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Standing Committee on Discipline v. Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary?

Caprice L. Roberts

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> 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 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.
>
> — Stephen Yagman[1]

I. Introduction

Attorney Stephen Yagman wrote these scathing words about United States District Court Judge William Keller.[2] In addition, Yagman accused Judge Keller of being anti-Semitic and "drunk on the bench" after Judge Keller denied Yagman's motion and sanctioned him for bringing forth an improper and frivolous claim.[3] In a disciplinary proceeding, *Standing Committee on Discipline v. Yagman*,[4] the United States District Court for the Central District of California found that Yagman's statements impermissibly impugned the integrity of the court.[5] The court concluded that Yagman's statements constituted an ethical violation warranting a two-year suspension from practicing law in the Central District of California.[6] The United States Court of Appeals for the Ninth Circuit reversed the district

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1. Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1434 n.4 (9th Cir. 1995) (quoting Letter from Stephen Yagman to Prentice Hall, publisher of *Almanac of the Federal Judiciary* (June 5, 1991)). The district court found that Yagman had mailed copies of this letter to Prentice Hall and to Judge Keller. Standing Comm. on Discipline v. Yagman, 856 F. Supp. 1384, 1386 (C.D. Cal. 1994), *rev'd*, 55 F.3d 1430 (9th Cir. 1995).

2. *Yagman*, 55 F.3d at 1434 n.4.

3. *See id.* at 1434 (finding that Yagman told *Daily Journal* reporter that Judge Keller was "drunk on the bench," although *Daily Journal* did not publish it, and that another paper quoted Yagman as stating that Judge Keller "has a penchant for sanctioning Jewish lawyers . . . [which is] evidence of anti-[S]emitism" (quoting Susan Seager, *Judge Sanctions Yagman: Refers Case to State Bar*, L.A. DAILY J., June 6, 1991, at 1)).

4. 856 F. Supp. 1384 (C.D. Cal. 1994).

5. *Yagman*, 856 F. Supp. at 1399-1400 (determining that Yagman's accusation impugning integrity of judiciary and interfering with random assignment of judges warranted two-year suspension).

6. *Id.*

court and struck down the suspension.[7] The court of appeals concluded that courts cannot sanction attorneys for making statements that degrade the integrity of the judiciary unless the statements are capable of being proved true or false.[8] The Ninth Circuit's opinion is the first time in nearly fifteen years that a federal appellate court has upheld an attorney's First Amendment freedom of speech rights in the face of ethical speech restrictions.[9]

In light of the *Yagman* opinion, this Note analyzes the constitutionality of ethical rules that restrict attorneys' freedom of speech. Part II outlines the relevant ethical rules that authorize sanctioning attorneys for speech that might otherwise receive First Amendment protection.[10] Part II compares the policy arguments that support the existing ethical rules restricting attorneys' freedom to criticize the judiciary with the policy rationale for condemning speech restrictions that infringe upon activity protected by the First Amendment.[11] Part III summarizes the historical development of the restriction on attorney criticism of the judiciary.[12] Part IV details the intricacies of the *Yagman* decision.[13] Part V critiques the *Yagman* opinion in light of the approaches taken in other cases that provided attorneys with less First Amendment protection.[14] Part VI explores the parallel jurisprudence of First Amendment rights in the contexts of the Hatch Act's restrictions on federal employees[15] and universities' restrictions on student speech.[16] In addition, Part VI examines whether policy concerns and existing jurispru-

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7. *Yagman*, 55 F.3d at 1445.

8. *Id.* at 1439-40.

9. *See* Richard C. Reuben, *Lawyer Free Speech Upheld: 9th Circuit Overturns Suspension for Maligning Judge*, A.B.A. J., Aug. 1995, at 23 (reporting that legal ethics expert Stephen Gillers believed Ninth Circuit opinion reversed modern trend by ruling in favor of attorney free speech rights).

10. *See infra* notes 19-20 and accompanying text (describing California ethical rules that restrict attorney speech impugning integrity of court or disrupting administration of justice).

11. *See infra* notes 25-42 and accompanying text (presenting policies supporting and opposing ethical rules restricting First Amendment rights of attorneys).

12. *See infra* notes 43-97 and accompanying text (summarizing historical development of ethical rules and case law supporting limitations on attorney criticism of judiciary).

13. *See infra* notes 98-147 and accompanying text (describing facts, rationale, and holding of *Yagman*).

14. *See infra* notes 148-62 and accompanying text (critiquing *Yagman* opinion and comparing Ninth Circuit's rationale with traditional attorney criticism jurisprudence).

15. *See infra* notes 174-99 and accompanying text (describing Hatch Act's First Amendment restrictions on federal employees that have withstood constitutional scrutiny).

16. *See infra* notes 207-29 and accompanying text (exploring First Amendment difficulties in maintaining hate speech codes on university campuses).

dence in the analogous contexts provide guidance for the attorney free speech controversy.[17] Finally, Part VII concludes that ethical codes can constitutionally restrict attorney criticism of the judiciary because attorneys accept a duty to uphold the integrity of the judicial system upon entering the profession, and with that duty, certain necessary restraints attach.[18]

II. Ethical Rules Restricting Attorney Speech Versus Attorneys' First Amendment Rights

The ethical rule at issue in the *Yagman* case, Local Rule 2.5.2 of the United States District Court for the Central District of California, prohibits conduct that "degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice therein."[19] Under Local Rule 2.6.8 of the United States District Court for the Central District of California, if a disciplinary panel finds that an attorney has violated this rule of professional conduct, then sanctions attach[20] despite the free speech rights afforded by the First Amendment.[21] By sanctioning attorney speech that degrades or impugns the integrity of the court, an ethical rule like the one in the *Yagman* case can proscribe speech that would receive protection under the First Amendment but for the speaker's profession.[22] Courts have recognized that attorneys have diminished First Amendment rights under the ethical rules that sanction otherwise protected speech. [23] The *Yagman*

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17. *See infra* Parts VI.A.2, VI.B.3 (suggesting that persuasive principles from Hatch Act and hate speech code cases lend assistance in resolving debate over attorney criticism of judiciary).

18. *See infra* Part VII (arguing that ethical restrictions on attorney criticism are valid despite fact that restrictions require attorneys to conform to higher code of conduct and to forgo some liberties).

19. LOCAL RULES OF THE U.S. DISTRICT CT. FOR THE CENTRAL DISTRICT OF CALIFORNIA Rule 2.5.2 (1995), *available in* Westlaw, CA-Rules Database [hereinafter LOCAL RULES].

20. *See id.* Rule 2.6.8 (authorizing imposition of sanctions if disciplinary body finds attorney guilty of unprofessional conduct in violation of California Rules of Professional Conduct).

21. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

22. *See In re* Woodward, 300 S.W.2d 385, 390, 393-94 (Mo. 1957) ("A layman may, perhaps, pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics.").

23. *See In re* Sawyer, 360 U.S. 622, 636 (1959) (plurality opinion) (observing that attorneys are subject to ethical restrictions on speech to which ordinary citizens are not subject); David W. Wright, In Re Holtzman*: Free Speech or Professional Misconduct?*, 9

opinion, however, represents a departure from the traditional response given by courts that, in certain contexts, attorneys do not possess First Amendment rights equal to those of the ordinary citizen.[24]

The restrictions placed on attorney speech and the consequences for violations of attorney speech regulations fuel the debate over which policy arguments should prevail.[25] One of the purposes behind ethical rules prohibiting conduct that degrades the integrity of the court is to minimize unjust attorney criticism of judicial officers.[26] The drafters of ethical rules that restrict attorney criticism of the judiciary neither intended nor desired to protect judges from offensive or unsettling criticism, but intended to preserve public faith and confidence in the fairness and impartiality of the judicial system.[27] Courts repeatedly have endorsed ethical rules regulating attorney criticism of the judiciary based on the rationale that allowing such criticism to flourish would severely diminish the public's confidence in the judiciary and thus hinder the efficient administration of justice.[28] Although

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TOURO L. REV. 587, 587 (1993) (noting that "[m]embership in the bar is a privilege burdened with conditions" (quoting People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (Cardozo, J.))); *cf.* United States Dist. Court v. Sandlin, 12 F.3d 861, 866 (9th Cir. 1993) (stating that although attorneys do not surrender freedom of expression, they must temper criticisms in accordance with professional standards of conduct).

24. *See, e.g., In re* Terry, 394 N.E.2d 94, 95-96 (Ind. 1979) (disbarring lawyer for making false accusations against judge to members of jury and public officials); *In re* Frerichs, 238 N.W.2d 764, 768-69 (Iowa 1976) (admonishing attorney for criticism of court's decision and explaining that lawyers have fewer free speech rights than private citizens); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168-69 (Ky. 1980) (disciplining attorney for public statements about sitting judge); *In re* Raggio, 487 P.2d 499, 500-01 (Nev. 1971) (reprimanding attorney for criticism of court's holding).

25. *See infra* notes 26-42 and accompanying text (articulating and comparing legitimate competing policy concerns that exist on both sides of attorney criticism debate).

26. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 355 (1871) (recognizing that valid purpose behind sanctioning attorneys is need to limit offensive conduct and insulting language about integrity of judiciary).

27. *See Terry*, 394 N.E.2d at 95 (declaring that drafters' intent was to promote integrity of judicial system and not to shelter judges from unpleasant criticism).

28. *See, e.g., In re* Evans, 801 F.2d 703, 706-08 (4th Cir. 1986) (stating that attorney's letter to judge questioning judge's competence and impartiality, written during pendency of appeal, amounted to attempt to prejudice administration of justice); *In re* Shimek, 284 So. 2d 686, 689 (Fla. 1973) (finding that attorney's statement that judge was avoiding performance of his sworn duty was "calculated to cast a cloud of suspicion upon the entire judiciary"); *Terry*, 394 N.E.2d at 96 ("Unwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process."); Committee on Prof'l Ethics & Conduct v. Horak, 292 N.W.2d 129, 130 (Iowa 1980) ("To permit unfettered criticism regardless of the motive would tend to intimidate

the courts have acknowledged that attorney criticism of the judiciary detrimentally affects the public's confidence in the legal system, some commentators have questioned whether an actual correlation exists between attorney criticism of the judiciary and reduced public confidence in the judiciary.[29]

Another purpose of speech restrictions is to bolster the notion that the legal profession is honorable, and thus, its members must conform to a higher code of conduct to ensure the honor and integrity of the legal system.[30] Advocates of attorney speech restriction posit that upon entering the legal profession, attorneys tacitly agree to abide by a higher code of conduct, including free speech limitations.[31] Additionally, courts have stated that attorneys are officers of the court who have voluntarily relinquished certain rights as members of a regulated profession.[32] Others, however, assert that attorneys do not relinquish their free speech rights when they

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judges in the performance of their duties and would foster unwarranted criticism of our courts."); *Heleringer*, 602 S.W.2d at 168 (declaring that attorney's press conference statements that judge's behavior was unethical and grossly unfair tended to "bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process").

29. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.3.2, at 601-02 (1986) (finding "current that runs through some judicial opinions is that all lawyer criticism of judges creates public disrespect for the law or the judiciary" and noting that courts' "self-solicitude for the respect that lawyers owe judges entirely overlooks the fact that there is no provision in the Code prohibiting lawyer disrespect for judges"); Jeanne D. Dodd, Comment, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. KY. L. REV. 129, 144 (1988) (positing that "silencing all attorney criticism is as likely to generate suspicion as it is to promote confidence in the judicial system").

30. *See* ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2, Legal Background, at 541 (3d ed. 1996) [hereinafter ANNOTATED MODEL RULES] (stating that one justification for restrictions of attorney speech is necessity of maintaining public's confidence in integrity of judiciary).

31. *See id.* (explaining another rationale for regulating attorney speech is that attorneys "relinquish certain rights as members of a regulated profession and as officers of the court").

32. *See, e.g., In re* Snyder, 472 U.S. 634, 644-45 (1985) (reasoning that "license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice"); *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) (stating that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech"); *In re* Frerichs, 238 N.W.2d 764, 769 (Iowa 1976) (recognizing that "lawyer, acting in professional capacity, may have some fewer rights of free speech than would a private citizen"); *In re* Johnson, 729 P.2d 1175, 1179 (Kan. 1986) (finding that one purpose of disciplinary action is to enforce "honorable conduct on the part of the court's own officers"); State *ex rel.* Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46, 53 (Neb. 1982) (proclaiming that "[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").

enter the profession, especially given the public's need for attorneys to serve as the watchdog of the judiciary.[33]

First Amendment considerations compete with the policy rationales for regulating attorney criticism of the judiciary.[34] By affirming decisions to sanction attorneys for their criticism of judges, courts protect the ethical justifications for the regulations and restrict attorneys' First Amendment freedom of speech rights.[35] The Supreme Court, however, has yet to determine how to interpret ethical rules that restrict attorney criticism of the judiciary in light of the First Amendment's guarantee of free speech.[36] Added to the freedom of speech issue are the corollary interests of the public's right to be informed about their legal system and the belief that attorneys are best suited to provide such information.[37] These two concerns

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33. *See* WOLFRAM, *supra* note 29, § 11.3.2, at 602-03 (refuting notion that lawyers agree to less First Amendment protection and asserting necessity of attorney criticism of judiciary). Professor Wolfram contends:

> Any argument that lawyer criticism of judges is entitled to lesser protection than nonlawyer criticism would have to proceed on the readily rejectable premise that lawyers are not entitled to the normal rights of citizens or on the only slightly stronger argument that there is a substantial and compelling state interest in requiring lawyers to protect judges by never subjecting them to accurate criticism. Certainly when the question before the public is whether a judge should be retained in office in a judicial election, there should not be the slightest doubt that lawyers are constitutionally entitled to debate the merits of a judicial candidacy as vigorously as all other citizens.

Id.

34. *See* WOLFRAM, *supra* note 29, § 11.3.2, at 602 (asserting that First Amendment protection fully applies to attorneys and thus directly conflicts with hostility shown to lawyer criticism of judges).

35. *See, e.g., In re* Terry, 394 N.E.2d 94, 95-96 (Ind. 1979) (restricting attorney free speech rights based on policy of protecting integrity of judiciary); *In re* Frerichs, 238 N.W.2d 764, 767-69 (Iowa 1976) (same); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168-69 (Ky. 1980) (same); *In re* Raggio, 487 P.2d 499, 500-01 (Nev. 1971) (same).

