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Professional Responsibility and the First Amendment: Are Missouri Attorneys Free to Express Their Views?

*Matter of Westfall*¹

I. INTRODUCTION

The history of First Amendment cases in our country demonstrates that many attorneys have argued successfully for the free speech rights of their clients. When an attorney seeks to invoke the same right as a defense in a professional disciplinary action, however, the attorney may find less shelter under the First Amendment. This Note examines the extent of first amendment protection a Missouri attorney receives when criticizing courts or judges.

II. FACTS AND HOLDING

The Advisory Committee of the Missouri Bar instituted a disciplinary proceeding against George R. (Buzz) Westfall, charging him with violations of Rules 8.2(a), 8.4(a), and 8.4(d) of Missouri Supreme Court Rule 4, Rules of Professional Conduct.² The Missouri Supreme Court limited its review to the finding that Westfall violated Rule 8.2(a), which prohibits an attorney from making false or reckless statements about the qualifications or integrity of a judge.³

1. 808 S.W.2d 829 (Mo. 1991) (en banc).

2. MO. S. CT. R. 4, RULES OF PROFESSIONAL CONDUCT.

Rule 8.2(a) states:

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.

Rule 8.4 states in part:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(d) engage in conduct that is prejudicial to the administration of justice;

....

3. *Westfall*, 808 S.W.2d at 832. The court stated that the charges brought under Rule 8.4 were encompassed within the violation of Rule 8.2(a) and could not be distinguished for the imposition of discipline. *Id.* at 839.

Westfall was the prosecuting attorney of St. Louis County when he made the statements that led to the disciplinary action.⁴ As prosecutor, Westfall had participated in the proceedings against Dennis Bulloch for crimes connected with the death of Bulloch's wife.⁵ When the Missouri Eastern District Court of Appeals granted Bulloch a temporary writ of prohibition to prevent further prosecution for armed criminal action, Westfall made remarks to a St. Louis television station criticizing the court's opinion and the author, Judge Kent Karohl.⁶

Westfall said that "for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes."⁷ He also stated that Judge Karohl "made up his mind before he wrote the decision" and "just reached the conclusion that he wanted to reach."⁸

4. *Id.* at 831.

5. *Id.* Bulloch was found not guilty of first or second degree murder and guilty of involuntary manslaughter. *See State ex rel. Bulloch v. Seier*, 771 S.W.2d 71, 72 (Mo. 1989) (en banc), *cert. denied*, 110 S. Ct. 718 (1990). Subsequent to the homicide trial, Bulloch was indicted on charges of armed criminal action and tampering with physical evidence. *Id.* at 72. The Missouri Court of Appeals, Eastern District, granted a temporary writ of prohibition to bar further prosecution of Bulloch, holding that the prosecution for armed criminal action constituted double jeopardy. The Missouri Supreme Court made the writ absolute. *See id.* at 72-76.

6. *Westfall*, 808 S.W.2d at 831-32. The full content of his statements are contained in the opinion:

The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy.

[B]ut for reasons that I find somewhat illogical, and I think even a little bit less than honest, Judge Karohl has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes.

The decision today will have a negative impact on all murder one cases pending in Missouri, in the future in Missouri, and some that are already on appeal with inmates in prison. So it's a real distressing opinion from that point of view.

But if it's murder first degree and we're asking for death, which of course, is the most serious of all crimes, Judge Karohl's decision today says we cannot pursue both. And that, to me, really means that he made up his mind before he wrote the decision, and just reached the conclusion that he wanted to reach.

Id.

7. *Id.* at 831.

8. *Id.* at 832.

