexual assaults of unconscious victims. The other seeks to expand the definition of rape to include all types of penetration. Both bills must survive floor votes in both houses before going to Gov. Jerry Brown.

Among those supporting the bill cracking down on crimes involving unconscious victims were Santa Clara County prosecutors, including the deputy district attorney who prosecuted the Turner case.

"We all need to try to protect the next Emily Doe against the next Brock Turner," prosecutor Alaleh Kianerci testified. "It's on us."

Echoing that theme of preventing future campus assaults, Santa Clara County District Attorney Jeff Rosen argued that the bill would "hold accountable sexual offenders who go unnoticed within our state's college campuses."

"They don't fit some people's image of a predator," Rosen said. "Instead of brandishing knives or threats, these predators use vodka or beer. They use the cover of an outdated, offensive perception that campus sexual assaults are simply youthful, drunken indiscretions."

For years, California has sought to reduce a prison population swollen in part by tougher sentencing laws approved in the 1980s and 1990s. Opponents of Assembly Bill 2888, including the American Civil Liberties Union, warned of repeating that history, with ACLU lobbyist Mica Doctoroff warning that "hasty policy-making" in response to specific outrage-generating cases has had "unintended consequences."

"Mandatory minimum sentencing is poor policy that disproportionately impacts communities of color," Doctoroff said.

Yet even liberal lawmakers typically skeptical of increasing criminal penalties voted for AB 2888. Sen. Mark Leno, D-San Francisco, who for years pushed to do away with mandatory felony sentences for drug crimes, noted that current law imposes harsher penalties for sexual assaults that entail use of force.

"What's the more despicable crime? The sexual assault or the sexual predatory assault?" Leno said. "In the latter, the victim is the weakest, the most (defenseless), the most vulnerable. Isn't that the more serious crime?"

The bill expanding the definition of rape, Assembly Bill 701, came from two lawmakers who have championed efforts to oust Judge Aaron Persky, who presided over Turner's case. Noting that Turner digitally penetrated his victim, they argued California law fails to punish assailants for the full spectrum of sexual violence.

"Rape is rape," said Assemblywoman Cristina Garcia, D-Bell Gardens.

D. ROSS CAMERON The Associated Press

Protesters demonstrate against a sex assault sentence during Stanford University's graduation.

Jeremy B. White: 916-326-5543, @CapitolAlert

CALIFORNIA AUGUST 22, 2016 7:26 PM

Stanford sex assault judge bows out from upcoming sex case

HIGHLIGHTS

A California judge under fire for a light sentence given to a Stanford University swimmer has recused himself from making his first key decision in another sex crimes case.

The Associated Press

PALO ALTO, CALIF. — A California judge under fire for a light sentence given to a Stanford University swimmer has recused himself from making his first key decision in another sex crimes case.

Santa Clara County Judge Aaron Persky filed a statement with the court saying that some people might doubt his impartiality, The Mercury News reported Monday (http://bayareane.ws/2c0GQtu).

The judge is the target of a recall campaign that started in June after he sentenced former Stanford swimmer Brock Turner, 20, to six months in jail for sexually assaulting an intoxicated woman who passed out behind a trash bin after a fraternity party.

Persky was scheduled this week to consider a request from Robert Chain to reduce his conviction for possessing child pornography from a felony to a misdemeanor. The judge said last year he would be receptive to the idea if the plumber stayed sober.

"While on vacation earlier this month, my family and I were exposed to publicity surrounding this case," the judge wrote in his brief ruling. "This publicity has resulted in a personal family situation such that 'a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.' "

The newspaper reports that Michele Dauber, a Stanford law professor who is leading the recall, said she is pleased by Persky's recusal. Gary Goodman, a deputy public defender who opposes a recall, said the recusal is a prime example of Persky's integrity.

Persky followed a recommendation by the county probation department to sentence Turner, the former Stanford swimmer, to six months in prison despite prosecutors seeking six years. Turner could have faced up to 14 years in prison.

The 23-year-old victim read an impassioned statement at the sentencing hearing. She described the assault in graphic detail and said her "independence, natural joy, gentleness, and steady lifestyle I had been enjoying became distorted beyond recognition."

MORE CALIFORNIA

Before the
Attorney Grievance Commission of Maryland
Office of Bar Counsel
200 Harry S. Truman Parkway, Suite 300
Annapolis, Maryland 21401

In the Matter of	)
	)
Baltimore State's Attorney Marilyn Mosby	)
and Others*	)
	)
Regarding the Investigation and Prosecution	)
of Six (6) Baltimore Police Officers For the	)
Death of Freddie Gray	)

B. It Is Respectfully Suggested That Baltimore State's Attorney Marilyn Mosby Violated the Maryland Lawyer's RPC 3.6(b) and RPC 3.8(e) Which Limit Public Statements Which Prosecutors May Permissibly Make in Connection with Criminal Proceedings

RPC 3.6 - Trial Publicity - provides that "(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state: [long list including offenses, public record information, scheduling, warnings, information about accused, etc.]

As shown in the transcript of her remarks [**APPENDIX III - MOSBY STATEMENT**], Respondent, in addition to a lengthy statement of what she called "The statement of probable cause," also said: "To the people of Baltimore and the **demonstrators across America: I heard your call for 'No**

As shown in the transcript of her remarks [**APPENDIX III - MOSBY STATEMENT**], Respondent, in addition to a lengthy statement of what she called "The statement of probable cause," also said: "To the people of Baltimore and the **demonstrators across America**: **I heard your call for 'No justice, no peace.'** Your peace is sincerely needed as I work to deliver justice on behalf of this young man."

"To those that are angry, hurt or have their own experiences of injustice at the hands of police officers I urge you to channel that energy peacefully as we prosecute this case **I have heard your calls for 'No justice, no peace,'** however your peace is sincerely needed as I work to deliver justice on behalf of Freddie Gray. . . ."

"Last but certainly not least, to the youth of the city. **I will seek justice on your behalf.** This is a moment. **This is your moment.** Let's insure we have peaceful and productive rallies that will develop structural and systemic changes for generations to come. You're at the forefront of this cause and **as young people, our time is now**." [emphasis added]

First, the statements above, made by Respondent, clearly go far beyond that permitted by Maryland Lawyer's **RPC 3.6(b)** and **RPC 3.8(e)**. Thus they create a prima facie case of violation warranting appropriate discipline. At the very least, Respondent must be asked to clearly and precisely explain why, in her opinion, her statements do not constitute a violation, especially since they do not appear to fall within any established exception.

For example **RPC 3.8(c)**, which provides that "Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to

For example **RPC 3.8(c)**, which provides that "Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity" does not seem to be applicable here.

Second, to many her statement appears to establish that a major reason for issuing the charges was not necessarily because there was probable cause to do so, and/or that there was sufficient evidence to support convictions, but rather the prevent further mob violence.[1] While seeking to deter mob violence is a laudable goal, it should not be the major role of a prosecutor, and a prosecutor should never issue an indictment merely to satiate a mob's desire for revenge.