36. *See* ANNOTATED MODEL RULES, *supra* note 30, Rule 8.2, at 543 (noting that despite First Amendment implications, Supreme Court has yet to evaluate ethical rules prohibiting attorney criticism in light of First Amendment). The *Annotated Model Rules of Professional Conduct* state that the Supreme Court has yet to determine the "fundamental constitutional question of whether, and how, ethical constraints on lawyer criticism of judges and legal officers are to be interpreted in light of the free speech guarantee." *Id.* Rule 8.2 states:

> (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1983).

37. *See* Alan M. Dershowitz, *Betraying the Bill of Rights*, N.Y. TIMES, Nov. 28, 1976, § 7 (Book Review), at 1, 42-44 (discussing importance of upholding attorneys' freedom of

drive the arguments against ethical regulations that impose strict regulations on attorney speech.[38]

Opponents of the regulation of attorney speech point to the First Amendment guarantee of unrestricted, robust, and expansive debate on public issues, no matter how vehement and caustic the speech may be.[39] According to opponents of the restrictions, attorneys' freedom of speech interests in criticizing the judiciary deserve additional respect because the First Amendment's primary purposes are to ensure freedom of communication on subjects relating to government operations and to secure the public's right of access to that information.[40] The opponents assert that the interests in attorney freedom of speech rights and in the public's right to know are paramount to the ethical considerations supporting the regulation of attorney criticism of the judiciary.[41] Accordingly, these opponents conclude that

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speech guarantees and encouraging attorney evaluations of judges so that public is accurately informed about flaws in judicial system). Dershowitz argues:

> But, there is a high price paid in leaving to non-lawyers the major responsibility for educating the lay public about the inadequacies of our courts. Practicing lawyers who are daily exposed to the intricacies of the law have a unique insider's understanding of the subtle relationships among the rules, institutions and personalities that comprise our legal system. Many books by non-lawyers . . . sometimes fail to grasp these subtleties.

Id. at 43.

38. *See id.* (explaining that barring attorney criticism has created inherent tragedy by misguiding public about adequacy of judiciary).

39. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (acknowledging existence of "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").

40. *See* Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The* Gentile v. State Bar of Nevada *Decision*, 43 CASE W. RES. L. REV. 1347, 1356 (1993) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980)). For the position that criticism of the judiciary serves a vital purpose in the criminal justice setting, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government."). For authority supporting the proposition that the public has a protected interest in receiving information about the judiciary, see *In re Express-News Corp.*, 695 F.2d 807, 809 & n.2 (5th Cir. 1982) (stating that variety of cases have demonstrated that individuals have right to receive information) and LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-11, at 859 (2d ed. 1988) (interpreting *Richmond Newspapers* as establishing public's right to information).

41. *See* Dershowitz, *supra* note 37, at 42-43 (asserting that freedom of speech rights and public's need to know truth about judiciary's faults outweigh policies underlying ethical rules restricting attorney criticism). For cases recognizing that the First Amendment

attorneys should retain the full panoply of rights guaranteed to every individual by the First Amendment.[42]

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includes the public's right to know or receive information generally, see *Kleindienst v. Mandel*, 408 U.S. 753, 762, 765 (1972) (considering right to receive information from excluded alien); *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (acknowledging right to distribute informational literature); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (evaluating right of viewers and listeners to obtain information of public concern); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (recognizing right to read or view obscene materials in privacy of one's home); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965) (establishing right to receive information about contraceptives and to use contraceptives); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 304 (1965) (recognizing right to receive communist political propaganda); and *Martin v. City of Struthers*, 319 U.S. 141, 142-43 (1943) (endorsing right to receive religious information).

For a detailed discussion of the right to know, see generally Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Robert J. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); William J. Brennan, Jr., Lecture, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Thomas I. Emerson, Lecture, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245; Bill Aitchison, Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975); Frances L. Pergericht, Note, *Attorneys' Rights Under the Code of Professional Responsibility: Free Speech, Right to Know, and Freedom of Association*, 1977 WASH. U. L.Q. 687; and John M. Steel, Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

42. *See Amici Curiae* Brief of the American Jewish Congress-Pacific Southwest Region, Article 19, and Individual Law Professors and Attorneys in Support of Respondent-Appellant at 2, Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (No. 94-55918) (asserting that First Amendment rights of attorneys create immovable barrier to imposition of sanctions for speech violations of ethical rules, particularly in light of public capacity of judges). The authors of the brief argued:

> The First Amendment stands as an *insurmountable obstacle* to the imposition of sanctions against an attorney for "impugning the integrity" of the Court by public criticism, even intemperate criticism, of judges. Federal court judges are public officials whose performance and public integrity *must be open to challenge*, like every other public official in our democratic system. If attorneys believe that sitting judges are anti-Semitic or dishonest, they are *free to say so publicly*. This is so even if it turns out that they are wrong and even if it is painful to the judge involved.
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> . . . .
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> [A]n attorney should *never* be punished simply for impugning the integrity of a particular judge, a court or the legal system as a whole.
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> . . . .
>
> Such threats to the "integrity" of public officials and institutions may not be purchased at the expense of freedom of expression in our constitutional system.

Id. at 2, 6, 23 (emphasis added). The views of this amici curiae brief represent the position

III. The Historical Foundation of Restrictions on Attorney Criticism of the Judiciary

Traditionally, courts have interpreted the *American Bar Association Code of Professional Responsibility* (Code) as imposing significant restrictions on attorney criticism of the judiciary.[43] The basis for the courts' holdings stems from one of two assumptions: (1) attorney criticism of the judiciary is likely to diminish public confidence in the legal system; or (2) attorneys sacrifice certain rights in exchange for their elevated status as members of a regulated profession.[44] The majority of courts have rejected

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held by the array of Yagman supporters. *Id.* app. A. Participants included the American Jewish Congress and Article 19, an international, nongovernmental organization. *Id.* at 2-3. The American Jewish Congress actively fights to protect religious, civil, political, and economic rights of Jewish people and to promote First Amendment liberties as enshrined in the Constitution. *Id.* In addition, over seventy individual lawyers and law professors contributed to Yagman's legal battle against censorship by providing a uniform front against the chilling effect of imposing ethical sanctions for speech critical of the judiciary. *Id.* at 2-3, app. A. Erwin Chemerinsky and Susan R. Estrich were among the many distinguished individuals who supported Yagman's position. *Id.* app. A; *see also Amicus Curiae* Brief of the Los Angeles Chapter of National Lawyers Guild at 1, Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (No. 94-55918) (declaring that imposition of sanctions poses massive risk of chilling attorney's exercise of First Amendment rights). In its brief, the National Lawyer's Guild proclaims:

> To the extent that such rules of procedure authorize the punishment of attorneys for conduct, particularly verbal conduct . . . such rules should be construed and applied most strictly in favor of the lawyers and against the right to inflict punishment. These rules should favor the minimization of punishment in those cases where any punishment at all is justified.
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> This is so especially in the case where the First Amendment rights of the lawyer are involved. Any process which has the effect of causing lawyers to be fearful in connection with their exercise of First Amendment rights must be avoided to the maximum extent possible. The failure to follow these principles is likely to have a chilling effect on the exercise of First Amendment rights by the attorney particularly where he is criticizing the courts or one of its members.

Id.

43. *See* Sandra M. Molley, Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 NOTRE DAME LAW. 489, 489-90 (1981) (explaining how courts have traditionally interpreted Code as restricting all attorney criticism); *see also In re* Shimek, 284 So. 2d 686, 687-90 (Fla. 1973) (interpreting and applying ethical rule to sanction attorney for criticism of judiciary); *In re* Terry, 394 N.E.2d 94, 95-96 (Ind. 1979) (same); *In re* Friedland, 376 N.E.2d 1126, 1127-28 (Ind. 1978) (same); *In re* Frerichs, 238 N.W.2d 764, 768-70 (Iowa 1976) (same); State v. Russell, 610 P.2d 1122, 1127-28 (Kan. 1980) (same); *In re* Raggio, 487 P.2d 499, 499-501 (Nev. 1971) (same); *In re* Lacey, 283 N.W.2d 250, 251-53 (S.D. 1979) (same).

44. *See* Molley, *supra* note 43, at 489-90 (explaining two justifications for courts' imposition of sanctions on attorneys for criticism of judiciary).

First Amendment arguments and have upheld restrictions on attorney criticism because of the strong state interest in preserving the integrity of the judiciary and the legal system generally.[45]

In the 1871 case of *Bradley v. Fisher*,[46] the Supreme Court proclaimed that lawyers have an obligation to refrain from making statements attacking the integrity of the judiciary.[47] The *Bradley* decision influenced states' early efforts to codify ethical restrictions on attorney speech.[48] By 1908, the American Bar Association (ABA) released the *Canons of Professional Responsibility* (Canons), which set forth aspirational goals designed to advance the legal profession and to preserve its dignity.[49] Because the ABA

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45. *See, e.g., In re* Terry, 394 N.E.2d 94, 95-96 (Ind. 1979) (sanctioning lawyer criticism of court's opinion); *In re* Frerichs, 238 N.W.2d 764, 768-69 (Iowa 1976) (admonishing attorney for criticism of court's decision); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168-69 (Ky. 1980) (disciplining attorney for statements made in public about judiciary); *In re* Raggio, 487 P.2d 499, 500-01 (Nev. 1971) (reprimanding attorney for criticism of court's holding); *see also* Molley, *supra* note 43, at 490 (discussing how courts have imposed numerous harsh sanctions, including public reprimand, suspension, and disbarring based on determination that free speech concerns do not outweigh state's interest in defending its public officials).

46. 80 U.S. (13 Wall.) 335 (1871).

47. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 356 (1871) (finding that attorney's threatening judge with personal chastisement was sufficient grounds for striking name of attorney from court's rolls of practicing attorneys in that court). In *Bradley*, the Supreme Court considered the extent of an attorney's obligation to abstain from impugning the integrity of the judiciary and the court's ability to sanction attorneys for such attacks. *Id.* at 355. According to the *Bradley* Court, attorneys have a duty to maintain a level of respect toward the judicial system and its officers at all times. *Id.* The Supreme Court emphasized that attorneys have an obligation to refrain from making insulting statements about the judiciary both in and out of court. *Id.* In conclusion, the *Bradley* Court stated that an attorney's threatening personal chastisement of a judge, out of court but during the pendency of trial, warranted the striking of the attorney's name from the rolls of lawyers practicing in the court. *Id.* at 356.

For a critique of the *Bradley* decision, see Molley, *supra* note 43, at 491. Molley asserts:

> The *Bradley* decision was inadequate because it failed to (1) define the boundary lines of the ethical standards it sought to maintain, (2) consider the effects of a strict application of these disciplinary regulations on attorneys' first amendment rights, and (3) recognize that a certain amount of criticism of the judiciary would help to maintain the viability of the legal system.

Id. (citing Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922, 924 (1974)).

48. *See* Dodd, *supra* note 29, at 132-35 (discussing impact of *Bradley* conclusion that attorneys should refrain from criticizing judiciary).

49. *See* ABA CANONS OF PROFESSIONAL ETHICS Canon 1 (1908) (setting forth aspirational goals to uplift legal profession and ensure its integrity).

believed that a correlation existed between maintaining the integrity of the legal profession and restricting attorney criticism of the judiciary, the Canons instructed attorneys to foster an attitude of respect for the judiciary as acknowledgment of the judicial system's supreme importance.[50] In addition, the Canons expected attorneys to further the propriety and the honor of the legal system.[51] Although the Canons allowed justifiable criticism of the judiciary if directed through the appropriate channels within the ABA,[52] the expansive language of the Canons impliedly prohibited any attorney criticism with the potential to injure the image of the judiciary or the legal profession generally.[53]

Most judicial decisions interpreting the Canons prohibited attorney criticism of the judiciary altogether, regardless of whether the criticism had any real potential to injure the image of the profession.[54] Most courts rendered opinions barring attorney criticism of the judiciary without consid-

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50. *See id.* (demanding that attorneys show utmost respect for judiciary due to its paramount importance). Canon 1 states:

> It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor.

Id.

51. *See id.* (describing attorneys' duty to maintain and improve propriety and honor of legal system).

52. *See id.* (explaining that attorneys should submit serious complaints about judiciary to proper authorities).

53. *See id.* (implicitly barring any unjust attorney statements that could injure perception of integrity of legal profession); *see also* Molley, *supra* note 43, at 491 (claiming that although Canons purported to allow attorney criticism of judiciary, broad language of Canons created room for interpretation restricting attorney criticism that was potentially harmful to profession's image).

54. *See* Florida Bar v. Stokes, 186 So. 2d 499, 499 (Fla. 1966) (neglecting to consider seriously impact of disparaging remarks on judicial system yet still sanctioning attorney for making such remarks); State *ex rel.* Fla. Bar v. Edwards, 102 So. 2d 610, 610 (Fla. 1958) (same); State *ex rel.* Fla. Bar v. Calhoon, 102 So. 2d 604, 608-09 (Fla. 1958) (same); *In re* Glenn, 130 N.W.2d 672, 675-76 (Iowa 1964) (same); Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321, 325-26 (Ky. 1955) (same); *In re* Lord, 97 N.W.2d 287, 294-95 (Minn. 1959) (same); State *ex rel.* Neb. State Bar Ass'n v. Nielsen, 136 N.W.2d 355, 359-60 (Neb. 1965) (same); State *ex rel.* Neb. State Bar Ass'n v. Rhodes, 131 N.W.2d 118, 127-28 (Neb. 1964) (same); State v. Kavanaugh, 243 A.2d 225, 231 (N.J. 1968) (same); State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964) (same); *In re* Greenfield, 262 N.Y.S.2d 349, 350-51 (App. Div. 1965) (same); Cincinnati Bar Ass'n v. Bednarczuk, 258 N.E.2d 116, 117 (Ohio 1970) (same); *In re* Gorsuch, 75 N.W.2d 644, 648-50 (S.D. 1965) (same); *In re* Simmons, 395 P.2d 1013, 1019 (Wash. 1964) (same).

ering the First Amendment issue.[55] Other courts explicitly rejected First Amendment arguments on the basis that voluntary entrance into the bar signified relinquishment of any First Amendment right to criticize the judiciary beyond the channels provided by the ABA.[56] Still other courts considered the First Amendment issue, but concluded that the state interest in upholding the public's respect for the judiciary outweighed attorneys' First Amendment freedom of speech rights.[57]

In 1959, the Supreme Court re-examined the traditional approach of restraining attorney criticism of the judiciary in *In re Sawyer*.[58] In *Sawyer*, the Supreme Court considered whether the evidence supported a lower court's conclusion that defense counsel's speech impugned the impartiality and fairness of the federal district court judge conducting the ongoing trial and frustrated the administration of justice by damaging the integrity of the court.[59] Harriet Sawyer acted as defense counsel in the trial of several defendants charged with conspiracy under the Smith Act.[60] A disciplinary body brought charges against Sawyer for statements made at a village meeting in Hawaii concerning the presiding United States District Court Judge six weeks after the initiation of the trial.[61] According to the charges, Sawyer claimed that a fair trial under the Smith Act was impossible, in part because presiding judges completely ignored the rules of evidence in order to assist the state in building its case.[62] In addition, Sawyer stated that horrible and shocking events occurred in the courtroom during a Smith Act conspiracy trial, including the Government's instructing witnesses to make

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55. *See* Dodd, *supra* note 29, at 134 (discussing historical trend of courts regarding attorney criticism and level of consideration or neglect given to First Amendment issues); Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922, 924 (describing extent to which courts ignored First Amendment issue in attorney criticism cases).

