SILENCING THE ADVOCATES OR POLICING THE PROFESSION? ETHICAL LIMITATIONS ON THE FIRST AMENDMENT RIGHTS OF ATTORNEYS

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I. INTRODUCTION

It is beyond question that attorneys, as citizens, possess the right, under the free speech clause of the first amendment to the United States Constitution[1] and under similar provisions in many state constitutions,[2] to speak out

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1. The United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I.

2. *See, e.g.*, IOWA CONST. art. I, § 7 ("[e]very person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."); MINN. CONST. art. I, § 3 ("[t]he liberty of the press shall remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.");

on issues of public and community concern, including issues related to the law and the legal system.[3] In fact, under limited circumstances and in appropriate forums, attorneys, unlike private citizens, are not only permitted but ethically obligated to speak out on such issues, in an effort to improve the law, our legal system, and the administration of justice.[4] Also unique to attorneys is the fact that they, unlike laypersons, may be subject to disciplinary sanctions if their criticism of the courts, their procedures, or particular judges is construed by the courts as violative of the statutes, canons, disciplinary rules, or ethical considerations proscribing unethical conduct.[5]

This article will address the limited circumstances in which the first amendment rights and ethical obligations of attorneys conflict, focusing particularly on those cases in which an attorney, asserting a first amendment defense, is subjected to disciplinary proceedings for criticizing the legal system, the administration of justice, or particular judges.

As will be demonstrated below, these conflicts have most often been resolved by the state courts, because of their unique authority to discipline attorneys[6] and because of the lack of a clear precedent from the Supreme Court of the United States on the nature and extent of first amendment protection in disciplinary proceedings.[7] State court resolution of these issues has led to the adoption of numerous, divergent standards for determining whether particular statements are entitled to first amendment protection.[8] Various schools of thought have developed with respect to the appropriate method of resolving conflicts between attorneys' first amendment rights and their ethical obligations.[9]

One such school of thought, adopted by appellate courts in several midwestern states, including Iowa,[10] simply refuses to extend first amendment

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KAN. CONST. § 11 ("[t]he liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights."); CAL. CONST. art. I, § 2 ("every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liability of speech or press.").

3. *In re* Sawyer, 360 U.S. 622, 632 (1959); Iowa Code of Professional Responsibility, EC 8-6; *In re* Frerichs, 238 N.W.2d 764, 768 (Iowa 1976); State v. Russell, 227 Kan. 897, 610 P.2d 1122, 1126 (1980) (a person's constitutional right to freedom of speech is not reduced by reason of having received a license to practice law); *In re* Gorsuch, 76 S.D. 191, 75 N.W.2d 644 (1956).

4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 8, EC 8-1 and EC 8-2 (1987).

5. *See generally* Preliminary Statement to the Code of Professional Responsibility.

6. *See* Ungar v. Sarafite, 376 U.S. 575 (1964); *In re* Frerichs, 238 N.W.2d 764 (Iowa 1976); *In re* Lord, 255 Minn. 370, 97 N.W.2d 287 (1959).

7. Committee on Legal Ethics v. Douglas, 370 S.E.2d 325 (W. Va. 1988).

8. *Compare In re* Frerichs, 238 N.W.2d 764 (Iowa 1976); *In re* Lacey, 283 N.W.2d 250 (S.D. 1979); and State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972) *with* Committee on Legal Ethics v. Douglas, 370 S.E.2d 325 (W. Va. 1988); Ramirez v. State Bar, 28 Cal. 3d 402, 619 P.2d 399, 169 Cal. Rptr. 206 (1980); and Kentucky State Bar Ass'n v. Helfringer, 602 S.W.2d 165 (Ky. 1980).

9. *Id. See* cases cited *supra* note 8.

10. *See* Committee on Professional Ethics & Conduct v. Hurd, 360 N.W.2d 96 (Iowa

protection to statements deemed violative of the statutes, canons, disciplinary rules, and ethical considerations proscribing unethical conduct.[11] If a statement is deemed unethical under this approach, it is automatically unprotected speech under the first amendment.[12] No further analysis is needed, and no first amendment protection is available.[13]

A second school of thought, adopted by appellate courts in West Virginia, New York, Texas, and California,[14] involves applying traditional first amendment principles in order to determine whether particular statements are constitutionally protected from discipline.[15] Proponents of this approach believe that criticism of the courts, their procedures, and particular judges is protected by the first amendment unless it poses a "serious and imminent threat to the fairness and integrity of the judicial system."[16] Under this approach even personal attacks on judges or court officials are protected by the first amendment, unless they consist of "knowingly false statements," "false statements made with reckless disregard for the truth," or statements outside the scope of any "community concern."[17] Courts adopting this standard apply the "actual malice" standard of *New York Times Co. v. Sullivan* to determine whether particular statements are entitled to first amendment protection.[18] If statements are made "maliciously," then under this standard the attorney who utters them is subject to discipline.[19] Conversely, if the statements are not made maliciously, then the attorney who utters them is protected from discipline by the first amendment.[20]

A third school of thought, adopted in recent years by appellate courts in Kansas, Kentucky, Nebraska, and Arizona, is a balancing approach.[21] In states following this approach, the first amendment rights of attorneys are recognized, but they must be balanced with "significant state interests" in

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1984); *In re* Lacey, 283 N.W.2d 250 (S.D. 1979); State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972); *In re* Raggio, 487 P.2d 499 (Nev. 1971).

11. *See* cases cited *supra* note 10.

12. Committee on Professional Ethics & Conduct v. Hurd, 360 N.W.2d 96, 105 (Iowa 1984).

13. *Id.*

14. *See, e.g.*, Committee on Legal Ethics v. Douglas, 370 S.E.2d 325 (W. Va. 1988); Ramirez v. State Bar, 28 Cal. 3d 402, 619 P.2d 399, 169 Cal. Rptr. 206 (1980); Baker v. Monroe County Bar Ass'n, 34 A.D.2d 229, 311 N.Y.S.2d 70 (1970), *aff'd*, 28 N.Y.2d 977, 323 N.Y.S.2d 837, 272 N.E.2d 337, *cert. denied*, 404 U.S. 915 (1971); State Bar v. Semaan, 508 S.W.2d 429 (Tex. Civ. App. 1974).

15. *See* cases cited *supra* note 14.

16. *See, e.g.*, Committee on Legal Ethics v. Douglas, 370 S.E.2d at 332.

17. *Id.*

18. *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

19. Committee on Legal Ethics v. Douglas, 370 S.E.2d at 332.

20. *Id.*

21. *See, e.g.*, Kentucky State Bar Ass'n v. Helfringer, 602 S.W.2d 165 (Ky. 1980); State *ex rel.* Nebraska State Bar Ass'n v. Michaelis, 210 Neb. 545, 316 N.W.2d 46 (1982); State v. Russell, 227 Kan. 897, 610 P.2d 1122 (1980); *In re* Riley, 142 Ariz. 604, 691 P.2d 695 (1984).

upholding the integrity of the judicial system. If the state has a significant interest in regulating an attorney's speech, then the courts in these states consider the attorney's first amendment rights outweighed by that interest. In the absence of a significant state interest, however, the attorney's first amendment rights will prevail and the attorney will be protected from discipline.[22]

As a detailed examination of these various approaches will reveal, each has its own unique attributes and flaws. The critical need is for the enunciation of a single, uniform, nationwide standard for resolving conflicts between attorneys' ethical obligations and their first amendment rights, so that statements protected in one jurisdiction will no longer be subject to discipline if uttered or published in another jurisdiction. As will be determined below, only the Supreme Court of the United States is in a position to promulgate such a standard, and there is an urgent need for the Court to address this issue.