Yet in saying "I heard your call for 'No justice, no peace'," and "as we prosecute this case I have heard your calls for 'No justice, no peace'," she - by repeating the very words and demands the mob made - is clearly signaling to them her hope that the indictments will bring the peace she desires, not only in Baltimore, but also perhaps elsewhere ["To . . . the demonstrators across America"].

E. It is Respectfully Suggested That Baltimore State's Attorney Marilyn Mosby's Conduct is, Judged in its Totality, and in Light of All of the Above, Inconsistent with the Conduct Required of an Attorney, and Especially of Public Prosecutor, under Various Ethical Standards Including RPC 8.4(c) ["Engage in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation"] and RPC 8.4(d) ["Engage in Conduct That Is Prejudicial to the Administration of Justice"]

Respondent respectfully suggests that, in addition to weighing her conduct against the specific individual rules noted above, the Commission weigh her conduct regarding these officers as a whole, under the many and various different ethical standards to which prosecutors are held.

While there may be a tendency to think that, as an elected official, the proper and appropriate remedies for a runaway prosecutor lie with the political system and not with the Commission, this would be to take a very narrow and much too restrictive view of the Commission's role and duties.

The importance of attorney discipline was seen recently in the situation involving former Durham

Blame the law, not the judge

By Philip C. Dubé

New York Times

A student at Stanford University protests the Brock Turner sentence.

On June 2, a Stanford University swimming student, Brock Turner, was sentenced to six months in the county jail and probation after being convicted of sexually assaulting a 23-year-old girl during a party outside an off-campus frat house in Santa Clara County. The seemingly lenient sentence has sparked outrage across the country and significant contempt toward Judge Aaron Persky, who sentenced Turner. This has even resulted in a recall effort as well as a campaign of "papering" the judge by the district attorney's office.

Many people, including civil practitioners, feel that the sentence was just too light for a rape case. While it is often impolitic to comment negatively about publicity cases particularly ones involving the sexual assault of a college girl, the truth is that any gripe about the college student's sentence should be with lawmakers, not this jurist, because time in prison is not mandatory for this particular sex offense under California law. Moreover, a prison sentence was not recommended by the Department of Probation, namely an arm of the Santa Clara County Superior Court.

PHILIP DUBÉ
Deputy public defender

Even where prison time is imposed as an exercise of the judge's discretion, many legal professionals agree that prison is not always indicated, even in a sex case. To ignore the probationary sentences offered every day by district attorney's offices in sex cases throughout the state misleads the public about the way we do business in the criminal justice system and how our colleagues who work in the trenches perceive such cases. In truth, rape, molestation, sodomy and sexual battery prosecutions resolve every day for probationary sentences because they are legally justified under the circumstances and are supported by sufficient mitigating evidence.

To his credit, Judge Persky did not succumb to political pressure or public outcry when deciding how to punish the offender. Even after granting Turner probation with six months in custody, albeit an unpopular ruling, the judge properly and ethically maintained his judicial independence without regard to recriminations. Sentencing factors to be weighed by the bench include input from probation officers, mitigation, balance, fairness, and uniformity and conformity with standard dispositions from similar cases, but certainly not including public perception.

Many laypeople do not realize that if, while on probation, the offender slips up by not timely performing his community labor or reporting to his probation officer, or by disobeying the law or court orders, he can forfeit his right to be supervised by the Department of Probation and instead be sent to prison by the court to serve his sentence. Thus, even when a defendant is granted probation in lieu of prison, a commitment to the Department of Corrections is always an available final consequence of a felony conviction punishable by time in custody. Moreover, the defendant must register as a sex offender with local police every year on his birthday and every time he moves for the rest of his life. This obligation will follow him even if he leaves California. There are no forgivable or permissible gaps in time in which the sex offender may dispense with notifying law enforcement in writing of his whereabouts. Thus, it is incumbent upon the individual sex offender to perfect annual registration or face penal consequences. The failure to register in California will subject him to six years in prison for each failure to register, even when he's 75 years old. This onerous obligation will dominate his life long after the judge retires and long after this controversy fades in the annals of time, again until the offender dies.

For now, the law affords Brock Turner the right to remain at liberty despite being branded a felon and sex offender for life. I say leave Judge Persky alone because, again, the real gripe should be with lawmakers who chose not to make this offense punishable by a mandatory prison sentence.

Philip C. Dubé *is a deputy public defender in Los Angeles. He writes in his individual capacity.*

Committee approves CJP audit

Momentum to probe agency spurred by Brock Turner sentence

By Malcolm Maclachlan
Daily Journal Staff Writer

SACRAMENTO — A state legislative committee on Wednesday approved an audit of the California Commission on Judicial Performance.

The first audit of the 56-year-old agency was approved without debate as part of the Joint Legislative Audit Committee's consent calendar.

The state auditor will now conduct an inquiry long sought by activists who say the CJP operates in secret and disciplines judges less often than equivalent agencies in other states.

These efforts gained new momentum in the wake of a six-month sentence given to a former Stanford University swimmer who sexually assaulted an unconscious woman.

Even critics of that ruling don't all agree that an audit of the CJP is the correct response, and some are instead pursuing a recall campaign against Santa Clara County Superior Court Judge Aaron Persky.

"The commission welcomes the opportunity to demonstrate that we have been good stewards of the state's funds," said CJP spokeswoman Victoria Henley in a statement.

She also defended the commission's "rigorous standards of judicial conduct" and noted that 90 percent of decisions reviewed by the state Supreme Court are upheld.

The committee received separate audit requests in July from Sen. Hannah-Beth Jackson, D-Santa Barbara, who chairs the Senate Judiciary Committee, and Assemblywoman Catharine Baker, R-San Ramon, an attorney who sits on JLAC.

Baker's July 15 letter centered on the "unfolding aftermath of Judge Aaron Persky's sentencing in the Brock Turner rape case."

"While the sentence in the case is not the subject of the audit request, it illuminated the lack of publicly available information regarding previous private actions against a judge," Baker added.

Jackson and Baker eventually combined their request into a single Aug. 3 request also signed by Assemblyman Mark Stone, D-Scotts Valley, who chairs the Assembly Judiciary Committee, and Assemblywoman Cristina Garcia, D-Bell Gardens, chair of the Assembly Accountability and Adminstrative Review Committee.

The final letter did not mention Persky.

Michele Dauber, a Stanford Law School professor who is trying to organize a campaign to recall Persky next year, said the CJP is best suited for disciplining judges "who take bribes or fail to disclose conflicts of interest."

A recall election, she said, allows the public to use existing rules to unseat a judge whose "bias in cases

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CJP to face its first audit

Continued from page 1

involving sexual violence against women" makes him "unfit for office."

"We are not accusing him of a crime," Dauber added. "We are saying he is biased in a way that denies people justice."