56. *See* Dodd, *supra* note 29, at 134-35 (noting that *Bradley* Court rejected First Amendment arguments because of belief that attorneys voluntarily sacrifice full First Amendment protection upon entrance into legal profession); Note, *supra* note 55, at 924-25 (same).

57. *See* Dodd, *supra* note 29, at 134-35 (explaining that courts which considered First Amendment issue concluded that state's interest in ensuring integrity of legal profession outweighed any First Amendment infringement); Note, *supra* note 55, at 924-25 (same).

58. 360 U.S. 622 (1959) (plurality opinion).

59. *In re* Sawyer, 360 U.S. 622, 626 (1959) (plurality opinion). The ABA Ethics Committee concluded that defense counsel's statements attacking the judiciary violated Canon 1, The Duty of the Lawyer to the Courts, and Canon 22, Candor and Fairness, of the *ABA Canons of Professional Ethics*. *Id.* at 625-26 (plurality opinion).

60. *Id.* at 623 (plurality opinion).

61. *Id.* (plurality opinion).

62. *Id.* at 628-29 (plurality opinion).

statements in order to convict the defendant.[63] Beyond the general attacks on the judicial system, the government generally, and the Federal Bureau of Investigation particularly, Sawyer also made impugning statements about the ongoing Smith Act trial.[64] The ABA Ethics Committee found that Sawyer's public remarks attacked the presiding judge's impartiality and fairness while also degrading the court's judicial integrity.[65] The ABA Ethics Committee concluded that Sawyer's speech violated the Canons, and the territorial supreme court found that the violation warranted suspension from the practice of law for one year.[66] The United States Court of Appeals for the Ninth Circuit affirmed the sanction.[67]

Justice Brennan, for the plurality,[68] determined that the evidence failed to support the finding that Sawyer's speech attacked the judge's impartiality or that it impugned the integrity of the court.[69] Justice Brennan found that Sawyer's statements criticized the system of laws relating to the Smith Act, rather than the enforcers of such laws.[70] The plurality opinion concluded that Sawyer's statements never crossed the line of impermissibility[71] because the statements only attacked the state of the law and the judge's interpretation of the law.[72] According to Justice Brennan, both types of statements were protected forms of speech despite the facts that the speaker was an attorney and that the attorney made the statements out of court during the pendency of the trial.[73] Because of the lack of proof that any of the statements tended to obstruct justice in the ongoing trial,[74] Justice Brennan found

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63. *Id.* at 629-30 (plurality opinion).

64. *Id.* at 630-31 (plurality opinion).

65. *Id.* at 624-25 (plurality opinion).

66. *Id.* at 623-25 (plurality opinion).

67. *In re* Sawyer, 260 F.2d 189 (9th Cir. 1958), *rev'd*, 360 U.S. 622 (1959).

68. *Sawyer*, 360 U.S. at 623-46 (plurality opinion). The Supreme Court Justices filed three separate opinions in *Sawyer*. Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, authored the plurality opinion. *Id.* (plurality opinion). Justice Frankfurter, joined by Justice Clark, Justice Harlan, and Justice Whitaker, wrote the dissenting opinion. *Id.* at 647-69 (Frankfurter, J., dissenting). Justice Stewart filed a separate opinion concurring in the result. *Id.* at 646-47 (Stewart, J., concurring).

69. *Id.* at 636 (plurality opinion).

70. *Id.* at 632 (plurality opinion).

71. *Id.* at 636 (plurality opinion). Justice Brennan noted that Sawyer did not state that the judge was "corrupt or venal or stupid or incompetent." *Id.* at 635 (plurality opinion).

72. *Id.* at 631-33 (plurality opinion). Defining the boundary of permissible attorney speech, Justice Brennan asserted that public statements attributing error in legal judgment to the judiciary are not a basis for disciplinary action. *Id.* at 635 (plurality opinion).

73. *Id.* at 636 (plurality opinion).

74. *Id.* (plurality opinion). Justice Brennan concluded that the statements lacked any

that the First Amendment protected Sawyer's statements and, therefore, lifted the suspension order.[75]

In a concurring opinion, Justice Stewart focused on the special duties of those who choose to join the legal profession.[76] Although he concluded that the speech was not punishable based on its content, Justice Stewart strongly asserted that an attorney's obligation to the legal profession outweighs the attorney's First Amendment rights when a conflict between the two arises.[77] The dissent, led by Justice Frankfurter and joined by three other justices, further endorsed the principle that attorneys surrender some First Amendment liberties upon admission into the profession.[78] In accordance with this belief that attorneys assume a heightened duty to uphold the court's integrity, the dissent urged that Sawyer's statements represented a fierce attack upon the court, well deserving of discipline.[79]

Two theories on the propriety of restrictions on attorney speech crystallized in the *Sawyer* opinion. The plurality focused on the First Amendment rights that attorneys retain, specifically the right to criticize a body of law and the judicial interpretations of that law.[80] The dissent argued that attorneys must remain within certain ethical boundaries to preserve the integrity of the profession.[81] Because society entrusts attorneys with the responsibility of protecting and promoting the integrity of the legal system,

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tendency to obstruct justice because the statements were not likely to reach the judge or the jury. *Id.* (plurality opinion). The possibility of the statements disrupting the administration of justice, therefore, was too slim to be sanctionable. *Id.* (plurality opinion). On the other hand, Justice Frankfurter, in his dissent, argued that the type of criticism Sawyer made deserved no constitutional protection regardless of the likelihood that the statements would reach either the judge or the jury. *Id.* at 668 (Frankfurter, J., dissenting).

75. *Id.* at 636 (plurality opinion).

76. *Id.* at 646-47 (Stewart, J., concurring).

77. *Id.* (Stewart, J., concurring). In his separate concurrence, Justice Stewart asserted: "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. For example, I doubt that a physician who broadcast[s] the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline." *Id.* (Stewart, J., concurring).

78. *Id.* at 668 (Frankfurter, J., dissenting). In dissent, Justice Frankfurter proclaimed that an attorney "is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *Id.* (Frankfurter, J., dissenting).

79. *Id.* at 669 (Frankfurter, J., dissenting).

80. *See id.* at 631-32 (plurality opinion) (acknowledging First Amendment rights that attorneys retain, such as right to criticize state of law and judicial interpretation of law).

81. *See id.* at 668 (Frankfurter, J., dissenting) (asserting necessity of restraining forms of attorney criticism that are permissible to maintain integrity and honor of legal profession).

when an attorney betrays such duties, as Sawyer did, sanctions should flow.[82] Although Justice Brennan's plurality opinion applied an effects-based test, which required finding a tendency to obstruct justice,[83] Justice Frankfurter's dissent and Justice Stewart's concurrence emphasized the potential harm that could result if courts began to stray from the traditional standards established in *Bradley* and reaffirmed in the Canons.[84] Following *Sawyer*, many lower courts continued to apply those traditional principles.[85] Thus, these lower courts continued to affirm severe sanctions imposed on attorneys for criticizing the judiciary,[86] despite Justice Brennan's plurality opinion in *Sawyer*.

In an attempt to clarify the guidelines governing attorney criticism of the judiciary, the ABA recast the scope of limitations on attorney criticism in the 1969 *Code of Professional Responsibility* and then again in 1980.[87] The 1980 version of the Code holds attorneys to a higher standard of

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82. *Id.* (Frankfurter, J., dissenting).

83. *See id.* at 636 (plurality opinion) (advocating effects test that asks whether critical statements have tendency to obstruct justice).

84. *See id.* at 646 (Stewart, J., concurring) (warning of detrimental effects that might result if Supreme Court strays from traditional standards of Canons); *id.* at 668 (Frankfurter, J., dissenting) (echoing Justice Stewart's concern that departing from traditional approach of in-court criticism might cause negative consequences).

85. *See* Molley, *supra* note 43, at 494 (explaining that many courts persisted in their application of principles enunciated in *Bradley* and in Canons). Molley states: "Instead of applying the 'tend to obstruct' test of the plurality opinion in *Sawyer*, most courts have continued to apply the traditional standards established in *Bradley* and reiterated in the Canons and the Frankfurter dissent in *Sawyer*." *Id.*

86. *See, e.g.*, *In re* Whiteside, 386 F.2d 805, 806 (2d Cir. 1967) (upholding sanctions imposed on attorney for critical statements attacking judiciary); *In re* Belli, 371 F. Supp. 111, 112-14 (D.D.C. 1974) (same); Spencer v. Dixon, 290 F. Supp. 531, 537-40 (W.D. La. 1968) (same); Florida Bar v. Stokes, 186 So. 2d 499, 499 (Fla. 1966) (same); *In re* Terry, 394 N.E.2d 94, 95-96 (Ind. 1979) (same); *In re* Friedland, 376 N.E.2d 1126, 1127-28 (Ind. 1978) (same); *In re* Frerichs, 238 N.W.2d 764, 768-70 (Iowa 1976) (same); *In re* Glenn, 130 N.W.2d 672, 675-76, 678 (Iowa 1964) (same); State v. Russell, 610 P.2d 1122, 1127-28 (Kan. 1980) (same); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168-69 (Ky. 1980) (same); State *ex rel.* Neb. Bar Ass'n v. Rhodes, 131 N.W.2d 118, 127-28 (Neb. 1964) (same); *In re* Raggio, 487 P.2d 499, 499-501 (Nev. 1971) (same); State v. Kavanaugh, 243 A.2d 225, 231 (N.J. 1968) (same); State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964) (same); *In re* Meeker, 414 P.2d 862, 863-70 (N.M. 1966) (same); *In re* Greenfield, 262 N.Y.S.2d 349, 350-51 (App. Div. 1965) (same); Cincinnati Bar Ass'n v. Bednarczuk, 258 N.E.2d 116, 117 (Ohio 1970) (same); *In re* Simmons, 395 P.2d 1013, 1019 (Wash. 1964) (same).

87. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) (restructuring restrictions on attorneys for critical statements about judiciary). For an in-depth description of the *Model Code*'s contents, see Dodd, *supra* note 29, at 138-39.

conduct than the average citizen.[88] It includes Ethical Considerations that encourage attorneys to exercise their First Amendment rights to evaluate the legal system critically because attorneys are uniquely qualified to evaluate the deficiencies in the judicial system.[89] The Ethical Considerations specifically state that attorneys have a heightened level of responsibility to offer commentary about the judiciary.[90] Thus, in some respects, the language of the Code concerning attorney criticism provides some level of protection for attorney free speech rights.[91] The Disciplinary Rules, however, restrict the extent to which an attorney can criticize the judiciary.[92] For example, the Disciplinary Rules forbid attorneys to knowingly make false statements of fact and false accusations or to prejudicially interfere with the administration of justice.[93] Thus, the Disciplinary Rules present the possibility of sanctions for attorneys who violate the ethical rules, which could dissuade attorneys from fully exercising their free speech rights and could deprive the public of information about the quality of judicial officials.[94]

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88. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble at 1 (1980) (describing attorneys' role as guardians of law which includes obligations to uphold highest standards of ethical conduct).

89. *See id.* EC 8-1 (encouraging attorneys to make constant efforts to enhance legal system and command public respect for legal system). The ABA has stated that the "Ethical Canons are aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.* prelim. statement at 2.

90. *See id.* EC 8-6 (stating that attorneys have special obligations to ensure that judges meet qualification standards). The Ethical Consideration adds that although attorneys have the right to criticize such officials publicly, an attorney "should 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." *Id.*

91. *See* Dodd, *supra* note 29, at 140 (stating that on its face, Disciplinary Rule language prohibiting knowingly making false accusations provides enhanced protection to attorneys in disciplinary proceedings in comparison to subjective knowing or reckless disregard standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

92. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-102 (1980) (instructing that attorney shall not knowingly make false statements of fact concerning qualifications of judicial candidate and attorney shall not knowingly make false accusations against judiciary).

93. *Id.* DR 1-102(A)(5) & DR 8-102. DR 1-102(A)(5) states: "A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice." *Id.* DR 1-102(A)(5). DR 8-102 states: "(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office. [or] (B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." *Id.* DR 8-102.

94. *See* Molley, *supra* note 43, at 495 (asserting that uncertainty and mere threat of sanctions not only stifles attorneys' free speech, but also deprives public of access to information about actions and quality of judicial officers).

In 1983, the ABA adopted the *Model Rules of Professional Conduct*, attempting to strike a balance between ensuring litigants' rights to fair trials and protecting attorney free speech rights.[95] Rule 8.2 addresses attorney criticism of the judiciary and attempts to provide broader First Amendment protections to attorneys than did previous rules.[96] Subsequently, the Supreme Court again confronted the issue of attorney criticism of the judiciary, but refused to address the constitutional issues.[97]

IV. Standing Committee on Discipline v. Yagman

In *Yagman*, the United States Court of Appeals for the Ninth Circuit considered whether Yagman's public statements violated local ethical restrictions on attorney criticism of the judiciary.[98] In 1991, Yagman filed a pro se lawsuit against several insurance companies[99] and sought to disqualify Judge Manuel Real on the basis of bias.[100] Judge William Keller heard the motion to disqualify, denied the motion,[101] and sanctioned Yagman for bringing an improper and frivolous matter.[102] Yagman reacted to Judge Keller's denial and sanction by launching a series of verbal and written attacks regarding Judge Keller's personal characteristics and professional qualifications.[103]

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95. *See* Dodd, *supra* note 29, at 141 (describing ABA's efforts to accommodate competing interests of public and of attorneys).

96. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 (1983) (stating that attorney shall not make statement with knowledge of its falsity or in reckless disregard as to its truth or falsity concerning qualifications or integrity of judiciary).

97. *In re* Snyder, 472 U.S. 634, 642-43 (1985) (declining to evaluate constitutional issues considered to be unnecessary to disposition of case).

98. Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1436 (9th Cir. 1995).

99. *Id.* at 1433.

100. *Id.*

101. *Id.* at 1434 (citing Yagman v. Republic Ins., 136 F.R.D. 652, 657-58 (C.D. Cal. 1991)).