II. Existing Standards

A. *Critical Statements as "Unprotected Speech"*

1. *Iowa Decisions*

Like courts in several other midwestern states, the Iowa appellate courts refuse to extend first amendment protection to statements by attorneys which are deemed violative of the statutes, canons, disciplinary rules, and ethical considerations proscribing unethical conduct.[23] The Iowa Supreme Court has addressed the first amendment rights of attorneys who criticize the courts, their procedures, and particular judges on at least three occasions in recent years.[24] The leading Iowa case on the subject is *In re Frerichs*.[25] In *Frerichs* disciplinary proceedings were initiated against an attorney who asserted, in a petition for rehearing filed in the Supreme Court, that the court had practiced what amounted to fraud and deceit when it failed to address certain constitutional issues in resolving three criminal appeals. In pertinent part, respondent's petition for rehearing[26] stated:

> Petitioner's Petition for Rehearing specifically charges the Iowa Supreme Court with willfully avoiding the substantial constitutional issues raised

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22. *See* cases cited *supra* note 21.

23. *See* Committee on Professional Ethics & Conduct v. Hurd, 360 N.W.2d at 105; *In re* Frerichs, 238 N.W.2d at 768; *In re* Glenn, 256 Iowa 1233, ____, 130 N.W.2d 672, 675-76 (1964).

24. *Id.*

25. *In re* Frerichs, 238 N.W.2d 764, 765 (Iowa 1976).

26. The court in *Frerichs* also considered assertions in two other petitions for rehearing filed with it by respondent Frerichs, in which he variously accused the court of rewriting the record, rewriting assigned errors, making "a game out of the pursuit of justice" and "victimiz[ing] the criminal accused for the protection of trial courts." *Id.* at 766.

> by defendant's appeal and of violating his rights to "due process" and "equal protection of the law."
>
> This allegation is not made in haste or without appropriate consideration by defendant's counsel. This is the third criminal appeal in a row pursued by defendant's counsel where the Iowa Supreme Court "ducked" the constitutional questions raised in the appeals.[27]

Justice David Harris, writing for a unanimous majority of the court, denied that constitutional issues had been "willfully avoided" in any of the cases, noting that Frerichs had not been cited for criticizing the court's opinions but because he attributed to the court "sinister, deceitful and unlawful motives and purposes."[28] While recognizing the "right and duty of any attorney holding such a view to assert it—within the broad but carefully prescribed boundaries of professional ethics," the court flatly rejected respondent's first amendment defense, stating: "The conduct here involved is generally held not protected by freedom of speech guarantees under the First Amendment."[29] The court found Frerichs' statements violated his oath of office, which required him to "maintain the respect due to courts of justice and judicial officers" and to "abstain from all offensive personalities."[30] In reaching its decision the court relied on the following provisions from the Iowa Code of Professional Responsibility: Disciplinary Rule [hereinafter "DR"] 8-102(B) (prohibiting attorneys from knowingly making false accusations against judges and adjudicatory officers),[31] Ethical Consideration [hereinafter "EC"] 8-6 (requiring that attorneys support judges against unjust criticism and use appropriate language and truthfulness when criticizing),[32] EC 7-36 (requiring that lawyers maintain respect, independence, and courtesy in relations with judges),[33] and EC 9-6 (requiring that lawyers encourage

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27. *Id.* at 765.

28. *Id.* at 767.

29. *Id.* at 768 (citing Annotation, *Licensing and Regulation of Attorneys as Restricted by Rights of Free Speech, Expression, and Association Under First Amendment*, 27 L.Ed.2d 953, 963-68; Annotation, *Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action*, 12 A.L.R.3d 1408, 1412-14).

30. *Id.* at 766 (citing IOWA CODE § 610.14 (1975)).

31. Iowa Code of Professional Responsibility, DR 8-102(B), provides: "a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

32. Iowa Code of Professional Responsibility EC 8-6, in pertinent part, provides: Adjudiciary officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

33. Iowa Code of Professional Responsibility EC 7-36, in pertinent part, provides: Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence a lawyer shall be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears.

respect for the law, the courts and judges).[34] The *Frerichs* majority noted that a "lawyer, acting in a professional capacity, may have some fewer rights of free speech than would a private citizen,"[35] and described the distinction between the first amendment rights of attorneys and those of laypersons as follows:

> A layman may, perhaps, pursue his theories of free speech or political activities 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; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.[36]

The *Frerichs* court cited favorably Justice Stewart's concurring opinion in *In re Sawyer* for the proposition that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."[37] Admonishing Frerichs for his misconduct, the court concluded a harsher sanction was not warranted because the respondent had not intended to show disrespect for the court or defiance in making the disputed statements.[38]

The Iowa Supreme Court also addressed the first amendment protection afforded attorneys who criticize the courts, their procedures, and particular judges in *In re Glenn*.[39] Attorney Glenn was suspended from the practice of law for one year for, *inter alia*, causing to be printed and distributed in the city of Ottumwa a leaflet attacking a municipal judge. In pertinent part, the leaflet stated:

> JUSTICE ? ? ? IN OTTUMWA?
> They say that Justice is blind, but it took Municipal Judge Willard Dullard to prove that it is also DEAF and DUMB!
> A courtroom full of spectators heard the appeal taken . . . [but] [n]ow the judge says no appeal was made. Quite coincidentally, this comes at a time when the cases are called up in District Court for trial anew. Is the judge afraid that these people might have a fair trial before a jury?
> Was Judge Dullard ordered to prevent an appeal?
> . . . Our constitution provides for due process of law and trial by jury. What state of affairs have we come to when the OVERLORDS of Ot-

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34. Iowa Code of Professional Responsibility EC 9-6, in pertinent part, provides: Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect and trust of his clients and of the public . . . .
35. *In re* Frerichs, 238 N.W.2d at 769.
36. *Id.* (citing *In re* Woodward, 300 S.W.2d 385, 393-94 (Mo. 1957)).
37. *Id.* (citing *In re* Sawyer, 360 U.S. 622, 646-47 (1959)).
38. *In re* Frerichs, 238 N.W.2d at 769-70.
39. *In re* Glenn, 256 Iowa 1233, 130 N.W.2d 672 (1964).

> tumwa can make a mockery of these fundamentals?
> The stink gets more overpowering each day. Many citizens are beginning to wonder what REALLY lies behind the Boathouse "deal" and what our officials are trying desperately to cover up.
> Isn't it time that the true facts come out and the whole rotten mess cleaned up? So long as our town is under the controlling influence of men who deny the U.S. Constitution there will be no justice in Ottumwa.
> WHO WILL LEAD THE WAY?[40]

Attorney Glenn contended the contents of his leaflet were protected by the first amendment, asserting a "right to criticize the court, and to speak fully regarding judicial acts and conduct."[41] The Iowa Supreme Court disagreed, however, finding respondent's statements "went beyond the limits of fair criticism of the court."[42]

The court concluded that, accusing Judge Dullard of being "so prejudicial and corrupt that he wished to deny the litigants a fair trial on appeal," and by implying that the judge was subject to the "control" of city and county officials,[43] attorney Glenn had violated Iowa Code section 610.14(1)[44] and Canon 1 of the Canons of Professional Ethics.[45] In reaching its decision the court cited favorably an opinion of the Oklahoma Supreme Court, which, in pertinent part, provided:

> An attorney has the right to criticize the courts of this State, so long as his criticisms are made in good faith and in respectful language and with no design to willfully or maliciously misrepresent the position of the courts, or "*bring them into disrepute or lessen the respect due them.*"[46]

The court expressed "no hesitancy" in holding that the disputed leaflet "went much farther than the accused, as a lawyer, had a right to go," finding it especially compelling that Glenn had "offered no evidence" to substantiate his charges.[47] Also significant was the fact that the entire publication

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40. *Id.* at 1237-38.
41. *Id.* at 1237-38, 130 N.W.2d at 675-76.
42. *Id.*
43. *Id.* at 1238, 130 N.W.2d at 675-76.
44. IOWA CODE § 610.14(1) (1963) provided: "It is the duty of an attorney and counselor: to maintain the respect due to the courts of justice and judicial officers."
45. In pertinent part, Canon 1 of the Canons of Professional Ethics provided:
> 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. Whenever there is proper ground for serious complaint against a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected against.