The advisory committee charged Westfall with violations of the rules of professional conduct and requested that Westfall be disbarred.⁹ The Missouri Supreme Court appointed Judge Bruce Normile of the Second Judicial Circuit as master of the disciplinary proceedings, and he recommended that Westfall be suspended from the practice of law for one year.¹⁰

The Missouri Supreme Court reviewed the evidence of the proceedings to determine if Westfall violated Rule 8.2(a).¹¹ The majority applied an objective standard and found that Westfall made the statements about the appellate decision and Judge Karohl with reckless disregard as to their truth or falsity.¹² The court held that Westfall's conduct was prejudicial to the administration of justice and was in violation of the rule.¹³ The court noted that this was a case of first impression and initial construction of Rule 8.2(a); therefore, Westfall only received a public reprimand.¹⁴

III. LEGAL BACKGROUND

The First Amendment protects the "profound national commitment" to debate on public issues, even when such debate involves criticism of the government or public officials.¹⁵ Despite this commitment to "uninhibited, robust" debate,¹⁶ courts have often declined to give attorneys full First Amendment protection when they have criticized the judiciary.¹⁷

Criticism of the judiciary is only one of the areas where attorneys have limited First Amendment freedom. Attorneys are subject to speech restrictions when they advertise,¹⁸ solicit business,¹⁹ or comment on a pending trial.²⁰ The history of these restrictions reveals the ongoing tension between an

9. *Id.* at 831.

10. *Id.*

11. *Id.* The findings and recommendations of the master are advisory. The court reviews the evidence *de novo* and draws its own conclusions of law. *Id.*

12. *Id.* at 837-38.

13. *Id.* at 838.

14. *Id.* at 839.

15. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

16. *Id.* at 270.

17. *See In re Raggio*, 487 P.2d 499, 500 (Nev. 1971); *see also In re Troy*, 111 A. 723 (R.I. 1920). *But cf. Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 121-22 (Tenn. 1989) (a lawyer has every right to criticize court proceedings and judges as long as the statements are made in good faith, without the intent to willfully misrepresent judges or courts), *cert. denied*, 493 U.S. 917 (1989).

18. *See infra* notes 85-115 and accompanying text.

19. *See infra* notes 50-84 and accompanying text.

20. *See infra* notes 21-49 and accompanying text.

attorney's First Amendment rights and the state's interest in regulating the profession.

A. Trial Publicity

In *Sheppard v. Maxwell*,²¹ the United States Supreme Court observed that an attorney who is allowed to speak to the press without restriction may adversely affect the fairness of a trial. Dr. Sam Sheppard, accused of murdering his wife, was the subject of extensive press coverage and publicity prior to his trial.²² During the trial, the judge did little to control the jurors' exposure to the media barrage.²³ The press' attendance and coverage of the trial created a "carnival atmosphere" in the courtroom.²⁴ The Court held that Sheppard was denied a fair trial and instructed the district court to issue a writ of habeas corpus.²⁵

In addition, the Court found that the trial judge made no attempt to control the prejudicial news items disseminated by the prosecution and defense lawyers.²⁶ The Court stated that the "trial court might well have proscribed extrajudicial statements by any lawyer . . . which divulged prejudicial matters . . ."²⁷ According to the decision, collaboration between an attorney and the press affects the fairness of a trial; therefore, the collaboration is subject to regulation and is worthy of disciplinary measures.²⁸

The United States Supreme Court has recognized that a balance must be struck between a defendant's right to a fair trial and the First Amendment rights enjoyed by others.²⁹ A prior restraining order to prevent press commentary will seldom be issued or upheld on appeal, despite the need to insure a fair trial.³⁰ In comparison, attorneys have limited rights to discuss pending litigation with the media.³¹ The Court recently discussed an

21. 384 U.S. 333, 363 (1966).

22. *Id.* at 338-49.

23. *Id.* at 353.

24. *Id.* at 358-59.

25. *Id.* at 363.

26. *Id.* at 361.

27. *Id.*

28. *Id.* at 363.

29. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976); *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 1 (1989).

30. *Nebraska Press*, 427 U.S. at 570.

31. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6; ROBERT H. ARONSON ET AL., PROBLEMS, CASES, AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 631-33 (1985); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1989) (unlike Rule 3.6, allows an attorney to describe physical evidence seized).

attorney's right to make public comments prior to trial in *Gentile v. State Bar of Nevada*.³² Gentile called a press conference after his client was indicted for an alleged theft of a safety deposit vault.³³ He told the press the evidence demonstrated his client's innocence, the likely thief was a police detective, and some victims were not credible because they were drug dealers or convicted money launderers.³⁴ The State Bar of Nevada filed a complaint alleging that Gentile's statements violated the Nevada disciplinary rule regarding pretrial publicity.³⁵ The Nevada Supreme Court affirmed the decision to issue a private reprimand.³⁶

The United States Supreme Court reversed the decision of the Nevada Supreme Court and held that the rule was void for vagueness.³⁷ The Court found that the rule's "safe harbor" provision seemed to permit attorneys to make statements regarding the general nature of the claim or defense even if such statements were likely to cause prejudice.³⁸ According to the Court, this imprecise rule could lead to discriminatory enforcement.³⁹ The Court noted that the possibility of discriminatory enforcement was of particular relevance because criminal defense lawyers, who challenge the actions of the state, are more likely to be affected by the regulation.⁴⁰

Despite the reversal on vagueness grounds, five members of the Court agreed that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that required for regulation

32. 111 S. Ct. 2720 (1991).

33. *Id.* at 2723. The client was acquitted by a jury six months later. *Id.* "[T]he trial judge had succeeded in seating an impartial jury that was unaffected by the media coverage . . ." 77 A.B.A. J. 50 (1991).

34. *Gentile*, 111 S. Ct. at 2729.

35. *Id.* at 2723. Nevada Supreme Court Rule 177 is substantially similar to MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6. *Id.* Part (1) states that "[a] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at 2737. Part (2) lists the character of statements that might have such an effect. *Id.* at 2737-38. Part (3) states that an attorney may "state without elaboration . . . the general nature of the claim or defense" and enumerates other permissible statements. *Id.* at 2738.

36. *Id.* at 2723.

37. *Id.* at 2731.

38. *Id.* According to the court, the additional evidence that Gentile had studied the rule before he called the press conference demonstrated that the rule "create[d] a trap for the wary as well as the unwary." *Id.* at 2731-32.

39. *Id.* at 2732.

40. *Id.*

of the press.⁴¹ The Court noted that a group of preceding cases did not permit suppression of speech unless the speech would cause a "clear and present danger" to an adjudicative proceeding.⁴² For example, a court may not suppress press commentary on a trial unless the state can show that the unchecked publicity would render it impossible to find impartial jurors.⁴³ Although the media benefits from this high level of protection, the Court found that an attorney's First Amendment rights are adequately protected by a rule that proscribes statements that may have a "substantial likelihood of material prejudice" to pending litigation.⁴⁴ The Court stated that the right to a fair trial is a fundamental one that must be protected by "narrow and necessary" limitations on lawyers' speech.⁴⁵

The Court observed that attorneys, as participants in the judicial system, may expect more strict regulations in many areas that involve First Amendment issues.⁴⁶ Because lawyers have special access to information that may lead the public to believe that their extrajudicial statements are authoritative, a lawyer's statements pose an inherent threat to the fairness of a trial, according to the Court.⁴⁷ As officers of the courts, attorneys may not burden the judicial system by making statements that can affect the outcome of the trial or prejudice the jury venire.⁴⁸ Therefore, the "substantial likelihood" test is a constitutionally permissible balance between the lawyer's First Amendment rights and the right to a fair trial.⁴⁹

B. Solicitation

The United States Supreme Court upheld a professional rule that proscribed an attorney's ability to solicit business in *Ohralik v. Ohio State Bar Ass'n*.⁵⁰ The Court held that a state bar association may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely

41. *Id.* at 2744.

42. *Id.* at 2742-43; see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

43. See *Nebraska Press*, 427 U.S. at 569 (1976).

44. *Gentile*, 111 S. Ct. at 2745.

45. *Id.*

46. *Id.* at 2744; see, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

47. *Gentile*, 111 S. Ct. at 2745.