102. *Id.* (citing Yagman v. Republic Ins., 137 F.R.D. 310, 312 (C.D. Cal. 1991)). Judge Keller reprimanded Yagman harshly. *Id.* (citing *Yagman*, 137 F.R.D. at 318-19). The sanction order stated that "neither monetary sanctions nor suspension appear to be effective in deterring Yagman's pestiferous conduct." *Id.* (citing *Yagman*, 137 F.R.D. at 318). The order further recommended that Yagman be "disciplined appropriately" by the California State Bar. *Id.* (citing *Yagman*, 137 F.R.D. at 319). On appeal, the Court of Appeals for the Ninth Circuit affirmed the denial of Yagman's recusal motion, but reversed the sanctions. Yagman v. Republic Ins., 987 F.2d 622, 643 (9th Cir. 1993).

103. *See Yagman*, 55 F.3d at 1434 (describing Yagman's numerous critical attacks of Judge Keller in retaliation for Judge Keller's sanction order); *see also supra* note 1 and accompanying text (same).

Less than a week after Judge Keller's sanction order, the press quoted Yagman as accusing Judge Keller of anti-Semitism.[104] In an unpublished statement, the press recorded Yagman as saying that Judge Keller was "drunk on the bench."[105] In response to a request from Prentice Hall, the publisher of the *Almanac of the Federal Judiciary*,[106] Yagman sent an inflammatory letter criticizing Judge Keller's actions as a judge and as an individual.[107] In addition, Yagman placed an advertisement in the *Los Angeles Daily Journal* requesting attorneys sanctioned by Judge Keller to contact Yagman's law office.[108] Ultimately, Yagman informed another attorney, Robert Steinberg, that he hoped his public, critical attacks would force Judge Keller to recuse himself in future cases.[109] Because Steinberg

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104. *See Yagman*, 55 F.3d at 1434 (detailing statements Yagman made to members of press). The court noted that the press quoted Yagman's statement that Judge Keller "has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-[S]emitism." *Id.* (quoting Susan Seager, *Judge Sanctions Yagman: Refers Case to State Bar*, L.A. DAILY J., June 6, 1991, at 1).

105. *See id.* (citing Standing Comm. on Discipline v. Yagman, 856 F. Supp. 1384, 1386 (C.D. Cal. 1994)).

106. *See id.* (discussing *Almanac of Federal Judiciary*'s purpose and its request for comments concerning judges). The Ninth Circuit explained the common perception of the *Almanac of the Federal Judiciary* as a "much-fretted-about" publication. *Id.* The court described the *Almanac* as

> 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.

Id. at 1434 n.3.

107. *See supra* note 1 and accompanying text (describing critical letter Yagman sent to *Almanac of Federal Judiciary* regarding Judge Keller).

108. *See Yagman*, 55 F.3d at 1434 (describing advertisement that Yagman placed in newspaper soliciting comments from other attorneys sanctioned by Judge Keller). According to the court, the full text of the advertisement read: "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." *Id.* at 1434 n.5.

109. *See id.* at 1434 (describing Yagman's comments to another attorney, including statement of Yagman's desire to force Judge Keller's recusal). Although Yagman vehemently denied making any statements to Steinberg, the district court heard testimony from both sides and ultimately believed Steinberg's version. *Id.* at 1434 n.6 (citing *Yagman*, 856 F. Supp. at 1392).

believed that Yagman's actions constituted misconduct, Steinberg reported his conversation with Yagman in a letter to the Standing Committee on Discipline of the United States District Court for the Central District of California (Standing Committee).[110] Shortly thereafter, the Standing Committee received a letter from Judge Keller detailing the full extent of Yagman's critical comments.[111]

Prior to a hearing before three Central District judges, Yagman raised First Amendment arguments against the imposition of any sanctions based on his critical statements about Judge Keller.[112] Despite the complexity of the free speech issues, the district court disregarded the requests of both parties to brief the issues.[113] After a two-day hearing, the district court found that Yagman had committed misconduct by impugning the integrity of the court and by interfering with the administration of justice by judge-shopping.[114] Accordingly, the district court suspended Yagman from practice in the Central District of California for two years.[115]

On appeal, the Ninth Circuit first disposed of Yagman's due process claim, which Yagman based on alleged conflicts of interest by the three district court judges.[116] Then, the court of appeals considered the propriety of

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110. *See id.* at 1434 (explaining that Steinberg reported Yagman's critical statements and questionable intentions to disciplinary committee).

111. *See id.* at 1435 (noting that Judge Keller sent disciplinary committee Yagman's letter containing criticisms of Judge Keller). The court described Judge Keller's letter to the Standing Committee:

> 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." Judge Keller suggested: "The Standing Committee on Discipline should take action to protect the Court from further abuse."

Id. (quoting letter of Judge William Keller to Standing Committee on Discipline) (citations omitted).

112. *See id.* (explaining that Yagman raised First Amendment arguments against imposition of sanctions in district court).

113. *See id.* (describing how district court ignored requests to brief First Amendment issues despite difficulty of such issues).

114. *See id.* (citing Standing Comm. on Discipline v. Yagman, 856 F. Supp. 1395, 1400 (C.D. Cal. 1994)).

115. *Id.*

116. *See id.* at 1435-36 (dismissing Yagman's due process claim due to lack of support for assertion that district court judges had conflict of interest). The court stated: "Nor do we find any other support for Yagman's due process claim. . . . 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." *Id.* at 1436.

the sanctions against Yagman under two separate prohibitions of Local Rule 2.5.2 of the United States District Court for the Central District of California.[117] One prong of Local Rule 2.5.2 prohibits impugning the integrity of the court, and the other prong forbids interfering with the administration of justice.[118] The Ninth Circuit considered the two provisions separately because different First Amendment standards apply to each.[119]

First, the court of appeals analyzed the provision banning attorney activity that degrades the integrity of the court.[120] Although the district court found the provision to be overbroad,[121] the court saved the provision with a limiting construction:[122] the district court read into the provision an objective version of the malice standard introduced in *New York Times Co. v. Sullivan*.[123] Applying the rationale of *United States District Court v.*

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117. *Id.*; *see* LOCAL RULES, *supra* note 19, Rule 2.5.2 (prohibiting statements that impugn integrity of court or interfere with administration of justice).

118. *See Yagman*, 55 F.3d at 1436 (describing interrelation of two prongs of Local Rule, one of which prohibits impugning integrity of court and other of which bars interfering with administration of justice).

119. *See id.* at 1436-45 (considering two prongs of ethical rule separately due to different standards needed to evaluate violations under each prong).

120. *Id.* at 1436.

121. *Id.* at 1436-37. The court noted: "As the district court recognized, this provision is 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." *Id.*

122. *Id.* at 1437. Describing the limiting construction crafted by the district court, the Ninth Circuit stated:

> 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*. Relying on *United States District Court v. Sandlin*, . . . , 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."

Id. (citations omitted).

123. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (concluding that, in defamation suits, courts must apply subjective malice standard to particular individual that made statements at issue). In *New York Times*, the Supreme Court considered the extent to which the First Amendment limits state power to award a public official damages for a defamatory statement relating to the official's conduct. *Id.* at 256. Sullivan, who was the Commissioner of the City of Montgomery, Alabama and the supervisor of the police department, sued the New York Times Company for defamation based on a published advertisement that included several false charges of repressive police conduct in Montgomery. *Id.* at 256-58 & app. Although the *New York Times* advertisement did not mention Sullivan, the language of the article implicated Sullivan indirectly. *Id.* Under the controlling state libel per se law, once Sullivan demonstrated that the *New York Times* advertisement reflected

Sandlin,[124] the district court limited Local Rule 2.5.2 to forbid only false statements made either with knowledge of their falsity or with reckless disregard as to their truth or falsity as determined from the viewpoint of a reasonable attorney.[125] Under the *Sandlin* standard, attorneys may freely

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upon the agency Sullivan supervised, the only defense was truth, and thus, the New York Times lost. *Id.* at 267. The Supreme Court recognized the Constitution's profound commitment to uninhibited debate on public issues. *Id.* at 270. The Supreme Court reasoned that the deterrent effect of damage awards was so great that it severely chilled criticism of public officials, which is speech protected by the First Amendment. *Id.* at 277-79. The Court, however, concluded that a public official could recover damages for a defamatory falsehood relating to official conduct if she could prove that the author made the statement with actual malice, that is, the author possessed knowledge of the statement's falsity or acted with a reckless disregard of the truth. *Id.* at 279-80. Because Sullivan's proof was insufficient to show actual malice, the Supreme ultimately reversed in favor of New York Times Company. *Id.* at 285-92.

124. United States Dist. Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (determining that attorney disciplinary proceedings for ethical violations warrant objective standard, rather than subjective defamation standard). In *Sandlin*, the United States Court of Appeals for the Ninth Circuit considered whether to modify the *New York Times* malice standard for attorney disciplinary proceedings. *Id.* Attorney Sandlin wrongfully accused a district judge of instructing his court reporter to change the transcript of the court proceedings. *Id.* Even though the judge agreed to allow a deposition of the reporter, Sandlin failed to wait for the results of the deposition before making an accusation against the judge. *Id.* Disciplinary proceedings ensued against Sandlin pursuant to Washington Rule of Professional Conduct 8.2(a), which stated 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 . . . ." *Id.* at 864. Sandlin raised a First Amendment challenge to Rule 8.2. *Id.* Although the Ninth Circuit noted that the language of the ethical rule closely paralleled the *New York Times* malice standard, the court found that the wholly subjective standard applicable in defamation cases was not suited to attorney disciplinary proceedings. *Id.* at 867. According to the Ninth Circuit, an objective standard governs in attorney disciplinary proceedings. *Id.* The objective standard requires the court to determine what a reasonable attorney would do in the same or similar circumstances. *Id.* The court of appeals reasoned that there are substantial distinctions between the interests served by defamation law and the interests served by rules of professional ethics. *Id.* Applying the objective standard, the court of appeals concluded that Sandlin lacked a reasonable factual basis for his accusation by failing to utilize readily accessible means of verifying his accusation of criminal conduct by the judge. *Id.* at 867-68.

125. Standing Comm. on Discipline v. Yagman, 856 F. Supp. 1384, 1386-90 (C.D. Cal. 1994) (discussing objective knowledge and reckless disregard standard from *Sandlin*). According to the *Yagman* court, the *Sandlin* decision is consistent with the opinions of most state courts that have considered this issue. Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1437 n.12 (9th Cir. 1995); *see, e.g.*, Ramirez v. State Bar, 619 P.2d 399, 404 (Cal. 1980) (affirming sanction when attorney made false statements about judges based entirely on conjecture and without investigating accuracy of statements or factually substantiating allegations); *In re* Terry, 394 N.E.2d 94, 95-96 (Ind. 1979) (upholding sanctions because attorney's statements did not survive scrutiny under objective test); Louisiana State

make critical statements that have a reasonable factual basis, even if the statements turn out to be false.[126] The Ninth Circuit in *Yagman* claimed to apply the *Sandlin* objective standard, yet it protected Yagman with the broader shield of defamation law as it applies to the general public.[127]

According to the *Yagman* court, courts must recognize that attorneys who make statements impugning the integrity of the court may have other First Amendment protections applicable in the defamation context.[128] Those protections include the absolute defense of truth,[129] with the burden of showing falsity otherwise resting on the disciplinary body.[130] The court of appeals concluded that courts cannot sanction statements impugning the integrity of the court unless the statements are capable of being proved true or false.[131] Additionally, the Ninth Circuit declared that statements of opinion receive First Amendment protection unless the statements intimate a false assertion of fact.[132]

Applying these standards, the court of appeals found that none of Yagman's statements warranted sanction.[133] The Ninth Circuit reasoned that Yagman's statement that "[Judge Keller] has a penchant for sanctioning Jewish lawyers. . . . I find this to be evidence of anti-[S]emitism" con-

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Bar Ass'n v. Karst, 428 So. 2d 406, 409 (La. 1983) (sanctioning attorney because reasonable attorney would not have made such statements based on facts attorney knew or should have known); *In re* Graham, 453 N.W.2d 313, 321-22 (Minn. 1990) (using objective standard in decision upholding attorney sanctions); *In re* Westfall, 808 S.W.2d 829, 837 (Mo. 1991) (endorsing objective reasonable attorney standard when determining whether attorney statement constitutes ethical violation); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam) (upholding sanction when attorney falsely accused judge of misconduct during in-chambers meeting before questioning any individuals who were present at that meeting). *But see* State Bar v. Semaan, 508 S.W.2d 429, 432-33 (Tex. Civ. App. 1974, writ ref'd n.r.e.) (adopting *New York Times* subjective malice standard).

126. *See* Standing Comm. on Discipline v. Yagman, 55 F.3d. 1430, 1438 (9th Cir. 1995) (describing *Sandlin* standard as protecting critical statements that subsequently turn out to be false if attorney can establish that reasonable factual basis existed in support of such conclusions).

127. *See id.* at 1437-38 (purporting to apply objective standard yet relying on defamation case law rather than attorney professional responsibility cases).

128. *Id.* at 1438.

129. *Id.* (citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (discussing protection provided for true statements in defamation setting)).

130. *Id.* For a defamation case discussing plaintiff's burden to show falsity, see *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (cited in *Yagman*, 55 F.3d at 1438).

131. *Yagman*, 55 F.3d at 1438.

132. *Id.*

133. *Id.* at 1438-42.

tained an assertion of fact, as well as an expression of opinion.[134] The court of appeals assumed that the assertion of fact about Judge Keller's propensity for sanctioning Jewish lawyers was truthful because the Standing Committee did not claim otherwise.[135] Thus, the Ninth Circuit deemed the charge of anti-Semitism protected by the First Amendment as an opinion that did not intimate a false assertion of fact.[136] Next, the court considered Yagman's allegation that Judge Keller was dishonest.[137] Considering the dishonesty allegation in context, the Ninth Circuit found that the statement was not punishable because a reasonable interpreter would not find that the statement accused Judge Keller of criminal misconduct.[138] In evaluating Yagman's string of insults — "ignorant," "ill-tempered," "buffoon," "sub-standard human," "right-wing fanatic," and "one of the worst judges in the United States" — the court of appeals concluded that the First Amendment protected Yagman because the statements were "rhetorical hyperbole, incapable of being proved true or false."[139] Finally, the Ninth Circuit considered Yagman's statement that Judge Keller was "drunk on the bench."[140] Rejecting Yagman's argument that the drinking accusation was mere rhetorical hyperbole, the court of appeals found that the statement was capable of being proved true or false.[141] The Ninth Circuit concluded that the First Amendment shielded Yagman, however, because the Standing Committee failed to carry its burden to prove falsity.[142] Thus, the court of

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134. *Id.* at 1438.