46. *In re* Glenn, 256 Iowa at 1239, 130 N.W.2d at 676 (citing Williams v. Sullivan, 350 Okla. 745, 131 P. 703, 707 (1915)) (emphasis in original).
47. *Id.* at 1239, 130 N.W.2d at 676.

seemed to demonstrate a desire on the part of respondent to "belittle and besmirch the court and to bring it into disrepute with the general public."[48] Even if Glenn had possessed evidence to support his allegations, the court concluded, "proper ways were available to obtain a remedy."[49] Glenn was suspended from the practice of law for one year.[50]

The Supreme Court of Iowa last considered an attorney's first amendment right to criticize the courts and particular judges in *Committee on Professional Ethics and Conduct v. Hurd*.[51] In *Hurd* disciplinary proceedings were initiated against an attorney for making false statements in a verified motion for change of judge, including a statement that the judge had threatened to incarcerate respondent and his client and to hold respondent in contempt of court for pursuing discovery.[52] The disputed motion also asserted, falsely, that respondent was forced to suspend discovery in a case for several months because of the judge's threats, and that his client was unable to obtain a fair trial before the judge.[53]

In an opinion by Justice Mark McCormick, the Iowa Supreme Court found respondent's statements violative of Iowa Code sections 610.14(1)[54] and 610.14(3),[55] which require that lawyers maintain the respect due to courts and judges and avoid misleading them with false statements of law or fact, and of DR 1-102(A)(4),[56] DR 1-102(A)(5),[57] and DR 1-102(A)(6)[58] of the Iowa Code of Professional Responsibility,[59] which "prohibit an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, or that is prejudicial to the administration of justice, or that adversely reflects on the attorney's fitness to practice law."[60]

With respect to respondent Hurd's first amendment defense to the disciplinary charges against him, the court stated: "Our cases make it clear that a lawyer's right of free speech does not include the right to violate the stat-

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48. *Id.*

49. *Id.*

50. *Id.*

51. Committee on Professional Ethics & Conduct v. Hurd, 360 N.W.2d 96 (Iowa 1984).

52. *Id.*

53. *Id.*

54. IOWA CODE § 610.14(1) (1983) required, in pertinent part, that attorneys "maintain the respect due to the courts of justice and judicial officers."

55. IOWA CODE § 610.14(3) (1983) required that an attorney "employed for the purpose of maintaining the cause confided to him, employ such means only as are consistent with truth, and never seek to mislead the judge, by any artifice or false statement of fact or law."

56. Iowa Code of Professional Responsibility, DR 1-102(A)(4), states that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

57. Iowa Code of Professional Responsibility, DR 1-102(A)(5), states that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice."

58. Iowa Code of Professional Responsibility, DR 1-102(A)(6), states that a lawyer shall not "engage in any other conduct that adversely reflects on his fitness to practice law."

59. Committee on Professional Ethics & Conduct v. Hurd, 360 N.W.2d at 104.

60. *Id.* at 105 (citing *In re* Frerichs, 238 N.W.2d 764, 769 (1976)).

utes and canons proscribing unethical conduct."[61] The court, considering respondent's prior disciplinary record and the seriousness of his current offense, suspended his license to practice law for a minimum period of six months.[62]

These cases make it evident that the Iowa courts do not balance the ethical obligations and first amendment rights of attorneys who criticize the courts, their procedures, or particular judges. In effect, the Iowa courts deny first amendment protection to attorneys who are deemed to have violated the broadly-worded statutes, canons, disciplinary rules, and ethical considerations proscribing unethical conduct. Under this approach, if a particular statement is deemed unethical, the person uttering or writing it is simply not entitled to first amendment protection. The speech is unprotected and no further analysis is needed, because attorneys and judges may not use their first amendment rights to evade responsibility for unethical conduct.

2. *Other Jurisdictions Following the Iowa Approach*

Appellate courts in South Dakota and Nevada also follow this approach in resolving apparent conflicts between attorneys' first amendment rights and their ethical obligations.

In *In re Lacey* a South Dakota attorney was disciplined for certain statements he made to a newspaper reporter while representing a group of taxpayers challenging the construction of a new school.[63] After his clients' appeal was denied by the United States Court of Appeals for the Eighth Circuit, respondent was quoted in a local newspaper as saying: "[T]he state courts were incompetent and sometimes downright crooked, Judge Adams excepted."[64] In a letter to the chairman of the South Dakota Grievance Commission, which was also published in the paper, respondent admitted making the disputed statements and was quoted as refusing to apologize for them.[65]

Rejecting respondent's claim that the disputed statements were within his first amendment right, the South Dakota Supreme Court stated: "The right of free speech does not give a lawyer the right to openly denigrate the court in the eyes of the public."[66] The court stated that, although it would not exercise its power to control who may practice law in order to abridge first amendment freedoms, there are limits on the rights of attorneys to speak freely.[67] According to the court:

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61. *Id.*
62. *Id.*
63. *In re* Lacey, 283 N.W.2d 250, 251 (S.D. 1979).
64. *Id.*
65. *Id.*
66. *Id.* at 252.
67. *Id.*

> A person may have to respond in damages for libelous speech. A publication obstructive of a pending judicial proceeding may subject a person to punishment for contempt of court. And in the case of a lawyer an abuse of the right of free speech may be some index of his character or fitness to be a lawyer.[68]

Finding respondent Lacey violated S.D.C.L. 16-18-13,[69] requiring that attorneys maintain respect for the courts, Canon 8 of the Code of Professional Responsibility,[70] requiring that attorneys assist in improving the legal system, DR 8-102(b),[71] proscribing false accusations against a judge, and EC 8-6,[72] limiting attorney criticism of judges, the court censured him for his statements.[73] Significant to the court's decision was the fact that respondent "must have been well aware at the time he made the statements that he could have voiced his complaints to the South Dakota Judicial Qualifications Commission," but that he nevertheless elected to "voice his complaints in precisely the manner and forum that would most likely cast doubt upon the competence and integrity of the members of the judiciary without the slightest possibility that any constructive, remedial actions would result from those remarks."[74]

The Supreme Court of Nevada, like the appellate courts in Iowa and South Dakota, also believes that the first amendment does not give attorneys a right to make public, derogatory comments regarding court decisions.[75] In *In re Raggio* a district attorney was reprimanded for making a scathing attack in the media on a decision of the Nevada Supreme Court.[76] Raggio characterized the disputed opinion as "most shocking,"[77] and stated:

> I feel very strongly as I sit here today faced with the task of—almost insurmountable task—of reacquiring witnesses after some six or seven years and retrying the case. I feel that it's an example of judicial legisla-

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68. *Id.* (citing *In re* Gorsuch, 76 S.D. 191, 198, 75 N.W.2d 644, 648 (1956)).