Tamir Sukkary, a Sierra College political science adjunct professor who has been calling for an audit of the CJP for years, said the California Code of Judicial Ethics clearly bars bias by judges. He said more transparent oversight would also allow people to more easily look into any previous complaints against Persky.

"Because of Persky, people are beginning to realize how secretly the CJP operates," Sukkary said.

An analysis from the state auditor's office said the audit will examine who within the commission decides whether someone has broken the code of ethics and how consistently it follows its own investigative standards. The report estimated the audit will cost $492,480 but did not specify a completion date.

Meanwhile, Persky was back in headlines this week, this time over reports that in 2015 he sentenced a man to four days in jail for possessing child pornography.

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GUEST COLUMNS

Judging Justice Ginsburg

Was the Supreme Court justice out of line in making critical comments about a candidate for president of the United States?

No citizen should be silent

By Douglas W. Kmiec

S. F. Daily Journal 7/14/16

Justice Ruth Bader Ginsburg recently made reference to her late husband, Martin, when queried about the candidacy of Donald Trump. Martin, who predeceased the once inconceivable and unlikely success of Trump, posited the possibility of such a presidency might prompt a move to New Zealand.

Naturally, Trump rejects the suggestion, and aided by the New York Times, itself, argues that it is wrong for sitting justices to engage in political punditry. The question posed is whether the commentary by the justice transgressed judicial boundary which tracks actual impartiality as well as its appearance. The Times implies there is only one answer — the tradition is for judges to keep silent.

But is there no circumstance where that silence might be ethically unsound? Is it not possible to contemplate that even judges are needed to speak out in the face of extreme political threats to the separation of powers and the very idea of an independent judiciary and the rule of law? Ginsburg thinks there

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is, and anyone with a memory of Hitler's blatant power grab using German judges to conduct his war on Jews, must concede this as well.

Yes, it is important to maintain impartiality and the appearance of impartiality in the administration of the law, but where the political sources of law have become antagonistic to basic human rights, we rely on those trained in the law to defend the self-evident truths of human nature and to stand up for those truths when they are in jeopardy.

To date, Trump's pronouncements are not at the same tragic level as Hitler's were in the 1940s. Nevertheless, among his bombast is the suggestion of discriminating on the basis of religion and imposing sanctions on people he sees as opposed to his "vision." In 1942 and after, Hitler's "Justice Minister," Otto Thierack, demanded that judges under threat of removal give harsh judgment against the Jews because it is the duty of judges "to destroy traitors and saboteurs on the home front. The home front is responsible for maintaining peace, quiet, and order as support for the war front. This heavy responsibility falls especially to German judges. Every punishment is fundamentally more important in war than in peace."

Ginsburg certainly supports the proposition that judges should stay as far away from political commentary as consciously possible. This was Ginsburg's articulated view in dissent in *Republican Party of Minnesota v. White*, which over her dissent, invalidated a judicial canon that admonished judicial candidates to not announce their ideological views on matters that might come before them. This is a good, defensible standard when the ideology underlying the Constitution and the Declaration of Independence is honored. Nuremberg established, however, that a standard of neutrality does not justify judicial complacency and silence where raw power is being gathered in almost announced glee that those who disagree will be crushed for their disagreement.

Meaning no disrespect to Martin Ginsburg, or New Zealand, America is my home. No citizen — judge or not — should forget history or casually ignore the gathering storm of someone who would assemble power for his own personal aggrandizement, especially when it is disguised in nationalistic and implicitly hate filled symbols, insinuations about others than himself or the particular interests of the audience he may then be addressing. The challenge of Trump's demonstrated hatreds reminds us that the fair application of constitutional principle can sometimes require an allegiance to a principle higher than the common place nostrums of impartiality. In this way, Ginsburg's comments helps to keep the judiciary as an instrument of justice for all, not a tool of oppression and exclusion for some.

Viewed in its entire context, Ginsburg's assessment of the work of the past term reveals an abiding respect to the ethic of not pre-deciding a matter before briefing, hearing and deliberation. Moreover, the concern with Trump to one side, the equanimity of Justice Ginsburg is everywhere on display, including a compliment to the chief justice and the direction of the bulk of her well measured criticism not to Trump at all, but to his erstwhile political party, that abused its majority in the Senate to default upon constitutional duty — specifically, evaluating the nomination of Judge Merrick Garland.

Douglas W. Kmiec *is a former U.S. Ambassador and Caruso Family Chair in Constitutional Law and Human Rights at Pepperdine University.*

She has a duty to be silent

By Richard W. Painter

S.F. Daily Journal 7/14/16

Justice Ruth Bader Ginsburg is afraid of something.

She was lucky to be born in the United States. That was March 1933, the month the German government barred Jews from serving as judges, claiming that Jews were biased against the political leaders German voters had chosen in the 1932-33 elections. By the time Justice Ginsburg was one year old, all semblance of an independent judiciary in Germany was gone.

Justice Ginsburg's family came to the United States from Odessa, Russia, not Germany, but within less than a decade, invading armies brought to most of Europe the Nazi vision of a world without judges. Within a few years Europe was also a world almost entirely without Jews.

In the past few days we have seen how an 83-year-old jurist who remembers world events from her childhood reacts when she hears a prospective nominee for president say too many things that sound too familiar. She worries when he says that a judge has to recuse from a

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Continued from page 1

case simply because the judge is Mexican-American, and when he says that persons of a religious minority should be subjected to immigration restrictions and additional police surveillance. She worried when he says that persons of this same religious minority "hate us," and that millions of other people living peaceably inside the United States should be transported to places yet to be determined. He rants, while she worries.

She also worries when his Twitter messages resemble slogans of Benito Mussolini and when his campaign literature juxtaposes a pile of money against a star of David referring to his opponent Hillary Clinton as "crooked" because of where she allegedly gets her money.

Finally, she makes the biggest mistake of her career. She speaks. She says what the rest of us, including those of us who are staunch Republicans, should say, but what she should not say.

She should not say it because she has a job to do as a justice of the Supreme Court. Her judgments must be beyond reproach, whether the case involves a contested convention in Cleveland, a third party candidate who seeks ballot access in November or a contested general election as we had just 16 years ago. Her judgments and those of the court must be even more immune from attack if we elect a president with an authoritarian agenda and he tries to implement it.

And if the time comes when a president challenges the independence of the judiciary, claiming that even the Supreme Court cannot tell him what to do, the court's judgments must have the support of other high ranking officials in our government, including the military officers who report to the president as commander in chief.

Ginsburg's duty is to preserve and protect the authority of the court, and the independence of the judiciary. That duty is even more important when political leaders threaten to undermine the judiciary. Her duty is to keep her mouth shut and do her job.

Our duty as citizens, and voters, is to understand and openly discuss what Ginsburg and many other people are worried about, and then to make sure it does not happen in America.