135. *Id.*

136. *Id.* at 1438, 1440. The Ninth Circuit stated that the anti-Semitic claim "convey[ed] Yagman's personal belief that Judge Keller is anti-Semitic. As such, it may be the basis for sanctions only if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false." *Id.* at 1438-39. The court further stated that the statement was "protected by the First Amendment as an expression of opinion based on stated facts" and that "[e]ven 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.'" *Id.* at 1440 & n.17.

137. *Id.* at 1440.

138. *Id.*

139. *Id.* The Ninth Circuit described the derogatory remarks as conveying "nothing more substantive than Yagman's contempt for Judge Keller." *Id.*

140. *Id.* at 1441.

141. *Id.*

142. *Id.* at 1441-42. The Ninth Circuit found that the district court had presumed falsity and thereby "unconstitutionally relieved the Standing Committee of its duty to produce evidence on an element of its case. Without proof of falsity, Yagman's 'drunk on the bench' allegation . . . cannot support the imposition of sanctions for impugning the integrity of the court." *Id.*

appeals, in a two-to-one decision, concluded that none of Yagman's statements warranted sanction under the ethical rules because the First Amendment afforded Yagman the liberty to make such allegations.[143]

The court of appeals also considered whether the district court validly sanctioned Yagman for interfering with the administration of justice when he attempted to shop for a favorable judge.[144] The Ninth Circuit found that Yagman's statements did not constitute a punishable interference with the administration of justice because there was no clear and present danger to the proper functioning of the court system.[145] Although the court of appeals recognized the harsh nature of Yagman's statements,[146] the court concluded that the First Amendment protected Yagman's speech, however offensive, and that the district court erred in sanctioning Yagman.[147]

V. Critique of the Yagman *Decision*

In reversing the ethical sanctions against Yagman, the Ninth Circuit effectively rejected the notion that membership in the legal profession is inextricably intertwined with special limitations on First Amendment freedoms.[148] Although the Ninth Circuit purported to endorse the *Sandlin* objective test,[149] the court essentially resorted to common-law defamation principles in its application of the test.[150] By importing a defamation

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143. *Id.* at 1438-42.

144. *See id.* at 1442 (defining judge-shopping to include efforts to compel Judge Keller to recuse himself in all cases when Yagman appeared as counsel).

145. *Id.* at 1445.

146. *Id.* at 1443.

147. *Id.* at 1445.

148. *See In re* Sawyer, 360 U.S. 622, 635-36 & n.16 (1959) (plurality opinion) (observing that attorneys in pending cases are subject to ethical restrictions on speech to which ordinary citizens are not); Wright, *supra* note 23, at 587 (noting that "[m]embership in the bar is a privilege burdened with conditions" (quoting People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (Cardozo, J.))).

149. *See* Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1437-38 (9th Cir. 1995) (purporting to reject purely subjective standard applicable in defamation cases because of standard's unsuitability to attorney disciplinary proceedings and stating that objective standard governs); *see also* United States Dist. Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (adopting objective standard for determining whether to sanction attorneys for statements about judicial system). In defining the objective standard, the *Sandlin* court stated: "[W]e determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Id.*

150. *See Yagman*, 55 F.3d at 1437-45 (citing defamation cases and applying common-law libel standards to determine whether district court erroneously sanctioned Yagman).

standard, the court of appeals unmasked its opposition to institutional restrictions on the First Amendment rights of attorneys.[151]

Instead of following the traditional reasoning of courts that have afforded attorneys less First Amendment protection,[152] the Ninth Circuit departed from existing Supreme Court and circuit court jurisprudence by concluding that, unless an attorney's statements are libelous,[153] neither the disciplinary body nor the court can sanction the attorney.[154] The *Yagman* court's application of a common-law defamation standard[155] roughly equates

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151. *See id.* at 1445 (concluding with quote that emphasizes First Amendment rights). The *Yagman* court concluded its opinion by reiterating the words of Justice Black:

> 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.

Id. (quoting Bridges v. California, 314 U.S. 252, 270-71 (1941) (Black, J.)).

152. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1074 (recognizing that states can regulate more freely speech of attorneys participating in pending cases than ordinary citizens because attorneys have special obligations to ensure fair administration of justice); *Sawyer*, 360 U.S. at 646-67 (Stewart, J., concurring) (declining to join in "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct"). Justice Stewart further asserted that "obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id.* (Stewart, J., concurring); *see also* Ramirez v. State Bar, 619 P.2d 399, 404 (Cal. 1980) (concluding that "outrageous" and "unwarranted" statements by attorneys concerning judicial officers did not deserve First Amendment protection).

153. *Yagman*, 55 F.3d at 1438.

154. *See In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995) (criticizing *Yagman* court for potentially extending attorneys' First Amendment speech rights and departing from court precedents), *cert. denied*, 116 S. Ct. 1854 (1996). The *Palmisano* court asserted:

> To the extent *Standing Committee v. Yagman* may hold that attorneys are entitled to excoriate judges in the same way, and with the same lack of investigation, as persons may attack political officeholders, it is inconsistent with *Gentile* and our own precedents . . . . Even a statement cast in the form of an opinion ("I think that Judge X is dishonest") implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty.

Id. (citations omitted).

155. *Yagman*, 55 F.3d at 1438. *But see id.* at 1437-38 (distinguishing attorney discipline proceedings from defamation cases and claiming to adopt *Sandlin* objective standard because attorneys do not have full protective shield of defamation law standard). Although the Ninth Circuit voiced its endorsement of the *Sandlin* objective test and claimed to recognize the special limitations on attorney free speech rights, the court almost exclusively

attorney free speech rights with those of the ordinary citizen engaged in political debate. Thus, the Ninth Circuit's expansion of attorney speech rights[156] conflicts with the Supreme Court's constriction of these rights.[157]

By increasing attorneys' free speech protection, the Ninth Circuit undermined the policies of protecting the legal system's integrity, the public's confidence in it, and the fair administration of justice.[158] Specifically, the Ninth Circuit heavily relied on common-law defamation principles, even though the court purported to adopt the *Sandlin* objective test based on its suitability to attorney disciplinary proceedings.[159] In so doing,

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cited defamation cases, not attorney discipline cases. *Id.* In this discussion, the Ninth Circuit cited only one attorney discipline case, *Oklahoma ex. rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 967 (Okla. 1988), in which the court dismissed a request for sanctions against an attorney because it found no proof of falsity. *Id. Porter* represents the minority view in that it refused to treat judges differently than other public officials and applied the traditional defamation standards. *Porter*, 766 P.2d at 962-67. Elaborating on the standards it intended to apply, the *Yagman* court stated:

> 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. Moreover, the disciplinary body bears the burden of proving falsity.
>
> 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." 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. Thus, statements of "rhetorical hyperbole" aren't sanctionable, nor are statements that use language in a "loose, figurative sense."
>
> With these principles in mind, we examine the statements for which Yagman was disciplined.

Yagman, 55 F.3d at 1438 (citations omitted). Notably, the *Yagman* court relied on common-law defamation standards throughout its analysis despite the fact that it was deciding an attorney discipline case for which ample precedent existed. *See id.* (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); RESTATEMENT (SECOND) OF TORTS § 566 (1977)).

156. *See Yagman*, 55 F.3d at 1437-44 (purporting to apply *Sandlin* objective standard while effectively allowing Yagman's critical statements to have virtually full First Amendment protection).

157. *See Palmisano*, 70 F.3d at 487 (reasoning that Constitution does not give attorneys same freedoms as participants in political debates); *supra* note 32 and accompanying text (providing cases that endorse view that attorneys have fewer First Amendment rights).

158. *See generally* Petition for Rehearing and Suggestion for Rehearing *En Banc*, Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (No. 94-55918) (providing detailed critique of Ninth Circuit's holding in *Yagman*).

159. *See supra* note 155 and accompanying text (illustrating inconsistency in Ninth Circuit's reliance on defamation cases as authority rather than citing attorney disciplinary cases).

the Ninth Circuit ignored the foundations of ethical restrictions on attorney speech. By considering whether Yagman's statements constituted opinion or rhetorical hyperbole, the Ninth Circuit departed from the *Sandlin* objective standard and created a conflict with courts that have adopted the objective standard and its policies.[160] In fact, the Ninth Circuit's mode of analysis clashes with Supreme Court jurisprudence on attorneys' First Amendment rights.[161] The traditional attorney discipline jurisprudence, in contrast to the *Yagman* decision, has continuously upheld the validity of ethical rules that require a higher standard of conduct from attorneys and that afford them fewer First Amendment safeguards.[162] By applying the First Amendment's protective shield to Yagman, the Ninth Circuit violated the policy objectives and principles justifying the limitation of First Amendment rights that are afforded to attorneys.

VI. Discussion of Analogous Jurisprudence

A discussion of the desirability of granting attorneys restricted First Amendment rights finds support in an examination of analogous free speech

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160. *See, e.g.*, Ramirez v. State Bar of Cal., 619 P.2d 399, 404 (Cal. 1980) (endorsing objective standard to determine whether attorney violated ethical rule restricting attorney criticism); *In re* Terry, 394 N.E.2d 94, 95 (Ind. 1979) (same); *In re* Graham, 453 N.W.2d 313, 322 (Minn. 1990) (same); *In re* Westfall, 808 S.W.2d 829, 837 (Mo. 1991) (en banc) (rejecting purely subjective standard based on policy rationales of protecting public, administration of justice, and legal profession's integrity); *In re* Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (same).

161. *Compare Yagman*, 55 F.3d at 1436-42, *with In re* Snyder, 472 U.S. 634, 644-45 (1985) (declaring that license to practice law carries obligation to conduct oneself in manner that comports with role of courts), *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) (stating that attorneys' ethical obligations "may require abstention from what in other circumstances might be constitutionally protected speech"), *and* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 355 (1871) (asserting that at all times attorneys have obligation to refrain from insulting judiciary). For an example of the Supreme Court's constriction of attorney First Amendment liberties in another context, see Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2383 (1995) (upholding thirty-day restriction on attorney advertising to prevent invasions of privacy by lawyers and erosion of public's perception of legal profession against which ABA organizations can actively regulate).

162. *See, e.g., In re* Terry, 394 N.E.2d 94, 95-96 (Ind. 1979) (prohibiting lawyer criticism of court's opinion); *In re* Frerichs, 238 N.W.2d 764, 768-69 (Iowa 1976) (barring attorney criticism of court's decision); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168-69 (Ky. 1980) (disciplining attorney for statements made in public about judiciary); *In re* Raggio, 487 P.2d 499, 500-01 (Nev. 1971) (prohibiting attorney criticism of court's holding); *see also* Molley, *supra* note 43, at 490 (discussing how courts have imposed numerous harsh sanctions, including public reprimand, suspension, and disbarment based on contention that free speech concerns do not outweigh state's interest in defending its public officials).

controversies.[163] Two areas in particular — Hatch Act limitation on political participation of government employees and university hate speech code restrictions on student speech — provide useful insight into how the legal profession should balance the need to restrain attorney criticism of the judiciary with attorneys' First Amendment guarantees.[164] The Hatch Act provides an example of a constitutionally permissible restriction of the rights of a particular subset of individuals based upon their professional status.[165] The Hatch Act restricts the First Amendment rights of federal employees,[166] and the Supreme Court has determined that such restrictions are constitutional.[167] University hate speech code cases illustrate the difficulty in crafting constitutional restrictions on the First Amendment rights of students.[168] Because of such difficulty, courts consistently have found university hate speech codes to be invalid restraints on First Amendment freedoms.[169]

Although neither of these areas addresses the specific policy concerns of the legal profession, both clarify the constitutionality of holding a particular group of individuals to a higher set of standards based on their mem-

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163. *See infra* Part VI.A-B (discussing parallel issues present in Hatch Act and hate speech code arenas).

164. *See infra* Part VI.A.1 (exploring Hatch Act jurisprudence in which government interest outweighed First Amendment right to engage in partisan political activities); *infra* Part VI.B.1-2 (summarizing hate speech code debate in which First Amendment has repeatedly trumped policy arguments supporting restraints on students' offensive speech).

165. *See* 5 U.S.C. §§ 1501-1508, 7321-7326 (1994) (restraining First Amendment activity of federal employees by specifically regulating political activity); *cf.* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (acknowledging that federal government has interests in regulating "the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general").

166. *See* 5 U.S.C. §§ 7323-7324 (limiting federal employees' freedom to participate in partisan political activities).

167. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (concluding that challenged speech restrictions of Hatch Act were constitutional); United Pub. Workers v. Mitchell, 330 U.S. 75, 103-04 (1947) (finding that Hatch Act survived constitutional scrutiny).

168. *See, e.g.*, Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 482 (E.D. Mich. 1993) (finding hate speech code fatally overbroad); UWM Post, Inc. v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163, 1172 (E.D. Wis. 1991) (concluding hate speech code was unconstitutionally overbroad because code restricted protected speech); Doe v. University of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989) (ruling that hate speech code was unconstitutional because it was overbroad both on its face and as applied in that it punished protected speech).

169. *See infra* Part VI.B.2 (discussing extent to which courts have found that hate speech codes do not survive First Amendment scrutiny).

bership in a regulated organization or environment.[170] Because of their different results and policy justifications, these two areas of law offer guidance to the judiciary's and to the legal profession's efforts to resolve the important considerations at stake in the attorney speech debate.[171] After exploring the two analogues and analyzing their relevance to the judicial criticism issue, this Note concludes that the justifications for restricting attorney speech more closely resemble the Hatch Act paradigm than the hate speech code context.[172] Accordingly, this Note ultimately asserts that the traditional restrictions on attorney speech are constitutional and that the *Yagman* court incorrectly trumped the ethical restrictions with the First Amendment on the mistaken belief that attorneys possess the same free speech rights as ordinary citizens.[173]

A. The Restriction of First Amendment Rights of Federal Employees Under the Hatch Act

The Hatch Act[174] imposes restrictions on the political activity of federal employees.[175] Specifically, the Hatch Act prohibits covered employ-

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170. *See infra* Part VI.A.2 (describing guidance Hatch Act jurisprudence lends to question of whether First Amendment rights can be restricted due to membership in particular profession); *infra* Part VI.B.3 (exploring lessons from failure of hate speech codes to restrict First Amendment rights of students based upon their educational environment).

171. *See infra* Part VII (extracting lessons from Hatch Act and hate speech code jurisprudence and ultimately suggesting approach for dealing with attorney criticism in light of First Amendment interests and ethical concerns at stake).

172. *See infra* Part VII (determining that policies supporting restrictions of attorney criticism are more closely aligned with interests justifying Hatch Act restrictions than with interests underlying hate speech codes).