69. S.D.C.L. 16-18-13 provides: "It is the duty of an attorney and counsellor at law to maintain the respect due to the courts of justice and judicial officers."

70. Canon 8 of the Code of Professional Responsibility provides: "A lawyer should assist in improving the legal system."

71. Code of Professional Responsibility, DR 8-102(B), provides: "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

72. Code of Professional Responsibility, EC 8-6, provides, in pertinent part:

> Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he 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. Criticism motivated by reasons other than a desire to improve the legal system are not justified.

73. *In re* Lacey, 283 N.W.2d at 252.

74. *Id.*

75. *In re* Raggio, 487 P.2d 499, 500 (Nev. 1971).

76. *Id.*

77. *Id.* at 500.

> tion at its very worst. . . . In my opinion this is the most shocking and outrageous decision in the history of the Supreme Court of this State. It's unexplainable, and in my opinion totally uncalled for.[78]

Noting that the disputed statements were made during a television interview which respondent arranged, and that they were "frequently repeated in the press and on television during the weeks and months to follow," the court speculated that "[e]ssential public confidence in our system of administering justice may have been eroded."[79]

Rejecting the respondent's purported first amendment defense, the majority wrote:

> One who is not a lawyer nor acquainted with the need for standards to govern members of the legal profession may tend to view a prosecutor's remarks about a pending case and the court's handling of that case to be an exercise of the right of free speech and, therefore, not subject to sanction. However, this is not true. The freedom to express oneself does not carry implications that nullify the guarantees of impartial trials. The processing of a case by those charged with the responsibility is not to be diverted from established protections and placed in the primitive melee of passion and prejudice. Justice Frankfurter once wrote that "free speech is not so absolute or irrational a concept as to imply paralysis of the means for effective protection of all freedom secured by the Bill of Rights" nor does free speech give a lawyer the right to openly denigrate the court in the eyes of the public.[80]

Finally the court, distinguishing the free speech rights of laypersons and those of members of the bar, held:

> We are never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work and the manner in which we perform it, and shall protect their right to so express themselves. A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he has sworn to uphold. Conformity with those standards has proven essential to the administration of justice in our courts.[81]

Attorney Raggio was reprimanded for his conduct, which the court deemed violative of his obligations to "protect the rights of litigants in pending cases,"[82] "to uphold the respect due courts of justice,"[83] and to avoid publishing "any material concerning a case on trial or any pending or anticipated litigation, calculated or which might reasonably be expected to inter-

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78. *Id.*

79. *Id.*

80. *Id.* (citing *In re* Maestraetti, 30 Nev. 187, 93 P. 1004 (1908); *In re* Breen, 30 Nev. 164, 93 P. 997 (1908)).

81. *Id.* at 500-01.

82. Nevada Supreme Court Rule 199.

83. Nevada Supreme Court Rules 73, 204.

fere in any manner or to any degree with a fair trial in the courts or otherwise prejudice the due administration of justice."[84]

B. *Jurisdictions Adopting a Balancing Approach*

1. *Kansas Decisions*

Like the courts in Iowa, South Dakota, and Nevada, the Supreme Court of Kansas appeared to adopt a non-balancing approach to resolving conflicts between attorneys' first amendment rights and their ethical obligations in *State v. Nelson.*[85] In *Nelson* disciplinary proceedings were initiated against an attorney who made comments critical of the Kansas Supreme Court in a newspaper interview given on the same day that the court censured him for misconduct.[86] During the disputed interview, respondent Nelson stated, in pertinent part:

> I did absolutely nothing wrong and they damn well know it. . . . I have very little respect for the police and the courts; that's absolutely true. And I am very zealous in defending my clients but I do it very ethically. . . . The police are headbeaters and they arrest people illegally about as often as they do legally. I think they commit more crimes per man than the worst of our criminals.
>
> Courts are commonly prejudiced and they're much more concerned with who appears before them than what the facts are, and the law is.[87]

Respondent Nelson was charged with violating DR 1-102(A)(5),[88] which prohibits conduct "prejudicial to the administration of justice," and DR 8-102(B),[89] which prohibits lawyers from making "false accusations against a judge or other adjudicatory officer."[90] Noting that "an attorney's right to free speech is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held," the Kansas Supreme Court cited Justice Stewart's concurrence in *In re Sawyer* for the proposition that "the right to free speech may not be invoked to protect an attorney against discipline for unethical conduct."[91]

Significantly, the court in *Nelson* rejected respondent's argument that he could not be disciplined for his statements because they were not within the "actual malice" rule announced by the Supreme Court of the United States in *New York Times Co. v. Sullivan.*[92] According to the court:

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84. Nevada Supreme Court Rule 199.
85. State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972).
86. *Id.* at ____, 504 P.2d at 213.
87. *Id.*
88. Code of Professional Responsibility, DR 1-102(A)(5).
89. Code of Professional Responsibility, DR 8-102(B).
90. State v. Nelson, 210 Kan. at ____, 504 P.2d at 214.
91. *Id.* (citing *In re* Sawyer, 360 U.S. 622 (1984)).
92. *Id.* at ____, 504 P.2d at 214-15 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

> This argument is untenable for several reasons. First, the *New York Times* case and the supporting line of cases cited by respondent in his brief are clearly inapplicable to a disciplinary proceeding because those cases are defamatory actions and deal with the constitutional privilege afforded news media. As an individual, respondent has no constitutional privilege to defame. . . . Second, it is widely recognized that neither civil nor criminal liability is necessary to maintain an action in a disciplinary proceeding.[93]

With respect to whether respondent's remarks amounted to knowingly false accusations against a judge or adjudicatory official under DR 8-102(B), EC 8-6, or Canon 8, the court stated: "[r]espondent's statements, while admittedly unprofessional, were general in nature and directed broadly at all law enforcement and judicial institutions."[94] The court found the evidence against respondent fell short of the required standard of proof, and that discipline was not, therefore, warranted.[95]

Eight years later, however, once again reviewing disciplinary charges arising out of an attorney's public comments, the Kansas Supreme Court appears to have introduced at least an element of "balancing" into its standard for resolving conflicts between first amendment rights and ethical obligations.[96] In *State v. Russell* a Kansas City attorney running for a position on the Board of Public Utilities was censured for writing and publishing in a local newspaper a political advertisement which contained various statements about his opponent which he knew or should have known were "false, deceptive and misleading."[97] Recognizing that a "person's constitutional rights to freedom of speech guaranteed by the Constitutions of the United States and the State of Kansas is no less by reason of having received a license and privilege to practice law,"[98] the court nevertheless held: "[t]he imposition of the ethical obligation of honesty upon lawyers under DR 1-102(A)(4) and subsequent discipline for violation of the rule is permissible and may be necessary in the interests of the administration of justice."[99] Unlike the majority in *State v. Nelson*, the court in *Russell* imposed a formidable limitation on its authority to discipline attorneys for their critical comments, stating:

> It is only in those instances where unbridled speech amounts to misconduct which *threatens a significant state interest* that a state may restrict a lawyer's exercise of personal rights guaranteed by the Constitutions . . . .