Richard W. Painter, *a law professor at the University of Minnesota, was the chief White House ethics lawyer for President George W. Bush.*

Don't judge Persky

sentence in a vacuum

By Aram James

Former Stanford student and potential Olympic swimmer Brock Turner, a 19-year-old freshman at the time of this incident, was convicted in March of three felonies: assault with intent to commit rape of an intoxicated or unconscious person, sexual penetration of an intoxicated person, and sexual penetration of an unconscious person. The victim was a 22-year-old female college graduate, from another university, who attended the same alcohol-fueled Stanford fraternity party as Turner.

On June 2, Judge Aaron Persky of the Santa Clara County Superior Court — after reviewing and considering a very detailed probation report prepared by a senior female member of the Santa Clara County Probation Department, including statements from the victim and defendant, and numerous letters attesting to Turner's good character — sentenced Turner to six months in the county jail, with three years of formal probation. The sentence imposed by Persky — the same judge who presided over the trial — was entirely consistent with the probation officer's recommendation. Turner had no prior record.

The perceived leniency of Persky's sentence set off a near public lynching of both Turner and Persky. A media and social media lynching that were witnessed by the entire nation. Calls for Persky to resign or face a recall election over the case continue to this day.

Before retiring as a career public defender I handled hundreds, if not thousands, of felony probation violations. I can attest to the fact that young offenders, closely supervised on felony probation, frequently fail to make it through formal probation unscathed. The numerous potential pitfalls of formal probation are an important reason why the six-month initial county jail sentence cannot be viewed in a vacuum. To understand the severity of the punishment, one must understand the part probation plays in the overall sentencing scheme.

> If he violates probation he could well end up serving a prison sentence of three to 10 years, or more — hardly a slap on the hand.

Defendants, who may have initially received what appears to be a light, or restorative-justice inspired sentence, for a serious crime, often end up serving some, if not all, of the maximum prison time they could have received at the time of the original sentencing. In Turner's case, this means if he violates probation he could well end up serving a prison sentence of three to 10 years, or more — hardly a slap on the hand.

Given the infamous cause celeb status that this case has achieved, Turner is now one of the most reviled defendants in American. He will undoubtedly be closely scrutinized on probation. Turner will be on a very short leash.

A defendant on probation is spared prison only so long as he agrees to severe limits on his freedom. The terms and conditions of probation define the quality and limits of a defendant's freedom. Even a minor violation — e.g., failure to report to your probation officer, even on one occasion, or a one-time violation of a no drug or alcohol condition — can result in the revocation of probation and imposition of a previously suspended prison sentence.

So what does three years of formal probation really mean in the context of the Brock Turner case? Based on the nature of Turner's convictions, the terms and conditions of his probation are multiple, complex, restrictive and appropriately oppressive.

As an example, while on probation, Turner was ordered by Persky to participate in and complete an approved sex offender program, of not less than one year, and up to the entire three-year term of his probation. His failure to complete this program, or for that matter any other program ordered by the court, would trigger a revocation and a potential prison sentence.

As part of the sex offender program, Turner will be required to submit to polygraph exams to monitor and ensure compliance with the

program.

As a further public safety measure, Turner will be required to waive his psychotherapist-patient privilege, allowing his therapist to speak directly to Turner's probation officer re his progress or lack thereof.

Turner must register annually as a sex offender for life, and each time he changes his residence. He must reregister within a few days of moving. Failure to register in a timely manner would be both a new crime, allowing for the potential of new charges and a separate prison sentence, and a violation of his current probation.

Turner must submit to drug and alcohol testing to ensure he is complying with the terms of his probation, that he not consume alcohol or drugs, or frequent places where alcohol is sold or consumed as a primary business.

He must waive his Fourth Amendment rights, to be free of illegal and warrantless searches, and thus submit to random searches and seizure of his person, vehicle and place of residence, at any time.

Upon an alleged violation of probation, Turner, would be returned to court to face a hearing. Unlike with a new offense, there is no right to a jury trial when charged with a probation violation. A judge sitting alone hears the matter.

To find a violation the judge need only determine that the evidence proves the violation by a preponderance of the evidence, not proof beyond a reasonable doubt, as required at a jury trial.

If the judge, after hearing evidence of the alleged violation, concludes that Turner has in fact violated his probation, the judge can then sentence him to the maximum sentence, he faced at the time of the original sentencing.

In my experience, judges assigned to hear probation violations are some of the most putative jurists on the bench. Need I say, that given the media attention and wave of vitriol directed at Tuner, he will be the closest watched probationer in America.

Given the dizzying probationary maze faced by Turner, it is hard to quarrel with Persky's initial sentence.

As a society ruined by the scorch of over incarceration, it is critical that we have judges who have the discretion to encourage a rehabilitative model-first approach, while at the same time imposing severe conditions of probation that maximize public safety and protect us from truly violent predators.

The sentence in the Turner case more than adequately balances both the public safety and the rehabilitative purposes of probation.

Many of the same progressive voices who have spoken out long and passionately against over incarceration, mass incarceration, the disproportionate sentences imposed on the poor and people of color, are now doing an about face in the Turner case.

They are shouting out that more of the same cruelty and barbarism should have been handed down in the Turner case. The same mentality that has brought us to our current failed state of mass incarceration.

Instead of blindly demanding that a white male elite be sentenced to prison for his first offense, the better logic is to demand the same measure of justice and mercy, for similarly situated defendants of color and the poor. We must look to rehabilitation and restorative justice first, and harsh and unforgiving prison sentences, only where absolutely necessary.

The vengeful model of sentencing has proven over and over again to lead to recidivism, overcrowded prisons, and little or no true comfort or safety, for the victims.

We should support Persky's rehabilitation-motivated sentence, as an extension of the progressive movement's call, for an end to our country's failed mass incarceration policies.

Aram James *is a retired Santa Clara County deputy public defender and a cofounder of the Albert Cobarrubias Justice Project, a grassroots legal advocacy organization in San Jose.*

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Protests continue, but legal experts say judge should stay

By Phil Johnson
Daily Journal Staff Writer

SAN FRANCISCO — Embattled Santa Clara County Superior Court Judge Aaron Persky's recusal from a child pornography case has reinvigorated critics seeking the judge's removal from the bench for what they believe to be a compromised ability to rule on cases involving sexual violence.

But despite a sustained public outcry, which took the form of a protest Wednesday outside a meeting of the Commission on Judicial Performance, legal ethics experts are united in their staunch support of judicial independence.

Persky had been expected to hand down a sentence Thursday on a possession of child pornography case. Last year, Persky told the convicted possessor, Robert Chain, that the conviction could be reduced from a felony to a misdemeanor if Chain stayed sober and satisfied a host of other conditions.

But Persky changed course late last week when he recused himself. In a brief statement on his recusal, Persky cited publicity surrounding Chain's case.

"This publicity has resulted in a personal family situation such that 'a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial,'" Persky wrote, referencing a section of the state's judicial ethics canon.

The case will now be heard October 6 by Santa Clara County Superior Court Judge Kenneth P. Barnum.

To Persky's critics, the recusal comes as the latest example of his unwillingness to appropriately sentence sex offenders. Persky became persona non grata when he sentenced former Stanford swimmer Brock Turner to six months in jail after finding Turner guilty of three felony counts of sexual assault.