173. *See infra* Part VII (concluding that ethical codes restricting attorney speech are constitutional and that *Yagman* court erred in providing Yagman with layperson's First Amendment protections).

174. 5 U.S.C. §§ 1501-1508, 7321-7326 (1994). Sections 7321 through 7326 govern federal employees and officials, and §§ 1501 through 1508 impose analogous prohibitions on certain state employees working in programs that the government finances in whole or in part. The primary restraints on partisan activity in the federal sector appear in § 7323 and § 7324. The pertinent portion of § 7323 provides:

> (a) Subject to the provisions of subsection (b), an employee may take an active part in political management or in political campaigns, except an employee may not —
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> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election;
>
> (2) knowingly solicit, accept, or receive a political contribution from any person . . . .

ees[176] from using their official authority to interfere with or to affect an election or a nomination result;[177] from soliciting contributions for political

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Id. § 7323(a). According to § 7323(b)(2)(A), employees that are listed within § 7323(b)(2)(B) cannot "take an active part in political management or political campaigns." *Id.* § 7323(b)(2)(A). Subsection 7323(b)(2)(B) provides a list of bureaucratic entities whose employees must refrain from actively participating in partisan politics. *Id.* § 7323(b)(2)(B). The following are some of the entities listed within § 7323(b)(2)(B): the Central Intelligence Agency, the Internal Revenue Service, the Federal Bureau of Investigation, and the National Security Council. *Id.* Section 7324 provides a blanket proscription against engaging in political activity under certain circumstances. *Id.* § 7324. The relevant portion reads as follows:

> (a) An employee may not engage in political activity —
>
> (1) while the employee is on duty;
>
> (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;
>
> (3) while wearing a uniform or official insignia identifying the office or position of the employee, or
>
> (4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

Id. § 7324(a).

175. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 5.12, at 320 (1994) (explaining that Hatch Act restrains political activity in federal sector).

176. *See* 5 U.S.C. § 7322(1) (defining federal "employee" covered under Hatch Act). Section 7322(1) states:

> (1) "employee" means any individual, other than the President and Vice President, employed or holding office in —
>
> (A) an Executive agency other than the General Accounting Office;
>
> (B) a position within the competitive service which is not in an Executive agency; or
>
> (C) the government of the District of Columbia, other than the Mayor or a member of the City Council or the Recorder of Deeds; but does not include a member of the uniform services . . . .

Id.; *see also id.* § 1501(4)(A)-(B) (defining category of "state or local officer or employee" that Hatch Act covers). Section 1501 states:

> (4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include —
>
> (A) an individual who exercises no functions in connection with that activity; or
>
> (B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

Id.

177. *Id.* §§ 1502(a)(1), 7323(a)(1); *see* McKechnie v. McDermott, 595 F. Supp. 672,

purposes from another covered employee;[178] or from becoming a political candidate.[179] The Hatch Act does, however, allow covered employees the right to vote for the candidate of their choice and the right to express personal opinions on political subjects and candidates.[180] Hatch Act prohibitions apply to almost all employees of the executive branch of the federal government and to state and local employees whose employers receive federal funding.[181] In addition, all fifty states have enacted statutes modeled after the Hatch Act, which similarly restrict the political activities of state employees.[182]

The primary purpose of the Hatch Act is to secure the federal Government's political neutrality.[183] Because of the strong policy interests at stake,

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674-76 (N.D. Ind. 1984) (finding that city employee's control over advertising and promotion on city buses to assist campaign for election of partisan candidate and campaign participation during work hours constituted violation of Hatch Act).

178. 5 U.S.C. §§ 1502(a)(2), 7323(a)(2). Section 1502(a)(2) prohibits covered employees from "directly or indirectly coerc[ing], attempt[ing] to coerce, command[ing], or advis[ing] a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes." *Id.* § 1502(a)(2); *see also* Bauers v. Cornett, 865 F.2d 1517, 1526 (8th Cir. 1989) (holding that state employee violated Missouri law and Hatch Act because posting flyers to solicit funds for lobbyist was partisan political activity within meaning of Hatch Act).

179. *See* 5 U.S.C. § 7323(a)(3) (prohibiting covered employee from running for nomination or seeking to be partisan political candidate); *id.* § 1502(a)(3) (providing that covered employee cannot "be a candidate for elective office"); State v. Merit Sys. Protection Bd., 875 F.2d 179, 184 (8th Cir. 1988) (concluding that state employee knowingly violated Hatch Act on becoming candidate in partisan election warranting removal from state employment); *cf.* Special Counsel v. Bradford, 62 M.S.P.R. 239, 240-41 (M.S.P.B. 1994) (rejecting settlement agreement reached in Hatch Act case that allowed federal employee to retain both her federal government position and her elected, partisan Board of Education seat), *modified*, 69 M.S.P.R. 247 (M.S.P.B. 1995).

180. 5 U.S.C. §§ 1502(b), 7323(c).

181. *See* ROTHSTEIN ET AL., *supra* note 175, § 5.12, at 320 (describing coverage of Hatch Act prohibitions).

182. *Id.*

183. *Id.* According to Rothstein, the statute's purpose is "to prevent the bureaucracy from becoming a unified political power, to prevent the party in power from using government workers improperly, to prevent competition between the party and the department heads, and to prevent employee demoralization based on politics, not merit." *Id.*

For a discussion of the legislative history and purpose of the operative provision of the Hatch Act, see generally S. REP. NO. 93-689 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587. *See also* S. REP. NO. 101-165, at 2 (1990) (articulating that underlying rationale for nonpartisan civil service is belief that efficiency in government service necessitates lack of partisan administration). The Senate report concerns the Hatch Act Reform Amendment of 1989, S. 135, 101st Cong., which attempted to expand the freedoms of covered employees under the Hatch Act. *Id.* at 1-2. President Bush, however, vetoed the amendment and

employees who violate the Hatch Act may receive penalties ranging from thirty days unpaid suspension to removal from office.[184] Despite the sanction's severity, courts have found that such an infringement on constitutional rights does not outweigh the policy interests supporting Hatch Act restrictions.[185]

1. Leading Hatch Act Cases

Although the Hatch Act has survived constitutional scrutiny, both Congress and the Supreme Court have acknowledged and grappled with the First Amendment concerns it raises.[186] The Supreme Court specifically has rejected First Amendment challenges to the Hatch Act's prohibitions.[187] In

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Congress did not override his veto. *See For the Record*, WASH. POST, June 28, 1990, at V17, *available in* Westlaw 2123720 ("By a vote of 327 for and 93 against, the House overrode President Bush's veto of a bill (HR 20) permitting civil servants and postal workers limited involvement in partisan politics in the 51-year-old Hatch Act. But the bill died when the Senate . . . later upheld the veto.").

184. 5 U.S.C. § 7326 (1994) (providing that if "the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed"); *id.* § 1505(1)-(2) (providing that following hearing, Civil Service Commission determines whether employee or officer violated § 1502 of Hatch Act and, if so, whether such violation warranted removal from employment or office); *see In re* Ramshaw, 266 F. Supp. 73, 75 (D. Idaho 1967) (determining that discharge of civil service employee who violated Hatch Act prohibitions by taking part in political campaign (running for sheriff) fully complied with applicable law); Special Counsel v. Blackburne, 58 M.S.P.R. 279, 282-85 (M.S.P.B. 1993) (concluding that state agency employee's violation of Hatch Act warranted removal even though employee was on leave of absence and had relied on agency's advice that Hatch Act prohibition did not apply if on leave of absence); Special Counsel v. Brondyk, 42 M.S.P.R. 333, 337-39 (M.S.P.B. 1989) (finding that local government employee's violation of Hatch Act in becoming Republican candidate for county sheriff warranted removal, notwithstanding employee's thirty-year exemplary work record and alleged reliance on advice of state official).

185. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 579-81 (1973) (finding that Hatch Act restrictions on political activity were constitutional); United Pub. Workers v. Mitchell, 330 U.S. 75, 103-04 (1947) (finding that Hatch Act provisions survived First Amendment scrutiny).

186. *See* S. REP. NO. 101-165, at 22-23 (1990) (recognizing potential First Amendment problems). The Senate report stated that the American Civil Liberties Union testified in 1989 before Congress that the Hatch Act violated the First Amendment, but the Supreme Court specifically rejected that argument. *Id.*

187. *See Letter Carriers*, 413 U.S. at 556 (concluding that Hatch Act restrictions on political activity was constitutional); *Mitchell*, 330 U.S. at 103-04 (finding that Hatch Act provisions survived First Amendment scrutiny); *cf.* Northern Va. Regional Park Auth. v. United States Civil Serv. Comm'n, 437 F.2d 1346, 1350-51 (4th Cir. 1971) (determining that Hatch Act does not violate First Amendment).

1947, the Supreme Court in *United Public Workers, C.I.O. v. Mitchell*[188] examined the Hatch Act's prohibition against off-duty political activity.[189] The Supreme Court concluded that there is no distinction between on-duty and off-duty political activities because the policies supporting on-duty restrictions also justify off-duty limitations.[190] Further, the *Mitchell* Court concluded that the impermissible influence by government officials on political activity does not diminish just because the political activity takes place after hours, and therefore, it rejected the First Amendment challenge to the Hatch Act.[191]

More than twenty years later, in *United States Civil Service Commission v. National Association of Letter Carriers*,[192] the Supreme Court considered the constitutionality of the Hatch Act's prohibition of federal employees taking an active part in political campaigns.[193] In determining

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188. 330 U.S. 75 (1947).

189. *See Mitchell*, 330 U.S. at 94, 103-04 (upholding constitutionality of Hatch Act notwithstanding First Amendment attack). In *Mitchell*, the Supreme Court considered whether Hatch Act provisions prohibiting executive branch officers and employees from taking any active part in political management or campaigns under penalty of immediate removal were constitutional as applied. *Id.* at 94. Under the Hatch Act, the statutorily authorized body removed the plaintiff, an industrial worker, from office because he acted as a ward executive committee person and worked at the polls during his free time. *Id.* at 91-92 nn.23-24. Mitchell claimed that the Hatch Act prohibitions did not extend to off-duty political activities. *Id.* at 95. First, the Court defined the legislative latitude that Congress possesses. *Id.* at 96-104. The Court reasoned that Congress had the authority to regulate the political conduct of government employees within reasonable limits. *Id.* at 102. While recognizing that the Hatch Act prohibition at issue infringed to some extent upon unfettered political action, the Court nevertheless concluded that the extent of the regulation of political activity of federal employees rested primarily with Congress. *Id.* According to the Court, courts may interfere only when such restrictions pass beyond the general existing conception of governmental power, as developed "from practice, history, and changing educational, social, and economic conditions." *Id.* at 102-03. The Court rejected the petitioner's argument that a significant distinction existed between on-duty and off-duty political activity. *Id.* at 95. The Court dismissed plaintiff's off-duty distinction because a comparable risk of impermissible influence exists after work hours. *Id.* Ultimately, the Court found that the challenged provision of the Hatch Act did not violate the First Amendment. *Id.* at 104.

190. *Id.* at 95.

191. *Id.* at 103.

192. 413 U.S. 548 (1973).

193. *See* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 550, 579-81 (1973) (finding that Hatch Act prohibitions of participation in political management and in political campaigns are constitutional). In *Letter Carriers*, the Supreme Court considered whether the statutory definition of "political activity" was unconstitutionally vague and overbroad. *Id.* at 568. The union challenging the Hatch Act prohibitions on behalf of employees who wanted:

whether the challenged provisions of the Hatch Act were unconstitutionally vague and overbroad, the Supreme Court upheld Congress's power to enact a full panoply of restrictions on partisan political activity of federal employees.[194] Ultimately, the Supreme Court concluded that the Hatch Act's prohibitions did not violate the First Amendment.[195]

The Supreme Court's validation of the Hatch Act demonstrates that when policy concerns outweigh First Amendment considerations, statutes or rules can constitutionally impose severe limitations on the First Amendment rights of individuals based on their professional status or environment.[196] By upholding Hatch Act restrictions, the Supreme Court has found that the policy goal of securing the political neutrality of federal government employees and officers outweighs any potential chilling effect on First Amendment liberties.[197] In 1990, President Bush vetoed a congressional

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> to run in state and local elections for the school board, for city council, for mayor; to write letters on political subjects to newspapers; to be a delegate in a political convention; to run for an office and hold office in a political party or political club; to campaign for candidates for political office; [and] to work at polling places in behalf of a political party.

Id. at 595 (Douglas, J., dissenting). Because the language of 5 U.S.C. § 7324(a)(2) (currently codified as amended at 5 U.S.C. § 7323(b)(2)(A)) swept within its prohibitions all of the political activities that the petitioners wished to pursue, petitioners asserted that the Hatch Act prohibition against federal employees taking "an active part in political management or in political campaigns" was unconstitutionally vague and overbroad. *Id.* at 568. According to the Court, however, Congress had the authority to enact, in plain and understandable language, the following section, which prohibits:

> [O]rganizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention.

Id. at 556. Moreover, the Supreme Court found that neither the First Amendment nor any other provision of the Constitution invalidated laws barring such partisan political conduct by federal employees. *Id.* at 564-67, 579-81. Accordingly, the Supreme Court determined that the Hatch Act provisions at issue were not impermissibly vague or overbroad. *Id.* at 579-81.

194. *Id.* at 556.

195. *Id.* at 579-81.

196. *See id.* (finding that First Amendment restrictions on government employees under Hatch Act survive constitutional scrutiny); United Pub. Workers v. Mitchell, 330 U.S. 75, 103-04 (1947) (same).

197. *See supra* Part VI.A.1 (discussing Supreme Court's treatment of Hatch Act policy justifications).

attempt to liberalize the Hatch Act restrictions.[198] Although Congress amended the Hatch Act in 1993,[199] the Hatch Act continues to impose substantial restrictions on federal employees' First Amendment rights.