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93. *Id.* at ____, 504 P.2d at 215.
94. *Id.* at ____, 504 P.2d at 216.
95. *Id.*
96. *See* State v. Russell, 227 Kan. 897, 610 P.2d 1122 (1980).
97. *Id.* at ____, 610 P.2d at 1125.
98. *Id.* at ____, 610 P.2d at 1126 (citing *In re* Gorsuch, 76 S.D. 191, 75 N.W.2d 644 (1956)).
99. *Id.*

> When conflict occurs between the regulatory powers of government, as for example the subsequent imposition of discipline for misconduct by a state licensed attorney, and the individual liberty to speak and publish, a reconciliation must be effected *requiring a careful weighing and balancing of the respective interests.* Such measures of regulation are not prohibited where justified by a valid governmental interest within the administration of justice, and when the measures are not intended to control the content of speech but only incidentally limit its unfettered exercise.[100]

According to the court in *Russell*, there are only two areas in which the state has an interest significant enough to justify restricting an attorney's first amendment rights: (1) where an attorney's conduct or statements demonstrate an "inability to represent clients competently and honestly," and (2) where an attorney's conduct or statements "interfere with the processes or administration of justice."[101] The court concluded that Russell's comments infringed upon a significant state interest and were, therefore, subject to discipline, because large portions of his disputed political advertisement were false, indicating an inability on his part to represent clients competently and honestly.[102] The court concluded:

> An attorney may be disciplined for criticism in the heat of a political contest if such criticism is carried beyond the limits of truth and fairness. . . . Within that context the expression of opinion is protected if true or in good faith believed to be true, but when derogatory factual allegations are false and with ordinary care should have been known to be false, discipline may be imposed.[103]

As recently as 1986 the Kansas Supreme Court upheld its balancing approach to resolving conflicts between attorneys' first amendment rights and their ethical obligations, again expressly refusing to adopt the *New York Times* standard.[104] In *In re Johnson* the court held:

> A similar argument that the good faith standard used in libel should be applied in disciplinary cases was made in *State v. Nelson* . . . .
>
> We believe the reasoning in *Nelson* is sound. The *New York Times* standard of "actual malice" in a civil action for libel is not appropriate in a proceeding to discipline an attorney. Here, the Board found that the respondent knowingly made false statements to enhance his chance of winning the election for county attorney. The evidence supports these findings. Johnson is subject to disciplinary action for his false

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100. *Id.*

101. *Id.* at ____, 610 P.2d at 1126-27 (citing Polk v. State Bar, 374 F. Supp. 784, 787-88 (N.D. Tex. 1974)).

102. *Id.* at ____, 610 P.2d at 1128.

103. *Id.* at ____, 610 P.2d at 1127.

104. *See In re* Johnson, 240 Kan. 334, 729 P.2d 1175 (1986).

statements.[105]

2. *Other States Adopting a Balancing Approach*

Like the Supreme Court of Kansas, several other appellate courts have recently added an element of balancing to their standards for resolving conflicts between attorneys' first amendment rights and their ethical obligations.[106] Like the Kansas Supreme Court, these jurisdictions have not expressly elected to adopt the *New York Times* standard, but at the same time they have acknowledged that there must be a significant state interest involved in order to justify infringement on the free speech rights of attorneys.[107] States following this balancing approach include Kansas, Kentucky, Nebraska, and Arizona.[108]

In *Kentucky Bar Association v. Helfringer*, disciplinary proceedings were initiated against an attorney representing an organization calling itself Right to Life of Louisville for certain statements the attorney made at a press conference called to protest a district court's *ex parte* issuance of a temporary restraining order.[109] Calling the court's action, which enjoined enforcement of an anti-abortion ordinance, "highly unethical and grossly unfair," respondent Helfringer falsely implied that the court had exceeded its authority in issuing the order *ex parte*.[110] The Supreme Court of Kentucky found Helfringer's comments at the press conference falsely "raised the specter of a judicial officer being in complicity with the opponents of the ordinance," and implied that the court had abused the power of injunctive relief.[111] The court reprimanded Helfringer for violating DR 1-102(A)(5) and DR 8-102(B).[112]

Significantly, although the court rejected respondent's purported first amendment defense, it also expressly recognized: "[t]his point requires a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting an attorney's right to free expression."[113] In spite of its acknowledged obligation to "balance" these interests, however, the court in *Helfringer* cited favorably the following passage from Justice Stewart's concurrence in *In re Sawyer*:

> If, as suggested by my brother Frankfurter, there runs through the prin-

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105. *Id.* at ____, 729 P.2d at 1180-81.

106. *See, e.g.*, Kentucky Bar Ass'n v. Helfringer, 602 S.W.2d 165 (Ky. 1980); State *ex rel.* Nebraska State Bar Ass'n v. Michaelis, 210 Neb. 545, 316 N.W.2d 46 (1982); *In re* Riley, 142 Ariz. 604, 691 P.2d 695 (1984).

107. *See* cases cited *supra* note 106.

108. *See* cases cited *supra* note 106.

109. Kentucky Bar Ass'n v. Helfringer, 602 S.W.2d 165, 166 (Ky. 1980).

110. *Id.*

111. *Id.* at 166-67.

112. *Id.* at 169.

113. *Id.* at 167.

> cipal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to these standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.[114]

Because respondent Helfringer "knew or should have known" that his false allegations against a sitting judge were unwarranted, and that they would tend "to bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process," the court found him guilty of unethical conduct and subject to discipline.[115]

The Supreme Court of Nebraska has also adopted a balancing approach in attempting to reconcile attorneys' first amendment rights and their ethical obligations.[116] In *State ex rel. Nebraska State Bar Association v. Michaelis*, disciplinary proceedings were initiated against an attorney for various statements he made, published, and distributed while running for county attorney.[117] In numerous public statements and publications, respondent Michaelis charged the incumbent county attorney and several other area attorneys with unethical and illegal conduct, and claimed that three Cuming County officials conspired to remove his name from the election ballot.[118]

While the formal disciplinary charges against him were being investigated, respondent Michaelis also made the following comments to a local newspaper reporter: "[t]he Nebraska Supreme Court is scared of this, because they know they have a dirty house, and if you know you have a dirty house, you don't open the windows. . . . And two attorneys have already committed perjury in this matter."[119] During the pendency of the investigation, respondent also caused several pleadings to be filed in county court alleging theft from an estate by certain local attorneys, and he called into question the integrity of the courts and judicial system generally.[120] Finally, respondent Michaelis made the following statement to a local radio station:

> Never have I said anyone was guilty of bribery . . . . This is a blatant and apparent, this is a blatant lie. And apparently is perpetrated by the Nebraska State Bar Association using and misusing the press and media.

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114. *Id.* at 167-68.

115. *Id.* at 169.

116. State *ex rel.* Nebraska State Bar Ass'n v. Michaelis, 210 Neb. 545, 316 N.W.2d 46 (1982).

117. *Id.* at ____, 316 N.W.2d at 47-48.

118. *Id.* at ____, 316 N.W.2d at 49.

119. *Id.*

120. *Id.* at ____, 316 N.W.2d at 50.