Turner, who can complete the jail sentence in early September with good behavior, was convicted of digitally penetrating an intoxicated woman behind a dumpster.

"Why would a woman come forward when she knows the punishment will not fit the crime?" said Deborah Atkins, a nurse who attended the protest Wednesday.

The protest was led by UltraViolet, a women's advocacy group that supports efforts to recall Persky. The group is calling for the CJP to take action against Persky.

"For decades we've been asking women to come forward and trust their college, trust the judicial system and trust men," Atkins said. "But the public has lost faith in the system."

Atkins, who is black, said she would expect a person of color in Turner's position to have been sentenced to a lengthy prison term.

While outspoken members of the public continue to call for Persky's removal, ethics experts say compelling the judge to step down from the bench would represent a dire erosion of judicial independence.

"It seems wrong for the mob mentality to take over," said James A. Murphy, founding shareholder of Murphy Pearson Bradley & Feeney who defends judges in disciplinary proceedings.

"To try to put pressure on CJP to discipline or even remove a judge who is acting within his discretion is just wrong," Murphy added.

Diane L. Karpman of Karpman & Associates said she understood the protestors' position, but advised against Persky's reassignment.

"I wouldn't want to think the system would kowtow to pressure," Karpman said, adding Persky's potential reassignment has to occur when all county judges have assignments changed, not beforehand. "Otherwise it'll scare other judges who have to do the right thing."

Requests for comment on potential reassignment from Presiding Judge Rise Jones Pichon went unreturned Wednesday. Reassignments occur in January.

UC Hastings College of the Law Professor Richard Zitrin, who specializes in legal ethics, said that the notion of reassigning Persky away from the criminal calender before then carried dire consequences.

"I would prefer not to see the presiding judge do basically an emergency reassignment because that adversely affects the independence of the judiciary," Zitrin said.

Persky's seat is safe. According to a county spokeswoman, the deadline for a write-in challenge passed last week. His name will not appear on the ballot.

philip_johnson@dailyjournal.com

'Retain Persky' website aims to fight efforts to recall judge

By Phil Johnson
Daily Journal Staff Writer

Santa Clara County Superior Court Judge Aaron Persky will no longer be silent.

Rather than sit quietly with his new civil assignment and hope the public forgets its outrage about his sentencing practices, Persky seems prepared for a prolonged fight against those who seek to remove him from the bench.

In what appears to be his first public statement responding to calls for his removal, Persky, or someone writing on his behalf, created the website www.RetainJudgePersky.com. According to the Internet Corporation for Assigned Names and Numbers, which oversees internet domain registry databases, the site was created in mid-July.

"As a judge, I have heard thousands of cases. I have a reputation for being fair to both sides," the site reads under the "About Judge Aaron Persky" tab. The site also includes a tab for contributions. The lowest recommended amount is $99.

A request for comment from Persky about the site, its origins and how the money raised will be spent went unreturned Wednesday. A similar request to the website's administrator also went unreturned.

Persky has been under intense scrutiny for months after handing down what many perceived to be a lenient sentence to a Stanford University swimmer and convicted felon who digitally penetrated an incapacitated woman behind a dumpster.

But the sentence has created a division between the outraged public and many in the legal community who have defended Persky as being unfairly targeted for exercising his discretion as a judge, and lamented the pressure levied at Persky as corrosive of judicial independence. Persky's website contains links to seven articles and public letters voicing support for judicial independence.

Persky's voluntary reassignment from a criminal department to civil was announced late last week. Considering the timeline of a potential recall election against him, Persky's campaign page may be around for a while.

Persky is up for reelection November. Running unopposed, his name will not appear on the ballot. The campaign for his recall, led by Stanford Law professor Michele Dauber, must wait three months after Persky is seated again in January before launching a signature drive.

Should Dauber and her campaign against Persky gather approximately 60,000 signatures of Santa Clara voters between April and July, the recall effort would appear on the November 2017 ballot. Should the effort make it onto the ballot, voters would have to answer two questions: Should Persky be removed? And if so, who should replace him?

In an interview Wednesday, Dauber said she expects a handful of candidates concerned with the fair adjudication of cases involving female victims to run. Whoever receives the plurality of votes would replace Persky, if he is voted out.

On Wednesday, Dauber said she saw the creation of Persky's website as a small sign of success.

"It is clear we are now in an election campaign with two sides and will be in a back-and-forth campaign for voters to review Judge Persky's record," Dauber said.

Maintaining the public's scorn for Persky may be Dauber's greatest challenge. To keep the heat on the judge, Dauber is conducting a full review of Persky's docket. A story published last week by BuzzFeed News detailed Persky's handling of a college football player who pleaded no contest to felony domestic violence. The story quoted retired Santa Clara County Superior Court Judge LaDoris Cordell's criticism of Persky's handling of the case. "There are so many problems with how this case was handled that I'm not even sure where to start," Cordell said.

While the recall effort has a long way to go, the young man at the center of the controversy is nearing release. Brock Turner, the former Stanford swimmer, will be released from county jail Friday after serving three months.

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Persky's Move: A Reaction to the Reactionary

Recorder 9/5/16

Richard Zitrin

Richard Zitrin is a professor at UC Hastings and principal of San Francisco's Zitrin Law Office. He is the lead author of three books on legal ethics, including "The Moral Compass of the American Lawyer," and the 4th edition of "Legal Ethics in the Practice of Law."

MORAL COMPASS

This past week, Santa Clara Judge Aaron Persky bowed to pressure from many quarters and asked to be transferred from a criminal to a civil department in San Jose. Assuming the transfer was voluntary, as presiding Judge Risë Pichon reported, it's hard to blame Persky one bit. After he sentenced star Stanford University swimmer Brock Turner to a six-month sentence for the sexual assault of an unconscious woman, Persky has faced:

- A website, www.recallaaronpersky.com, organized and co-sponsored by the National Organization for Women, Advocates for Youth, and others;
- A recall petition organized by Change.org with 1.3 million signatures;
- Three similar petitions from the progressive organization MoveOn, which then refused to promote a counter-petition supporting judicial independence;
- Vitriolic TV news segments, print articles and headlines from across the country.

It's obvious that Turner's sentence was a light one. It's even more obvious that Turner's crime was appalling. Turner's father's treacly plea for leniency, widely reported in the press, made his son look even worse. But the misguided efforts to remove Persky from the bench overlook both the judge's record and, even more importantly, the basic American principle of judicial independence.

As for the judge himself, he's an ex-DA who specialized in prosecuting sex crimes and hate crimes. As a private practitioner, he was awarded the state's highest award for pro bono work, the Wiley Manuel Award. He has ably served both the Support Network for Battered Women and the Santa Clara County Network for a Hate-Free Community on his own time.