2. *Insight Provided by Hatch Act Jurisprudence*

Hatch Act jurisprudence provides guidance in the debate concerning attorney criticism of the judiciary. Significantly, the constitutionality of the Hatch Act affirms the principle that voluntary membership or employment in a regulated profession can entail surrendering a certain portion of First Amendment protection.[200] The Supreme Court has applied this same principle to the legal profession and has endorsed such restricted rights for attorneys.[201] Thus, sanctioning an attorney for speech that would receive First Amendment protection if uttered by an ordinary citizen does not necessarily create a constitutional dilemma. The Supreme Court has resolved the constitutional issue by ruling that, given the proper environment and legitimate government interests, employment can entail the acceptance of reduced First Amendment rights.[202] Therefore, an important issue in the attorney criticism debate is whether legitimate justifications exist for providing attorneys with less First Amendment protection.[203]

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198. *See For the Record*, *supra* note 183, at V17 ("The bill sought to give an estimated three million federal employees the opportunity to take part in political campaigns and causes off the job, but stopped short of allowing them to seek public office."). Opponents of the Hatch Act Amendments of 1990 asserted that the adoption would have been a virtual repeal of the Hatch Act allowing the federal employees to "hold office in a political party, work in partisan political campaigns or in party organizations, publicly endorse partisan candidates and urge others to support them; and solicit political contributions from fellow federal employees in certain circumstances." Letter from Carol T. Crawford, Assistant Attorney General, to Hon. John Glenn (July 24, 1989), *quoted in* S. REP. NO. 101-165, at 26, 27 (1990). According to a 1989 poll, over sixty percent of federal employees actually opposed a loosening of the Hatch Act. *Id.* at 22.

199. Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001.

200. *See* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564-67 (1973) (endorsing constitutionality of Hatch Act restrictions based upon government interests in regulating government employees); United Pub. Workers v. Mitchell, 330 U.S. 75, 102-03 (1947) (same).

201. *See supra* notes 26, 32, and accompanying text (providing Supreme Court's endorsement of limited First Amendment rights for attorneys).

202. *See Letter Carriers*, 413 U.S. at 564-67 (finding Hatch Act restrictions constitutional based upon special needs and policy interests of government employment); *Mitchell*, 330 U.S. at 96-104 (same).

203. *See supra* notes 25-42 and accompanying text (evaluating policies and interests at stake in attorney criticism debate in light of limitations on First Amendment freedoms).

Similarities between attorney free speech jurisprudence and Hatch Act jurisprudence suggest that restrictions on attorney speech require similar treatment. The Hatch Act regulates political speech. Traditionally, political speech represents a class of speech that this nation holds most sacred. The speech restricted by codes of professional ethics is most similar to speech that receives no protection under the First Amendment, such as false statements and obscenity.[204] Even though the Hatch Act infringes on political speech, which lies at the heart of the First Amendment, the Hatch Act restrictions have survived First Amendment attack. The Supreme Court has allowed the Hatch Act to infringe on First Amendment rights because the interests at stake justify the restrictions. Thus, if the policies supporting restrictions on attorney speech are as strong as the policies underlying the Hatch Act, then restrictions on attorney criticism should withstand First Amendment challenge.

In upholding the constitutionality of the Hatch Act restrictions, the Supreme Court pointed to the legitimate government interests in securing political neutrality and in protecting government employees from undue political influence. Interests supporting restrictions on attorney criticism are similarly legitimate. Both proponents of the restrictions and the courts have justified limiting First Amendment freedoms on the basis of the following primary policy concerns: upholding the public's image of the legal profession and the law, maintaining the appearance of judicial impartiality, and guaranteeing noninterference with the administration of justice.[205] Unre-

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204. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 54-55 (1973) (concluding that obscenity does not receive protection of First Amendment); Roth v. United States, 354 U.S. 476, 483 (1957) (concluding that obscenity is "outside the protection intended for speech").

205. *See, e.g., In re* Evans, 801 F.2d 703, 706-08 (4th Cir. 1986) (stating that attorney's letter to judge questioning judge's competence and impartiality, written during pendency of appeal, amounted to attempt to prejudice administration of justice); *In re* Shimek, 284 So. 2d 686, 689 (Fla. 1973) (finding that attorney's statement that judge was avoiding performance of his sworn duty was "calculated to cast a cloud of suspicion upon the entire judiciary"); *In re* Terry, 394 N.E.2d 94, 96 (Ind. 1979) ("Unwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process."); Committee on Prof'l Ethics & Conduct v. Horak, 292 N.W.2d 129, 130 (Iowa 1980) ("To permit unfettered criticism regardless of the motive would tend to intimidate judges in the performance of their duties and would foster unwarranted criticism of our courts."); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (attorney's press conference statements that judge's behavior was unethical and grossly unfair tended to "bring the bench and bar into disrepute and to undermine public confidence in the integrity of our judicial process"); *see also* WOLFRAM, *supra* note 29, § 11.3.2, at 601-02 (noting that some courts endorse conclusion that attorney criticism of judiciary causes public disrespect for judiciary or law generally).

strained attorney criticism of the type Yagman levied against Judge Keller frustrates the three policy interests that support the restrictions. Yagman's public statements easily could have damaged the judiciary's public image and led many to conclude that Judge Keller was in no way impartial. In addition, Yagman specifically stated to another attorney his intention to force Judge Keller to recuse himself from future proceedings. Yagman's effort to disrupt the random assignment of judges by publicly attacking the judiciary demonstrates Yagman's direct attempt to interfere with the administration of justice.

Proponents of attorney speech restrictions also point to the fact that attorneys implicitly consent to a restricted level of First Amendment rights when they enter the legal profession.[206] Upon entering the profession, Yagman accepted the obligation to meet higher standards of conduct as established by the ABA, state bar associations, and local court rules. Because of the similarities between the interests at stake and the differences between the types of speech regulated by the Hatch Act and the attorney ethics codes, courts should hold that attorney speech can be restrained without violating the First Amendment as one of the burdens associated with membership in the legal profession.

B. The Restriction of First Amendment Rights of College Students Under University Hate Speech Codes

Although the Hatch Act has survived First Amendment challenges, university hate speech codes have not withstood constitutional scrutiny.[207]

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206. *See In re* Sawyer, 360 U.S. 622, 635-36 & n.16 (1959) (plurality opinion) (observing that attorneys in pending cases are subject to ethical restrictions on speech to which ordinary citizens are not); Wright, *supra* note 23, at 587 (noting that "[m]embership in the bar is a privilege burdened with conditions" (quoting People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928) (Cardozo, J.))); *cf.* United States Dist. Court v. Sandlin, 12 F.3d 861, 866 (9th Cir. 1993) ("[O]nce a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct.").

207. *See* Iota Xi Chapter of Sigma Chi v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) (finding that university fraternity had First Amendment protection when fraternity sponsored "ugly women contest" that included sexual and racial epithets); Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 482 (E.D. Mich. 1993) (holding that university hate speech code was unconstitutionally overbroad); UWM Post, Inc. v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163, 1172-73 (E.D. Wis. 1991) (concluding that hate speech code was unconstitutionally overbroad because code restricted nonfighting words); Doe v. University of Mich., 721 F. Supp. 852, 866-67 (E.D. Mich. 1989) (ruling that hate speech code was unconstitutional because it was content-based, overbroad both on its face and as applied, and impermissibly vague). *But cf.* Wisconsin v. Mitchell, 508 U.S. 476,

The different results reached in these two areas demonstrate the spectrum of approaches and interests involved. The solution to the attorney free speech controversy lies somewhere between the teachings of the Hatch Act cases and the hate speech code cases. Therefore, a survey of the primary hate speech code cases also guides the attorney free speech debate.

The hate speech code cases are relevant to the attorney criticism controversy for two reasons. First, the policy arguments in favor of restricting freedom of speech on campuses parallel the rationales supporting restrictions on attorney speech. Second, hate speech codes have not survived First Amendment challenges despite the strong policy interests underlying the creation of such codes. Thus, a general understanding of the policies advanced by, and the reasons for the constitutional infirmity of, hate speech codes provide insight into how the legal profession and the courts should balance First Amendment interests against the harms of attorney criticism of the judiciary.

1. Policy Arguments Supporting Hate Speech Codes

A common theme among proponents of hate speech codes is the fear that hate speech will deny students equal protection under the law.[208] Proponents argue that students will not receive equal protection from harassment, intimidation, or hostile speech premised on an individual's race, ethnicity, religion, gender, national origin, or other protected status.[209] Further, hate speech code proponents contend that minorities have suffered from decades of discrimination and, thus, that educational institutions must protect those minority groups from the direct, immediate, and substantial injury that stems from the invidious discrimination of hate speech.[210]

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478 (1993) (holding that hate crime sentencing enhancement regulation was constitutional because it targeted conduct unprotected by First Amendment and was not regulation of thought).

208. *See* Richard Kirk Page & Kay Hartwell Hunnicutt, *Freedom for the Thought That We Hate: A Policy Analysis of Student Speech Regulation at America's Twenty Largest Public Universities*, 21 J.C. & U.L. 1, 6 (1994) (stating that equal protection is one primary goal of hate speech code advocates).

209. *See id.* at 6-7 (stating that equal protection for students in educational setting includes freedom from harassment, intimidation, or hostile speech that is based on race, ethnicity, religion, gender, national origin, or other protected status).

210. *See id.* at 7 (presenting arguments of proponents of hate speech codes who strongly believe hate speech is form of invidious discrimination). For a discussion of the extent to which hate speech directly harms minority groups who have been subject to decades of discrimination, see generally Alan Borovy et al., *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1989); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amend-*

Although equal protection arguments represent potential justifications for hate speech codes, proponents of restrictions on attorney criticism emphasize protection of the legal profession's reputation, maintaining the appearance of judicial impartiality, and ensuring noninterference with the administration of justice.[211]

A basic premise in the argument in favor of hate speech codes comports with arguments in favor of restrictions on attorney criticism of the judiciary. Both arguments posit that restrictions apply to individuals based on their choice to become members of a regulated institution or profession.[212] Upon entrance into regulated environments or professions, individuals implicitly consent to comply with a higher standard of conduct, such

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ment, 17 COLUM. HUM. RTS. L. REV. 11 (1985); and Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Charles R. Lawrence, III, *Speech That Harms: An Exchange — Acknowledging the Victims' Cry*, 76 ACADEME 10 (1990).

211. *See, e.g.*, *In re* Evans, 801 F.2d 703, 706-08 (4th Cir. 1986) (stating that attorney's letter to judge questioning judge's competence and impartiality, written during pendency of appeal, amounted to attempt to prejudice administration of justice); *In re* Shimek, 284 So. 2d 686, 689 (Fla. 1973) (finding that attorney's statement that judge was avoiding performance of his sworn duty was "calculated to cast a cloud of suspicion upon the entire judiciary"); *In re* Terry, 394 N.E.2d 94, 96 (Ind. 1979) ("Unwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process."); Committee on Prof'l Ethics & Conduct v. Horak, 292 N.W.2d 129, 130 (Iowa 1980) ("To permit unfettered criticism regardless of the motive would tend to intimidate judges in the performance of their duties and would foster unwarranted criticism of our courts."); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (finding attorney's statements at press conference that judge's behavior was unethical and grossly unfair tended to "bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process"); *see also* WOLFRAM, *supra* note 29, § 11.3.2, at 601-02 (noting that some courts endorse conclusion that attorney criticism of judiciary causes public disrespect for judiciary or law generally).

212. *See, e.g.*, *In re* Snyder, 472 U.S. 634, 644-45 (1985) (reasoning that "license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice"); *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) (stating that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech"); *In re* Frerichs, 238 N.W.2d 764, 769 (Iowa 1976) (recognizing that "lawyer, acting in professional capacity, may have some fewer rights of free speech than would a private citizen"); *In re* Johnson, 729 P.2d 1175, 1179 (Kan. 1986) (finding that one purpose of disciplinary action is to enforce "honorable conduct on the part of the court's own officers"); State *ex rel.* Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46, 53 (Neb. 1982) (proclaiming that "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").

as the ones that universities or professional associations establish. Thus, individuals that choose to become members of communities which, for legitimate policy reasons, insist on protection of the integrity of the community and the integrity of its members may not have the full range of free speech rights that the ordinary citizen enjoys.[213] Despite a similar foundation, hate speech codes have withered under First Amendment attack, whereas ethical rules have long provided an effective means for sanctioning attorney criticism of the judiciary, notwithstanding First Amendment claims — at least before the *Yagman* decision.[214]

2. *Leading Hate Speech Code Cases*

Plaintiffs have raised successful challenges to hate speech codes at public universities.[215] In *Doe v. University of Michigan*,[216] the university hate speech code denied a biopsychology student the opportunity to discuss biological differences between sexes and races.[217] The district court found that the speech code was unconstitutional because the code prohibited

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213. *See supra* note 212 (providing cases in which courts endorsed principle that attorneys surrender some First Amendment protection upon entry into legal profession).

214. *See* Reuben, *supra* note 9, at 23 (reporting that legal ethics expert Stephen Gillers believes Ninth Circuit opinion reverses modern trend by ruling in favor of attorney free speech rights).

215. *See* James R. Bussian, Comment, *Anatomy of the Campus Speech Code: An Examination of Prevailing Regulations*, 36 S. TEX. L. REV. 153, 171-73 (1995) (discussing recent First Amendment challenges to hate speech code cases in which courts have struck down codes).

216. 721 F. Supp. 852 (E.D. Mich. 1989).

217. *See* Doe v. University of Mich., 721 F. Supp. 852, 858, 866-67 (E.D. Mich. 1989) (concluding that hate speech code was unconstitutionally overbroad and vague). In *Doe*, the district court considered whether University of Michigan's hate speech code withstood First Amendment scrutiny. *Id.* at 853-54. In response to racist activities on campus, including posted fliers declaring "open season on blacks," the university drafted a hate speech code. *Id.* at 854-58. The code proscribed as punishable, "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis" of protected class status "and that a. [i]nvolves an express or implied threat to an individual's academic efforts . . . or b. [h]as the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, [or] participation in University sponsored extra-curricular activities." *Id.* at 856. Doe, a psychology graduate student, wanted to discuss genetic and biological differences between the sexes and races. *Id.* at 858. The primary focus of Doe's graduate study concerned the "interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities." *Id.* Doe brought suit against the university seeking a preliminary injunction on the basis that the speech regulation would unduly chill protected speech. *Id.* at 861. The district court concluded that the university's hate speech regulation was unconstitutionally overbroad and vague. *Id.* at 866-67.

speech based on its content[218] and embodied an impermissibly vague rule.[219] In *UWM Post, Inc. v. Board of Regents of University of Wisconsin*,[220] the U.S. District Court for the Eastern District of Wisconsin considered whether the University of Wisconsin hate speech code violated the Constitution.[221] Because the speech code banned specific language without a requirement that the utterance of the words have a tendency to incite violence, the district court concluded that the regulated speech[222] did not fall within the fighting words exception;[223] thus, the court found that the regulation was overbroad.[224] More recently, in *Dambrot v. Central Michigan University*,[225] the District Court for the Eastern District of Michigan determined that the speech code at issue was fatally overbroad.[226]

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218. *Id.* at 866.

219. *Id.* at 867.

220. 774 F. Supp. 1163 (E.D. Wis. 1991).