> It is a typical smear campaign by what is probably in many people's mind the dirtiest profession in all of America today. Not just today, it was that way yesterday, and the day before that.
>
> At least prostitutes, and prostitution has a sense of fairness and some decency. The Nebraska State Bar Association apparently has none.
>
> Not one of the many false allegations by this very ignorant committee of puppets and professional stooges of the Nebraska State Bar Association is true. No one wants to look into the factual truth, for they fear opening a can of worms that finds the West Point City Attorney guilty of gross negligence, reckless and wanten [sic] malice, greed, and gross conflicts of interest for his own personal gain and selfish glory over the past 20 years . . . . Some of the same is true about our former Cuming County Attorney . . . .[121]

Concluding that respondent's statements "would clearly have a profound effect upon the minds of the reading and listening public, and could only serve to shake the confidence of the public in the legal profession," the Nebraska Supreme Court disciplined Michaelis.[122] In doing so, the court rejected Michaelis' first amendment defense.[123] Like the supreme courts of Kentucky and Kansas, the majority in *Michaelis* recognized the need to balance competing first amendment rights and state interests in analyzing an attorney's first amendment defense.[124] In pertinent part, the court stated:

> The respondent's assertion that he cannot be disciplined for his comments because they were protected expressions under the first amendment is an issue raised for the first time before this court. *This issue requires a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting the right of an attorney to free expression.*[125]

Relying on the concurrence of Justice Stewart in *In re Sawyer* and citing *In re Frerichs* and *Kentucky Bar Association v. Helfringer*, the court in *Michaelis* noted that an attorney may not rely upon first amendment rights to immunize unethical conduct.[126] The court deemed respondent Michaelis' conduct violative of DR 1-102(A)(1), prohibiting conduct which violates a Disciplinary Rule, DR 1-102(A)(4), prohibiting dishonesty, fraud, deceit, and misrepresentation, DR 1-102(A)(5), prohibiting conduct prejudicial to the administration of justice, DR 1-102(A)(6), prohibiting conduct which adversely reflects on one's fitness to practice law, and DR 2-101(A), prohibiting

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121. *Id.*
122. *Id.* at ____, 316 N.W.2d at 52-54.
123. *Id.*
124. *Id.*
125. *Id.* at ____, 316 N.W.2d at 52.
126. *Id.* at ____, 316 N.W.2d at 53.

self-laudatory publicity.[127] Because Michaelis "failed or refused to profit from past experience" and remained convinced that his past conduct "was perfectly proper and ethical, and that he should not be penalized for his actions," the court disbarred him.[128]

In *In re Riley* the Supreme Court of Arizona also acknowledged that a lawyer may be disciplined for his critical comments "if his public comments threaten a significant state interest,"[129] and that "[t]he good standing of the judicial system is such a significant interest."[130] In *Riley* a candidate for judicial office made various derogatory comments about his incumbent opponent, telling reporters that a contempt order he had issued was "crazy," "absolutely insane," and "motivated by revenge on the part of [the judge]."[131] Respondent also said that his opponent was "vindictive," and "partial," and that "[t]he state simply doesn't get a fair trial in his court."[132] Concluding that respondent Riley's statements constituted, *inter alia*, conduct "prejudicial to the administration of justice," in contravention of DR 1-102(A)(5), and false representations of fact concerning a judicial officer, in contravention of Canon 7(B)(1)(c), the court censured attorney Riley.[133]

C. *Jurisdictions Applying Traditional First Amendment Principles*

A third approach to resolving the inevitable conflict between the first amendment rights and ethical obligations of attorneys who make statements critical of the courts, their procedures, and particular judges, involves the application of traditional first amendment principles to particular statements, in order to determine whether they are subject to discipline or constitutionally protected. Appellate courts in West Virginia, California, New York, and Texas have, to varying degrees, adopted this approach.[134]

1. *The West Virginia Standard*

The most recent jurisdiction to apply traditional first amendment principles in the context of attorney disciplinary proceedings is West Virginia. In by far the most comprehensive opinion on the subject to date, the Supreme Court of Appeals of West Virginia in *Committee on Legal Ethics v. Douglas* reviewed disciplinary proceedings involving an attorney who pub-

127. *Id.* at ___, 316 N.W.2d at 55.
128. *Id.*
129. *In re* Riley, 142 Ariz. 604, ___, 691 P.2d 695, 703 (1984).
130. *Id.*
131. *Id.* at ___, 691 P.2d at 703-04.
132. *Id.* at ___, 691 P.2d at 704.
133. *Id.* at ___, 691 P.2d at 706.
134. *See, e.g.*, Committee on Legal Ethics v. Douglas, 370 S.E.2d 325 (W. Va. 1988); *In re* Ramirez, 28 Cal. 3d 402, 169 Cal. Rptr. 206, 619 P.2d 399 (1980); Baker v. Monroe County Bar Ass'n, 34 A.D.2d 229, 311 N.Y.S.2d 70 (1970); State Bar v. Semaan, 508 S.W.2d 429 (Tex. Civ. App. 1974).

licly criticized an investigation by two circuit judges into allegations that he had prepared a warranty deed, limited power of attorney, and deed of trust on behalf of a client who had previously been hospitalized for mental illness.[135] In an article published in a local newspaper, the respondent expressed "disdain" and "contempt" for a "gag order" issued by the court in connection with the investigation, and attributed the whole affair to "political expediency," characterizing the probe as "a farse [sic] and a thinly disguised attempt at power jockeying."[136] The respondent also stated:

> I'm thoroughly convinced that neither judge gives a hoot or holler about Mr. Greenlief and that they are perfectly willing to sacrifice his right to privacy, his piece [sic] of mind, and all notions of fundamental fairness on the pagan altar of political expediency.
>
> . . . In essence the whole matter is indicative . . . of probably the nationwide trend that people are beginning to speak out against judges. They are no longer regarded as provincial dieties [sic]. It would appear from this whole affair that the Salem witch trials of 17th Century England are still with us.
>
> As far as I'm concerned the judges drew first blood. If a battle is inevitable, then I will rise to the challenge.[137]

The news article was accompanied by a photograph of respondent Douglas in military fatigues, armed with a facsimile bow and arrow, a knife, and rifle ammunition.[138] Beneath respondent's photograph the caption read: "[j]ust like Rambo I'll defend against the judges alone if necessary."[139] Charged with violating DR 1-102(A)(5), proscribing "conduct prejudicial to the administration of justice," and DR 1-102(A)(6), which prohibits "conduct that adversely reflects on [an attorney's] fitness to practice law," respondent Douglas asserted a first amendment defense, claiming a legal right to make the disputed statements and to pose for the disputed photograph.[140]

Noting that courts across the country have been reluctant to apply traditional first amendment free speech guidelines in attorney criticism cases, the majority in *Douglas* recognized the need for a clear precedent on the issue from the United States Supreme Court, particularly concerning "whether the strictures of the Code of Professional Responsibility, which are aimed at curbing lawyers' criticism of the judiciary or the judicial system, are to be interpreted in light of First Amendment free speech protection."[141]

In support of its contention that first amendment principles ought to apply in disciplinary proceedings involving attorney criticism, the majority

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135. Committee on Legal Ethics v. Douglas, 370 S.E.2d 325, 326-27 (W. Va. 1988).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 332-33.
141. *Id.* at 329.

in *Douglas* pointed to the decision of the United States Supreme Court in *Garrison v. Louisiana*.[142] In *Garrison*, a Louisiana district attorney was convicted of criminal libel after he characterized local judges as, *inter alia*, "lazy and incompetent," and asserted that "spending restrictions imposed on his office by the judges had impaired vice investigations."[143] Setting aside defendant Garrison's conviction, the Supreme Court of the United States declared Louisiana's criminal libel statute unconstitutional under *New York Times Co. v. Sullivan*, adopting as the law of the case its central principle which "forbids the punishment of false statements [against public officials], unless made with knowledge of their falsity or in reckless disregard of whether they are true or false."[144]