In the Turner case, Persky did not come up with his six-month sentence on his own. Persky actually accepted the sentencing recommendation of the county probation department. Their pre-sentencing report, prepared by a female probation officer, noted Turner's youth, clean record, intoxication and remorse, and recommended the same six months that Persky ultimately imposed. Light? Yes. Unprecedented? Not at all. Wrong? Perhaps. But in order to reach the conclusion that this sentence merits Persky's removal, it's necessary to conflate a single decision into a litmus test. That's the same tactic long used by the political right to attack judicial independence of judges who favored choice or opposed the death penalty. Or have we forgotten the recall of Chief Justice Rose Bird and her two excellent Supreme Court associate justices, Joe Grodin and Cruz Reynoso? If we were to take the single worst decision that even the best jurists have made and throw them off the bench for it, we would have perhaps three judges left in the whole state.

What's particularly disturbing this time is that the majority of those leading the charge to recall Persky are progressives. Frankly, they should know better.

By and large, progressives have remained protective of the civil rights of all Americans in these days of fear of terrorism. Many, though, may have forgotten another civics lesson: that along with free speech and freedom of the press, an independent judiciary is a paramount necessity for a free society. It's not an exaggeration to say that without judicial independence, we would have a police state.

MoveOn, an organization I have admired, is one example of a progressive organization gone awry. One of its petitions, with over 200,000 signatures, was given prominent play on its website and in emails to all subscribers, including me. It read, "Judge Aaron Persky's failure to hold Brock Turner accountable for the rape and his dismissive comments at sentencing

See ZITRIN page 7

ZITRIN

Continued from page 6

show that he cannot be trusted to dispense justice. He must be removed from the bench immediately."

Other MoveOn members proposed a counter-petition about judicial independence (any member may propose one) that made this point:

"Judges have a duty to apply the law to the facts and evidence before them, regardless of public opinion or political pressure ... We have seen no credible assertions that in issuing the sentence, Judge Persky violated the law or his ethical obligations or acted in bad faith ... Seeking to punish a judge under these circumstances presents a threat to judicial independence."

MoveOn's reaction was to put a notification ribbon on the top of that petition page that reads: "MoveOn volunteers reviewed this petition and determined that it either may not reflect MoveOn members' progressive values, or that MoveOn members may disagree about whether to support this petition. MoveOn will not promote the petition beyond hosting it on our site."

Is this well-regarded progressive organization not both promoting a reactive position and stifling dissent because some of its members "may disagree" about another petition's content?

Perhaps it's not fair to single out MoveOn, at least without noting that its stance seems to be emblematic of many progressive organizations that have taken the same short-sighted position. Asking for a judge's head because of one decision clearly within his discretion is the prototypical definition of "reactionary." I suggest we leave such reactions to others, and that progressives re-think the principles they have long fought for before jumping off the deep end of dogmatism to take positions antithetical to many of their own core beliefs.

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7/30/16

Law professors oppose recall in Stanford case

PALO ALTO

The debate over whether to oust Santa Clara Superior Court Judge Aaron Persky over the light jail sentence he gave a former Stanford athlete convicted of sexual assault heated up Wednesday, with a letter from supporters in the legal field announcing the latest petition.

A group of 46 professors from leading law schools in California issued the letter opposing the recall of Persky, who sentenced former Stanford student Brock Turner to six months in jail rather than two years in state prison for sexually assaulting an intoxicated unconscious woman.

—MERCURY NEWS

BILL WATCH

Sentencing bill inspired by Stanford swimmer case heads to governor

California is on the cusp of changing its sentencing laws in response to a nationally watched sexual assault case involving a former Stanford University swimmer, with lawmakers on Monday sending Gov. Jerry Brown legislation mandating heavier penalties for assaulting unconscious victims.

Lawmakers last week sent Brown Assembly Bill 701 to broaden the definition of rape, and on Monday approved Assembly Bill 2888, which would mandate a prison sentence for sex crimes in which the victim was unconscious. It passed 66-0.

The bill had the support of law enforcement groups, but it drew resistance from the American Civil Liberties Union and the California Public Defenders Association.

— JEREMY B. WHITE

Brock Turner to be released soon

The Mercury News

SAN JOSE

A former Stanford swimmer infamously convicted of sexually assaulting an unconscious woman outside a campus party – which touched off a national discussion about college rape – is expected to be released from jail Friday.

The early release for Brock Turner, who will have served three months out of a six-month sentence, was widely expected when he was sentenced in June, owing to a lack of prior criminal history. Jail records and the Santa Clara County Sheriff's Office have confirmed the release date.

WASHBURN UNIVERSITY SCHOOL OF LAW

AALS Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities

American law professors typically are members of two professions and thus should comply with the requirements and standards of each. Law professors who are lawyers are subject to the law of professional ethics in force in the relevant jurisdictions. Non-lawyers, in turn, should be guided by the norms associated with their disciplines. In addition, as members of the teaching profession, all law faculty members are subject to the regulations of the institutions at which they teach and to guidelines that are more generally applicable, such as the Statement of Professional Ethics of the American Association of University Professors.

This statement does not diminish the commands of other sources of ethical and professional conduct. Instead, it is intended to provide general guidance to law professors concerning ethical and professional standards both because of the intrinsic importance of those standards and because law professors serve as important role models for law students. In the words of the American Bar Association's Commission on Professionalism, since "the law school experience provides the student's first exposure to the profession and . . . professors inevitably serve as important role models for students, . . . the highest standards of ethics and professionalism should be adhered to within law schools." (reference citation: ". . . .In the spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism 19 (1986)).

Law professors' responsibilities extend beyond the classroom to include out of class associations with students and other professional activities. Members of the law teaching profession should have a strong sense of the special obligations that attach to their calling. They should recognize their responsibility to serve others and not be limited to pursuit of self interest. This general aspiration cannot be achieved by edict, for moral integrity and dedication to the welfare of others cannot be legislated. Nevertheless, a public statement of good practices concerning ethical and professional responsibility can enlighten newcomers and remind experienced teachers about the basic ethical and professional tenets-the ethos-of their profession.

Although the norms of conduct set forth in this Statement may be relevant when questions concerning propriety of conduct arise in a particular institutional context, the statement is not promulgated as a disciplinary code. Rather, the primary purpose of the Statement-couched for the most part in general aspirational terms-is to provide guidance to law professors concerning their responsibilities (1) to students, (2) as scholars, (3) to colleagues, (4) to the law school and university at which they teach, and (5) to the bar and the general public.

I. Responsibilities To Students

As teachers, scholars, counselors, mentors, and friends, law professors can profoundly influence students' attitudes concerning professional competence and responsibility. Professors should assist students to recognize the responsibility of lawyers to advance individual and social justice.

Because of their inevitable function as role models, professors should be guided by the most sensitive ethical and professional standards.

Law professors should aspire to excellence in teaching and to mastery of the doctrines and theories of their

subjects. They should prepare conscientiously for class and employ teaching methods appropriate for the subject matters and objectives of their courses. The objectives and requirements of their courses, including applicable attendance and grading rules, should be clearly stated. Classes should be met as scheduled or, when this is impracticable, classes should be rescheduled at a time reasonably convenient for students, or alternative means of instruction should be provided.