221. *See* UWM Post, Inc. v. Board of Regents of the Univ. of Wis., 774 F. Supp. 1163, 1164, 1181 (E.D. Wis. 1991) (finding that hate speech code was invalid). In *UWM Post*, the district court considered whether the university's hate speech code chilled protected speech. *Id.* at 1164, 1179. In response to several highly publicized racial incidents involving fraternities, the university adopted a hostile speech code. *Id.* at 1165. The speech code called for discipline of any student who participated in "racist or discriminatory comments, epithets or other expressive behavior directed at an individual . . . or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally: 1. Demean [the protected class status] of the individual . . . and 2. [c]reate an intimidating, hostile or demeaning environment for education." *Id.* (citing WIS. ADMIN. CODE § 17.06(2) (1989)). The district court concluded that the university's rule was overbroad and vague in that the rule was content based and that it restricted protected speech. *Id.* at 1181. According to the district court, the university's interest in shielding students from harmful psychological effects and injuries caused by offensive speech was commendable, but such an interest did not constitute a compelling state interest. *Id.* at 1176-77.

222. *See id.* at 1167 (stating that University of Wisconsin found that student violated hate speech code "by yelling obscene epithets loudly at a woman for approximately ten minutes").

223. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that "fighting words" are subcategory of speech that do not possess any constitutional protection). The *Chaplinsky* Court defined fighting words as "words likely to cause an average addressee to fight." *Id.* at 573.

224. *UWM Post*, 774 F. Supp. at 1168-72.

225. 839 F. Supp. 477 (E.D. Mich. 1993).

226. *See* Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 481-82 (E.D. Mich. 1993) (finding that hate speech code was fatally overbroad). In *Dambrot*, the district court considered the constitutionality of Central Michigan University's hate speech code. *Id.* at 478. The university claimed that the speech code addressed only fighting words, but the district court rejected the university's claim. *Id.* at 482-83. The district court reasoned that the code was overbroad because the language of the speech code included within

These invalidations of university hate speech codes reflect the difficulty of attempting to restrict the speech of a particular group of individuals, even if the policy reasons appear to be persuasive. For the university that wants to create a healthy environment through implementing speech codes, the challenge is to draft a regulation that is neither overbroad nor vague under the First Amendment.[227] Drafters of ethical rules face similar challenges because of the constant tension between ethical policy goals and freedom of speech rights.[228] The district court in *Yagman* found Local Rule 2.5.2, which prohibits impugning the integrity of the court, to be overbroad, but the court saved the rule by applying a libel-like reasonable attorney standard.[229] The issue thus has become whether the *Yagman* court misconstrued and misapplied the *Sandlin* test, thereby frustrating the Local Rule's purpose of protecting the integrity of the court by shielding Yagman as if he were an ordinary citizen, not a voluntary member of a regulated profession.

3. Insight Provided by Hate Speech Code Jurisprudence

In the debate over attorney criticism of the judiciary, the potential harms of permitting increased levels of criticism are more substantial than the dangers present in the hate speech code debate. The consequences of overturning a hate speech code arguably yield a more offensive, hostile environment for students who are victims of harsh epithets. Although the consequences of invalidating hate speech codes can result in mental injury to the speaker's targets, the danger of inhibiting the free exchange of ideas with a code that sweeps too broadly outweighs the risk of such injuries.

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its scope "[a]ll possible human conduct." *Id.* at 481-82. In addition, the district court determined that the university's hate speech policy was void for vagueness because it failed to give fair notice and because it gave excessive discretion to the enforcement officers. *Id.* at 484.

227. *See* Bussian, *supra* note 215, at 173-82 (describing constitutional boundaries for speech codes and recommending better methods for drafting such codes).

228. *See id.* at 173-74 (discussing extent to which universities continue their efforts to protect specific classes of individuals from harmful speech, often with codes that violate First Amendment). Bussian states that "384 public universities have some type of speech code. And according to well-established precedent, the majority of these codes violate the First Amendment." *Id.* (footnotes omitted).

229. *See* Standing Comm. on Discipline v. Yagman, 856 F. Supp. 1384, 1389-90 (C.D. Cal. 1994) (finding ethical rule overbroad, but applying limiting construction to save rule); *supra* note 124 (summarizing *Sandlin* holding, including court's adoption of reasonable attorney test).

In the hate speech context, courts have found that the risks of punishing protected speech[230] and chilling academic debate[231] outweigh the benefits of protecting specified groups from offensive and demeaning language.[232] In contrast, protecting the administration of justice and upholding the integrity of the legal system justify the reasonable restrictions imposed on attorneys. Therefore, the appropriate constitutional response to the attorney criticism debate should include the imposition of a defined set of restrictions upon attorneys' First Amendment rights, while providing alternative channels for criticisms that are necessary to improve the quality of our legal system.

VII. Conclusion

In reversing sanctions against Yagman, the Ninth Circuit departed from attorney discipline precedent that has sanctioned attorneys for criticizing the judiciary in a manner that damages the legal profession's reputation, taints the judiciary's appearance of impartiality, or interferes with the administration of justice.[233] Although courts have consistently determined that the policy interests supporting the restrictions warrant the limitation of rights, the Ninth Circuit applied the First Amendment to shield Yagman from sanctions as if he were not a member of a profession that bears special

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230. *See Dambrot*, 839 F. Supp. at 481-82 (finding hate speech code fatally overbroad because it swept protected speech within its prohibition); UWM Post, Inc. v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163, 1172 (E.D. Wis. 1991) (concluding that hate speech code was unconstitutionally overbroad because it restricted protected speech); Doe v. University of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989) (finding hate speech code unconstitutionally overbroad both facially and as applied because it punished protected speech).

231. *See* Page & Hunnicutt, *supra* note 208, at 13-14 (citing Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 (1989) (asserting that most typical argument for freedom of speech is that speech promotes discovery of truth)); *see also* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969) (declaring that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

232. *See* Iota Xi Chapter of Sigma Chi v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) (upholding First Amendment rights notwithstanding potential harms to insulted class of individuals); Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 482 (E.D. Mich. 1993) (finding that First Amendment protections prevailed even though speaker used racial epithets); *UWM Post*, 774 F. Supp. at 1172-73 (concluding First Amendment interests trumped efforts to suppress degrading epithets); *Doe*, 721 F. Supp. at 866-67 (concluding that First Amendment required striking hate speech code despite use of offensive, sexist remarks).

233. *See supra* notes 148-62 and accompanying text (critiquing Ninth Circuit for its departure from traditional attorney criticism precedent).

obligations.[234] If other circuits follow the Ninth Circuit's treatment of the attorney criticism issue, attorneys will have a powerful defense to ethical restrictions on speech,[235] and the legal profession's reputation and the administration of justice may suffer accordingly.

The Hatch Act jurisprudence and hate speech jurisprudence provide useful guidance for the resolution of the attorney free speech controversy.[236] The Hatch Act infringes on core political speech rights, and hate speech codes prohibit speech that more closely resembles unprotected speech.[237] Yet, the Supreme Court upheld the Hatch Act,[238] whereas courts consistently have invalidated hate speech codes.[239] This anomaly is explained by a valuation of the risks and the interests at stake. Hatch Act interests rest at one end of the spectrum and hate speech code interests rest at the other end — the former justifying speech restrictions and the latter not. The policies justifying restrictions on attorney speech resemble the policies underlying the Hatch Act more closely than they resemble the justifications for hate speech codes.[240] At the same time, the risks of imposing restrictions on attorney speech are less substantial than the risks of allowing federal employees to participate fully in partisan politics.[241] The risk of

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234. *See supra* notes 148-62 and accompanying text (discussing Ninth Circuit's utilization of standards governing ordinary citizen's First Amendment liberties to reverse sanctions against member of legal profession).

235. *See* Reuben, *supra* note 9, at 23 (reporting that legal ethics expert Stephen Gillers believes Ninth Circuit opinion provides attorneys with new First Amendment shield).

236. *See supra* Part VI (surveying Hatch Act and hate speech code jurisprudence in order to extract guiding principles for solving attorney criticism controversy).

237. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 54 (1973) (finding that obscenity does not receive protection of First Amendment); Roth v. United States, 354 U.S. 476, 483 (1957) (concluding that obscenity was "outside the protection intended for speech").

238. *See* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (concluding that First Amendment restrictions on government employees under Hatch Act survived constitutional scrutiny); United Pub. Workers v. Mitchell, 330 U.S. 75, 103-04 (1947) (same).

239. *See* Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 481-82 (E.D. Mich. 1993) (finding hate speech code unconstitutionally overbroad); UWM Post, Inc. v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163, 1168-72 (E.D. Wis. 1991) (concluding that hate speech code was unconstitutionally overbroad because it restricted protected speech); Doe v. University of Mich., 721 F. Supp. 852, 866-67 (E.D. Mich. 1989) (finding hate speech code unconstitutionally overbroad both facially and as applied because it punished protected speech).

240. *See supra* Part VI.A.2 (discussing extent to which attorney criticism interests and risks parallel Hatch Act justifications).

241. *See supra* Part VI.A.2 (discussing how risks of limiting attorney speech are less substantial than risks of limiting political speech under Hatch Act).

harm from restricting attorney criticism is less substantial because attorneys have alternative channels for presenting justified criticism.[242] The risk of harm to government employees is greater because the Hatch Act restrictions eliminate certain First Amendment rights completely.[243] Thus, courts should consider ethical restrictions on attorney speech under the jurisprudence upholding the Hatch Act. Based on the policy interests at stake in the context of attorney criticism of the judiciary, the Ninth Circuit should have remained faithful to traditional policy considerations and affirmed the imposition of sanctions against Yagman.

Opponents of ethical restrictions on attorney speech assert that there is no need for the restrictions because a judge can bring a defamation lawsuit that would fully protect the interests at stake.[244] This assertion entirely misses the point of the ethical restrictions. Ethical rules that restrict attorney criticism do not stem from a desire to shelter judges from the harms of personal insult. Rather, the purposes of attorney criticism restrictions include: (1) securing noninterference with the administration of justice, (2) safeguarding the appearance of judicial impartiality, and (3) upholding the reputation of the law and the legal profession.[245] Therefore, sufficient grounds exist for having a system that provides attorneys fewer First Amendment protections, and such restrictions should survive constitutional scrutiny as the Hatch Act restrictions have survived.

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242. *See* United States v. Brown, 72 F.3d 25, 28-29 (5th Cir. 1995) (determining that rule on impugning integrity of judge did not apply to lawyer's in-court comments concerning judge's actual performance during trial and appearance of partiality).

243. *See supra* Part VI.A.2 (explaining greater severity of Hatch Act consequences compared to minimal intrusion on attorneys' First Amendment rights).

244. *See Amici Curiae* Brief of the American Jewish Congress-Pacific Southwest Region, Article 19, and Individual Law Professors and Attorneys in Support of Respondent-Appellant at 3, Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (No. 94-55918) (suggesting that ethical restrictions on attorney speech are unnecessary because judges have complete access to defamation lawsuits to vindicate wrongs).

245. *See supra* notes 25-42 and accompanying text (describing policy interests supporting restrictions of attorney criticism of judiciary).

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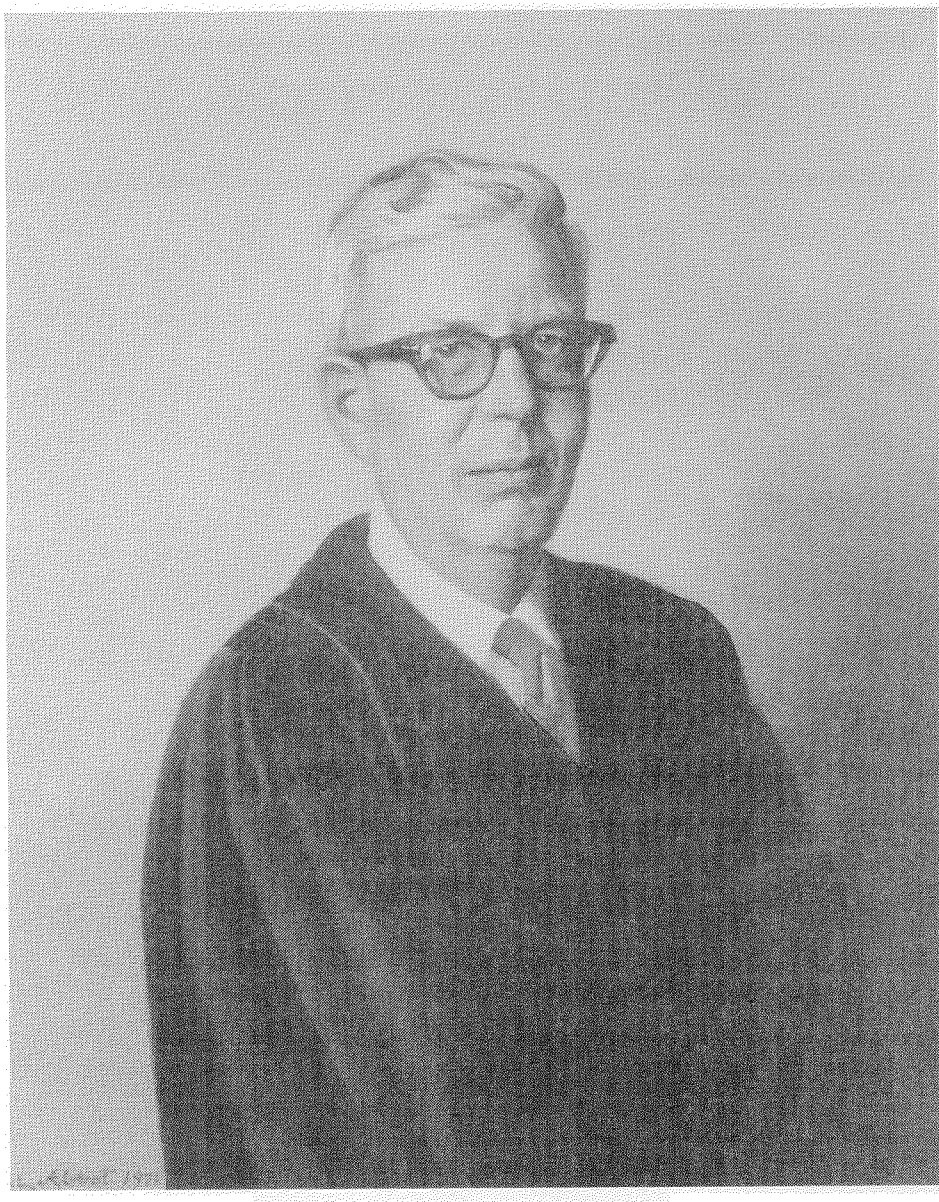

Alexander M. Harman, Jr.