The majority in *Douglas* also cited favorably the decision of the New Jersey Supreme Court in *In re Hinds*,[145] in which the court held that in disciplinary proceedings under DR 1-102(A) particular statements should only be deemed subject to discipline if they pose "a clear and present danger" or "a serious and imminent threat" to the fairness and integrity of the judicial system.[146] Borrowing heavily from the rationale underlying the *Hinds* decision, as well as the standards enunciated in *New York Times Co. v. Sullivan*, the court in *Douglas* held:

> From the foregoing, we conclude that the Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute. As the New Jersey Supreme Court recognized and the contempt cases bear out, *a lawyer's speech that presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected.*
>
> It is apparent that *when a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth.*[147]

The majority in *Douglas* concluded: "[f]urthermore, we believe that *statements that are outside of any community concern*, and are merely designed to *ridicule or exhibit contumacy toward the legal system may not enjoy First Amendment protection.*"[148] Without addressing whether respondent Douglas' conduct was protected under the first amendment principles adopted by the majority, the court in *Douglas* remanded the case to the Committee on Legal Ethics "for further development of the facts in light of

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142. *Id.* (citing Garrison v. Louisiana, 379 U.S. 64, 78 (1964)).
143. *Id.*
144. *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).
145. *Id.* at 330 (citing *In re* Hinds, 90 N.J. 604, 449 A.2d 483 (1982)).
146. *Id.*
147. *Id.* at 332. (Emphasis added.)
148. *Id.*

the standards established."[149]

2. *The California Approach*

The Supreme Court of California also extends traditional first amendment principles in attorney disciplinary proceedings involving criticism of the courts, their procedures, and particular judges. In *Ramirez v. State Bar*, disciplinary proceedings were initiated against an attorney who filed a reply brief in the United States Court of Appeals for the Ninth Circuit alleging that in reversing a trial court judgment in favor of his clients the court acted "unlawfully" and "illegally," and that the members of the court had become "parties to the theft" of his clients' property.[150] Respondent was also charged with misconduct for stating, *inter alia*, in a subsequent petition for writ of certiorari filed in the United States Supreme Court, that the court of appeals judges had falsified the record and that their "unblemished" records were "undeserved."[151] Although the California Supreme Court rejected respondent Ramirez' purported first amendment defense, it did cite favorably the free speech principles relied upon by the United States Supreme Court in *Garrison v. Louisiana* and *Chaplinsky v. New Hampshire*, stating:

> The United States Supreme Court, in addressing First Amendment protections of false statements made with reckless disregard for the truth, stated that "[c]alculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality . . . .'" . . . . Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection . . . .[152]

Like the West Virginia court in *Douglas*, the California Supreme Court in *Ramirez* applied the *New York Times* standard to the disputed statements, concluding that Ramirez' derogatory comments were in fact made with reckless disregard for the truth.[153] The majority in *Ramirez* suspended the respondent's license to practice law for one year.[154] Notably, however, Ramirez' suspension was stayed, and he was placed on conditional probation for one year.[155]

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149. *Id.* at 333.

150. Ramirez v. State Bar, 28 Cal. 3d 402, ____, 619 P.2d 399, 400-02 (1980), 169 Cal. Rptr. 206, ____.

151. *Id.*

152. *Id.* at ____, 169 Cal. Rptr. at ____, 619 P.2d at 404.

153. *Id.*

154. *Id.*

155. *Id.* at ____, 169 Cal. Rptr. at ____, 619 P.2d at 406.

3. *The New York Approach*

In *Baker v. Monroe County Bar Association*, a New York appellate court scrutinized various derogatory comments respondent Baker made in affidavits filed with the court and contained in a statement he filed with the Constitutional Convention Committee of the Monroe County Bar Association.[156] The disputed statement and affidavits complained of a surrogate's conduct and the conduct of a law firm involved in the trial and settlement of certain objections arising out of respondent's handling of his ninety-four year-old uncle's estate.[157] Characterizing respondent's disputed statements as "intemperate and vicious attacks upon the Surrogate and the attorneys," the court in *Baker* extended traditional first amendment principles to the respondent's free speech defense, stating:

> *New York Times Company v. Sullivan* . . . holds that the constitutional guarantees of free speech prohibit a public official from recovering damages for defamatory falsehood relating to his official conduct unless the statement was made with knowledge that it was false. In our opinion respondent knew that the defamatory statements made by him were false and, therefore, the rule stated in the *New York Times* case has no application.[158]

The court suspended attorney Baker from the practice of law for six months, concluding:

> Respondent's statements accusing the Surrogate of prejudice, unfairness, permitting and approving unconscionable exaction from estates and attempted intimidation of respondent are more than an offense against the Surrogate as an individual. These baseless, contumacious charges are offenses against the dignity and integrity of the courts and our judicial system. "It may bring discredit upon the administration of justice amongst citizens who have no way of determining the truth of the charges." It tends to impair the respect and authority of the court.[159]

4. *The Texas Approach*

The Texas appellate courts, like those in New York, California, and West Virginia, also apply traditional first amendment principles in determining whether attorney criticism of the courts, their procedures, and particular judges is subject to discipline. In *State Bar v. Semaan*, the Texas Court of Civil Appeals reviewed disciplinary proceedings involving a controversial series of letters two attorneys wrote to the editor of the *San Antonio*

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156. Baker v. Monroe County Bar Ass'n, 34 A.D.2d 229, ___, 311 N.Y.S.2d 70, 71-72 (1970).

157. *Id.*

158. *Id.* at ___, 311 N.Y.S.2d at 73-74.

159. *Id.* at ___, 311 N.Y.S.2d at 74.

Express, variously criticizing and praising a particular judge's conduct, knowledge of the law, and "courage to rule fairly and impartially."[160]

Recognizing the first amendment rights of the attorneys to express themselves, the court wrote:

> It is recognized that persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not.[161]

The court in *Semaan* also recognized, however, that the United States Supreme Court has not "authoritatively determined" the extent to which an attorney's first amendment rights can protect the attorney from the imposition of disciplinary sanctions by the bar.[162] Nevertheless, the *Semaan* court concluded: "It is apparent from the language of the unanimous opinion in *Garrison v. Louisiana* . . . that any bridle upon a free flow of information to the people concerning the performance and qualifications of public officials will have little chance of gaining constitutional approval."[163] The court found that the attorneys could not be disciplined for the contents of their letters under the *New York Times* standard, and set aside the committee's finding of professional misconduct.[164]

III. The Need for a Nationwide Standard

It is evident from a thorough examination of each of the aforementioned approaches that state appellate courts across the nation currently are operating under grossly divergent and inconsistent standards for resolving conflicts between attorneys' first amendment rights and their ethical obligations. In the absence of much-needed guidance from the Supreme Court of the United States on this issue, state appellate courts will continue to struggle with questions of whether and to what extent the first amendment and traditional free speech principles should apply in the context of attorney disciplinary proceedings. Similarly, without guidance from the Supreme Court on this issue, attorneys across the nation will continue to face a grave and significant threat of fundamental unfairness, at least to the extent that comments considered unethical and subject to discipline in one jurisdiction may well be deemed immune from disciplinary sanctions and protected by the first amendment in other jurisdictions.

The nature and extent of first amendment protection afforded attorneys

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160. *See* State Bar v. Semaan, 508 S.W.2d 429 (Tex. Civ. App. 1974).
161. *Id.* at 432.
162. *Id.* at 433.
163. *Id.* (citing *In re* Sawyer, 360 U.S. 622 (1959)).
164. *Id.*

who choose to speak out publicly on issues involving the courts, their procedures, and particular judges should not be dependent on fortuitous circumstances like the jurisdiction in which an attorney happens to live or practice. Clearly, there is a real and immediate need for the enunciation of a single, uniform, nationwide standard on this issue, and the Supreme Court of the United States is in the best position to promulgate one.