Law professors have an obligation to treat students with civility and respect and to foster a stimulating and productive learning environment in which the pros and cons of debatable issues are fairly acknowledged. Teachers should nurture and protect intellectual freedom for their students and colleagues. If a professor expresses views in class that were espoused in representing a client or in consulting, the professor should make appropriate disclosure.

Evaluation of student work is one of the fundamental obligations of law professors. Examinations and assignments should be conscientiously designed and all student work should be evaluated with impartiality. Grading should be done in a timely fashion and should be consistent with standards recognized as legitimate within the university and the profession. A student who so requests should be given an explanation of the grade assigned.

Law professors should be reasonably available to counsel students about academic matters, career choices, and professional interests. In performing this function, professors should make every reasonable effort to ensure that the information they transmit is timely and accurate. When in the course of counseling a law professor receives information that the student may reasonably expect to be confidential, the professor should not disclose that information unless required to do so by university rule or applicable law. Professors should inform students concerning the possibility of such disclosure.

Professors should be as fair and complete as possible when communicating evaluative recommendations for students and should not permit invidious or irrelevant considerations to infect these recommendations. If information disclosed in confidence by the student to the professor makes it impossible for the professor to write a fair and complete recommendation without revealing the information, the professor should so inform the student and refuse to provide the recommendation unless the student consents to full disclosure.

Discriminatory conduct based on such factors as race, color, religion, national origin, sex, sexual orientation, disability or handicap, age, or political beliefs is unacceptable in the law school community. Law professors should seek to make the law school a hospitable community for all students and should be sensitive to the harmful consequences of professorial or student conduct or comments in classroom discussions or elsewhere that perpetuate stereotypes or prejudices involving such factors. Law professors should not sexually harass students and should not use their role or position to induce a student to enter into a sexual relationship, or to subject a student to a hostile academic environment based on any form of sexual harassment.

Sexual relationships between a professor and a student who are not married to each other or who do not have a preexisting analogous relationship are inappropriate whenever the professor has a professional responsibility for the student in such matters as teaching a course or in otherwise evaluating, supervising, or advising a student as part of a school program. Even when a professor has no professional responsibility for a student, the professor should be sensitive to the perceptions of other students that a student who has a sexual relationship with a professor may receive preferential treatment from the professor or the professor's colleagues. A professor who is closely related to a student by blood or marriage, or who has a preexisting analogous relationship with a student, normally should eschew roles involving a professional responsibility for the student.

II. Responsibilities As Scholars

A basic responsibility of the community of higher education in the United States is to refine, extend, and transmit

knowledge. As members of that community, law professors share with their colleagues in the other disciplines the obligation to discharge that responsibility. Law schools are required by accreditation standards to limit the burden of teaching so that professors will have the time to do research and to share its results with others. Law schools also have a responsibility to maintain an atmosphere of freedom and tolerance in which knowledge can be sought and shared without hindrance. Law professors are obligated, in turn, to make the best and fullest use of that freedom to fulfill their scholarly responsibilities.

In teaching, as well as in research, writing, and publication, the scholarship of others is indispensable to one's own. A law professor thus has a responsibility to be informed concerning the relevant scholarship of others in the fields in which the professor writes and teaches. To keep current in any field of law requires continuing study. To this extent the professor, as a scholar, must remain a student. As a corollary, law professors have a responsibility to engage in their own research and publish their conclusions. In this way, law professors participate in an intellectual exchange that tests and improves their knowledge of the field, to the ultimate benefit of their students, the profession, and society.

The scholar's commitment to truth requires intellectual honesty and open-mindedness. Although a law professor should feel free to criticize another's work, distortion or misrepresentation is always unacceptable. Relevant evidence and arguments should be addressed. Conclusions should be frankly stated, even if unpopular.

When another's scholarship is used-whether that of another professor or that of a student-it should be fairly summarized and candidly acknowledged. Significant contributions require acknowledgement in every context in which ideas are exchanged. Publication permits at least three ways of doing this: shared authorship, attribution by footnote or endnote, and discussion of another's contribution within the main text. Which of these will suffice to acknowledge scholarly contributions by others will, of course, depend on the extent of the contribution.

A law professor shall disclose the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professorial capacity. A professor is deemed to possess an economic interest if the professor or an immediate family member may receive a financial benefit from participation in the covered activity. Disclosure is not required for normal academic compensation, such as salary, internal research grants, and honoraria and compensation for travel expenses from academic institutions, or for book royalties. Disclosure is not required for funding or an economic interest that is sufficiently modest or remote in time that a reasonable person would not expect it to be disclosed. Disclosure of material facts should include: (1) the conditions imposed or expected by the funding source on views expressed in any future covered activity; and (2) the identity of any funding source, except where the professor has provided legal representation to a client in a matter external to legal scholarship under circumstances that require the identity to remain privileged under applicable law. If such a privilege prohibits disclosure the professor shall generally describe the interest represented.

A law professor shall also disclose the fact that views or analysis expressed in any covered activity were espoused or developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor. Disclosure is not required for representation or consultation that is sufficiently remote in time that a reasonable person would not expect it to be disclosed. Disclosure should include the identity of any client, where practicable and where not prohibited by the governing Code or Rules of Professional Conduct. If such Code or the Rules prohibit a professor from revealing the identity of the client, then the professor shall generally describe the client or interest represented or both.

Covered activities include any published work, oral or written presentation to conferences, drafting committees, legislatures, law reform bodies and the like, and any expert testimony submitted in legal proceedings. A law professor should make, to the extent possible, all disclosures discussed in this policy at the earliest possible time. The earliest possible time should be when the professor is invited to produce the written work for publication or to make a presentation or when the professor submits the written work for publication or delivers the presentation.

III. Responsibilities To Colleagues

Law professors should treat colleagues and staff members with civility and respect. Senior law professors should be particularly sensitive to the terms of any debate involving their junior colleagues and should so conduct themselves that junior colleagues will understand that no adverse professional consequences would follow from expression of, or action based upon, beliefs or opinions contrary to those held by the senior professor.

Matters of law school governance deserve the exercise of independent judgment by each voting member of the faculty. It is therefore inappropriate for a law professor to apply any sort of pressure other than persuasion on the merits in an effort to influence the vote of another member of the faculty.

Law professors should comply with institutional rules or policies requiring confidentiality concerning oral or written communications. Such rules or policies frequently will exist with respect to personnel matters and evaluations of student performance. If there is doubt whether such a rule or policy is in effect, a law professor should seek clarification.

An evaluation made of any colleague for purposes of promotion or tenure should be based exclusively upon appropriate academic and service criteria fairly weighted in accordance with standards understood by the faculty and communicated to the subject of the evaluation.