The Supreme Court recently had an opportunity but failed to address the nature and extent of first amendment protection in attorney disciplinary cases. In *In re Snyder* the United States Court of Appeals for the Eighth Circuit suspended a Bismarck, North Dakota, attorney from practice for writing a letter to court officials which was critical of the compensation system and fees paid attorneys representing indigent criminal defendants.[165] Citing Justice Stewart's concurring opinion in *In re Sawyer*,[166] and the Kansas Supreme Court's opinion in *State v. Nelson*,[167] the Eighth Circuit Court of Appeals rejected respondent Snyder's first amendment defense, stating: "[i]t is well settled that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech."[168] The Supreme Court reversed respondent's suspension order, however, because even though it found Snyder's comments "ill mannered" and "harsh," it did not consider them violative of the ethical considerations and disciplinary rules under which he was suspended.[169] The Court failed to reach the respondent's first amendment defense, stating: "Petitioner challenges his suspension from practice on the grounds (a) that his October 6, 1983 letter to the district judge's secretary was protected by the First Amendment . . . . We avoid constitutional issues when resolution of such issues is not necessary for disposition of a case."[170]

The Supreme Court had had an earlier opportunity to discuss the first amendment rights of attorneys. In *In re Sawyer* an attorney representing defendants in a Smith Act trial made a public speech referring to the "horrible" and "shocking" things which occurred at the trial, complaining of the impossibility of a fair trial and stating: "All rules of evidence have to be scrapped or the government can't make a case."[171] Sawyer was suspended from practice for one year by the Supreme Court of Hawaii for her statements, and her suspension order was affirmed by the United States Court of Appeals for the Ninth Circuit.[172] On certiorari to the United States Supreme Court, however, the respondent's suspension order was reversed.[173] Although

165. *In re* Snyder, 734 F.2d 334 (8th Cir. 1984).
166. *In re* Sawyer, 360 U.S. 622, 646 (1959).
167. State v. Nelson, 210 Kan. 636, 504 P.2d 211, 214 (1972).
168. *In re* Snyder, 734 F.2d at 343.
169. *In re* Snyder, 472 U.S. 634, 646-47 (1985).
170. *Id.* at 642.
171. *In re* Sawyer, 360 U.S. at 627.
172. *Id.* at 639.
173. *Id.*

the Court was unable to agree on an opinion, five of its members did agree that the evidence against respondent was not sufficient to support the conclusion that her speech impugned the integrity of the trial judge or reflected adversely on his impartiality or fairness.[174] Therefore, as in *Snyder*, the court in *Sawyer* did not undertake a first amendment analysis of the respondent's statements, holding instead that they were not violative of the rules of ethics underlying her suspension.[175] Significantly, Justice Stewart, whose concurring opinion added the majority's fifth vote, expressly stated that he joined in the opinion with the understanding that it made no intimation that the first amendment could immunize an attorney's unethical conduct.[176]

Only when the Supreme Court addresses the disputed constitutional issues it failed to reach in *Snyder* and *Sawyer* will attorneys and state appellate courts across the country have a uniform standard to follow in reconciling conflicts between attorneys' first amendment rights and their ethical obligations. Even assuming, however, that the Court does accept and decide such a case, there remains the question of which standard the Court should adopt for the purpose of resolving such conflicts. Should the Court treat statements deemed "unethical" as unprotected speech? Should the Court apply traditional first amendment principles in order to determine whether particular statements are subject to discipline? Or should the Court undertake to balance the first amendment rights of attorneys with "significant state interests" in protecting the integrity of the judicial system in the public eye?

IV. The Appropriate Standard

Clearly, the appropriate standard for resolving conflicts between the first amendment rights and ethical obligations of attorneys subjected to discipline for criticizing the courts, their procedures, and particular judges must be flexible, comprehensive, and sympathetic to the fundamental first amendment freedoms of attorneys as citizens.

A "flexible" standard is one which balances well-recognized state interests in protecting the integrity of the judicial system with the free speech interests of attorneys. A "comprehensive" standard is one which enunciates a method of analyzing all types of critical comments, from personal attacks on judges or court officials to general statements critical of the judicial system and its procedures. A "sympathetic" standard is one which acknowledges the right of attorneys to speak out, publicly and critically, on issues involving the courts, their procedures, and particular judges, and one which

174. *Id.* at 624-25.

175. *Id.* at 638.

176. Committee on Legal Ethics v. Douglas, 370 S.E.2d at 329, n.10 (citing *In re* Sawyer, 360 U.S. at 646).

recognizes that attorneys are entitled to the protection of the first amendment and traditional first amendment principles in the context of attorney disciplinary proceedings.

In the author's opinion the most flexible, comprehensive, and sympathetic standard for resolving conflicts between attorneys' first amendment rights and their ethical obligations is the standard adopted by the Supreme Court of Appeals of West Virginia in *Committee on Legal Ethics v. Douglas*.[177] As previously noted, the court in *Douglas* held that the free speech clause of the first amendment "protects a lawyer's criticism of the legal system and its judges," but recognized that a lawyer's speech which "presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected."[178] The majority in *Douglas* applied the "actual malice" standard of *New York Times Co. v. Sullivan* to attorney disciplinary proceedings involving personal attacks on judges or court officials, holding that such personal attacks are protected from discipline by the first amendment unless they are made with knowledge of their falsity or with reckless disregard for the truth.[179] The court in *Douglas* also recognized that statements outside the scope of any "community concern," which are "merely designed to ridicule or exhibit contumacy toward the legal system," do not enjoy first amendment protection.[180]

The standard adopted by the court in *Douglas* is more flexible than the Iowa approach, which simply treats "unethical" statements as unprotected speech without regard to first amendment interests. In fact, only the *Douglas* approach protects a lawyer's right to criticize the legal system and its judges, while at the same time recognizing that first amendment protection ends where a serious and imminent threat to the integrity of the judicial system begins. Similarly, the *Douglas* standard is more comprehensive than either the balancing approach or the Iowa approach, in that it regulates not only general criticism of the courts and their procedures, but also personal attacks on judges and statements outside the scope of any community concern. Finally, the *Douglas* standard is more "sympathetic" to the first amendment rights of attorneys than the Iowa and balancing approaches, because it expressly acknowledges the right of attorneys, as citizens, to speak out on issues involving the courts and their procedures, while at the same time recognizing that the first amendment and traditional first amendment principles apply in the context of attorney disciplinary proceedings.

V. Conclusion

For all of the foregoing reasons, it is clear that the Supreme Court of

177. *Id.* at 325.
178. *Id.* at 332.
179. *Id.*
180. *Id.*

the United States should promulgate a single, uniform, nationwide standard for resolving the inevitable conflict between the first amendment rights and ethical obligations of attorneys who choose to speak out, publicly and critically, on issues concerning the courts, their procedures, and particular judges. The appropriate standard for the Court to adopt in resolving this issue is the standard enunciated by the Supreme Court of Appeals of West Virginia in *Committee on Legal Ethics v. Douglas*. By adopting this standard the Court will for the first time extend the first amendment and traditional first amendment principles to attorney disciplinary proceedings, ensuring that even critical comments by attorneys are protected under the first amendment, unless they pose a serious and imminent threat to the integrity of the judicial system, run afoul of the *New York Times* "actual malice" standard, or step outside the scope of any community concern. The Court should act swiftly to adopt this standard.