Law professors should make themselves reasonably available to colleagues for purposes of discussing teaching methods, content of courses, possible topics of scholarship, scholarly work in progress, and related matters. Except in rare cases and for compelling reasons, professors should always honor requests from their own law schools for evaluation of scholarship in connection with promotion or tenure decisions. Law professors should also give sympathetic consideration to similar requests from other law schools.

As is the case with respect to students (Part I), sexual harassment, or discriminatory conduct involving colleagues or staff members on the basis of race, color, religion, national origin, sex, sexual orientation, disability or handicap, age, or political beliefs is unacceptable.

IV. Responsibilities To The Law School And University

Law professors have a responsibility to participate in the governance of their university and particularly the law school itself. Although many duties within modern universities are assumed by professional administrators, the faculty retains substantial collective responsibility to provide institutional leadership. Individual professors have a responsibility to assume a fair share of that leadership, including the duty to serve on faculty committees and to participate in faculty deliberations.

Law professors are frequently in demand to participate in activities outside the law school. Such involvement may help bring fresh insights to the professor's classes and writing. Excessive involvement in outside activities, however, tends to reduce the time that the professor has to meet obligations to students, colleagues, and the law school. A professor thus has a responsibility both to adhere to a university's specific limitations on outside activity and to assure that outside activities do not significantly diminish the professor's availability to meet institutional obligations. Professors should comply with applicable laws and university regulations and policies concerning the use of university funds, personnel, and property in connection with such activities.

When a law professor resigns from the university to assume another position, or seeks a leave of absence to teach at another institution, or assumes a temporary position in practice or government, the professor should provide reasonable advance notice. Absent unusual circumstances, a professor should adhere to the dates established in the Statement of Good Practices for the Recruitment of and Resignation by Full-Time Faculty

Members of the Association of American Law Schools.

Although all law professors have the right as citizens to take positions on public questions, each professor has a duty not to imply that he or she speaks on behalf of the law school or university. Thus, a professor should take steps to assure that any designation of the professor's institution in connection with the professor's name is for identification only.

V. Responsibilities to the Bar and General Public

A law professor occupies a unique role as a bridge between the bar and students preparing to become members of the bar. It is important that professors accept the responsibilities of professional status. At a minimum, a law professor should adhere to the Code or Rules of Professional Conduct of the state bars to which the law professor may belong. A law professor may responsibly test the limits of professional rules in an effort to determine their constitutionality or proper application. Other conduct warranting discipline as a lawyer should be a matter of serious concern to the professor's law school and university.

One of the traditional obligations of members of the bar is to engage in uncompensated public service or pro bono legal activities. As role models for students and as members of the legal profession, law professors share this responsibility. This responsibility can be met in a variety of ways, including direct client contact through legal aid or public defender offices (whether or not through the law school), participating in the legal work of public interest organizations, lecturing in continuing legal education programs, educating public school pupils or other groups concerning the legal system, advising local, state and national government officials on legal issues, engaging in legislative drafting, or other law reform activities.

The fact that a law professor's income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to which practicing lawyers may be more inhibited. With that freedom from economic pressure goes an enhanced obligation to pursue individual and social justice.

Adopted by the Executive Committee, November 17, 1989. Amended May 2003.

RETURN TO FACULTY AND STAFF RESOURCES

Prosecutors of officers accused in Freddie Gray death face pressure for disbarment

Marilyn Mosby, Baltimore state's attorney, pauses while speaking during a media availability on May 1, 2015, in Baltimore. Mosby announced criminal charges against all six officers suspended after Freddie Gray suffered a fatal spinal injury while in police custody. (Associated ... more >

By Ryan M. McDermott - *The Washington Times - Monday, July 18, 2016*

Legal analysts ripped Baltimore prosecutors Monday over their handling of the Freddie Gray case, saying the prosecution should drop all charges against the three remaining police officers or risk more embarrassment in the courtroom.

What's more, John Banzhaf, an activist law professor at George Washington University, said he would file a complaint Tuesday with the Maryland Attorney Grievance Commission calling for the disbarment of the lead prosecutors in the trials of the six police officers accused of wrongdoing in the 2015 arrest and death of the 25-year-old black man.

The pointed criticism came Monday after Lt. Brian Rice was acquitted of all charges for his role in Gray's arrest and death. The lieutenant was the highest-ranking of the accused officers, and his full acquittal was the third consecutive loss for prosecutors. Another trial ended in a hung jury in December, and a retrial has been scheduled.

PHOTOS: 13 Things Liberals Want To Ban

But legal analysts said any subsequent trials should be canceled. They noted prosecutors' failure to convict the most senior officer involved in Gray's arrest (Lt. Rice) and the driver of the police van in which Gray's neck was broken (Officer Caesar Goodson).

"It's quite clear that the prosecution should not continue on," said Barry Slotnick, a prominent defense lawyer who has followed the trials in the Gray case. "The prosecution in the next three cases should strongly make a suggestion in court — on the record — that these cases have not been proven and will not be proven and therefore they should be dismissed."

Still, Mr. Slotnick said it's unlikely that Baltimore State's Attorney Marilyn Mosby will drop the remaining trials. He attributed her filing of charges against the six officers to an intent to appease the community.

PHOTOS: Famous felons

"It's rather sad," he said. "The fact of the matter is that I think this prosecution was commenced by people who were concerned about community reaction. People should not be accused of a crime to have a community satisfied. It's absolutely inappropriate."

Mr. Banzhaf late last month filed a complaint against Ms. Mosby, accusing her of misconduct in bringing charges without sufficient evidence. He told The Washington Times that he would file disbarment complaints Tuesday against Baltimore Chief Deputy State's Attorney Michael Schatzow and Deputy State's Attorney Janice Bledsoe, the lead prosecutors for the police trials.

"Though they may have been ordered by Mosby to do what they did, that is no defense. Every prosecutor has an individual obligation," the law professor said. "They aren't some minions way down below on the chain that really have no choice. These are the two major people in charge of making the decisions. I think they are as guilty of ethical violations as she."

Mr. Banzhaf said the prosecution's ordeal would be over if Ms. Mosby would bow out and come clean.

"She could get up today and say, 'I really tried. We have put in every effort we possibly could. It has precipitated a formal [Justice Department] investigation and changes in policy. We've accomplished a lot and gone as far as we can,' " he said. "Most of her followers would accept that."

Prosecutors, defense attorneys and acquitted officers are bound by a gag order from speaking about the trials until all of the cases have been settled.

On Monday, Baltimore Circuit Judge Barry Williams acquitted Lt. Rice, who was charged with involuntary manslaughter, misconduct in office and reckless endangerment. Prosecutors dropped a second misconduct charge before the trial started, and the judge dropped a second-degree assault charge after the prosecution rested its case last week.

In addition, the judge chided prosecutors for the second time in a trial related to Gray's death for withholding evidence from defense attorneys.

Police handcuffed and shackled Gray but did not secure him in a seat belt when they arrested him. He died April 19, 2015, a week after his neck was broken in the back of the van. His death and funeral sparked days of protests and rioting in Baltimore.