48. *Id.*

49. *Id.*

50. 436 U.S. 447 (1978).

to pose dangers that the state has an interest in preventing.⁵¹ Such dangers include assertion of fraudulent claims and potential harm to the client through overreaching, overcharging, under-representation, and misrepresentation.⁵²

Ohralik was disciplined for soliciting the legal business of two young automobile accident victims.⁵³ He visited the driver while she was still in the hospital and visited the passenger at her home, without prior invitations.⁵⁴ Ohralik sued the accident victims for breach of contract when they subsequently discharged him; they filed complaints against him with the local bar association.⁵⁵ Although Ohralik claimed the solicitation was protected by the First Amendment,⁵⁶ the Court found that the state's disciplinary rule could be constitutionally applied to suspend him for an indefinite time period.⁵⁷

The Court noted that commercial speech generally gets limited protection and may be subject to more regulation than other types of speech.⁵⁸ The Court observed that in-person solicitation may not lead to the desirable goals of informed and reliable decision-making because it has a tendency to exert pressure on the client to make a quick decision.⁵⁹ The state interests in protecting consumers and maintaining professional standards are strong;⁶⁰ therefore, the attorney may be disciplined whether or not harm actually resulted from the solicitation.⁶¹

Ohralik can be distinguished from solicitation cases where the attorney has not contacted a potential client for the purpose of pecuniary gain.⁶² In *NAACP v. Button*,⁶³ the Supreme Court held that the activities of the NAACP and its legal staff were modes of expression and association protected by the First and Fourteenth Amendments, which Virginia could not prohibit under its power to regulate the legal profession.⁶⁴

The legal staff of the NAACP held several meetings with parents and children to explain the legal steps necessary to achieve desegregation in their

51. *Id.* at 461, 468.

52. *Id.* at 461.

53. *Id.* at 449-50.

54. *Id.* at 450-51.

55. *Id.* at 452.

56. *Id.* at 455.

57. *Id.* at 453-54, 467.

58. *Id.* at 456.

59. *Id.* at 457-58.

60. *Id.* at 460.

61. *Id.* at 464.

62. *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

63. 371 U.S. 415.

64. *Button*, 371 U.S. at 428-29.

school districts.⁶⁵ The staff brought forms to the meetings to obtain signatures of prospective litigants.⁶⁶ The Supreme Court of Virginia held that a state statute and the Canon of Ethics prohibited this activity because it was a form of solicitation.⁶⁷

The United States Supreme Court held that a state "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."⁶⁸ In this case, the NAACP legal staff was engaged in "solicitation" for the public interest, not for private gain.⁶⁹ Therefore, Virginia's compelling interest in regulating the illegal practices of barratry, champerty, and maintenance⁷⁰ did not apply to the activities in question.⁷¹

In *In re Primus*,⁷² the United States Supreme Court held that an attorney who seeks to pursue litigation as a form of political expression cannot be disciplined unless the state shows that the conduct actually caused undue influence or other harm.⁷³ Primus received a public reprimand⁷⁴ because she sent a letter to a potential client describing the legal services offered by the American Civil Liberties Union (ACLU).⁷⁵ The letter suggested that the potential client could seek legal recourse for an allegedly unconstitutional sterilization.⁷⁶ The Court held that Primus' activity on behalf of the ACLU was protected by the First Amendment because it was a form of political expression, not an attempt to solicit a pecuniary benefit.⁷⁷ Attorneys have

65. *Id.* at 421.

66. *Id.*

67. *Id.* at 424-26.

68. *Id.* at 439.

69. *Id.* at 440, 444.

70. Barratry is defined as "the offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." BLACKS LAW DICTIONARY 137 (5th ed. 1979). Champerty is "a bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." *Id.* at 209. Maintenance is defined as "an officious intermeddling in a suit which in no way belongs to one . . ." *Id.* at 860.

71. *Button*, 371 U.S. at 439.

72. 436 U.S. 412 (1978).

73. *Id.* at 434.

74. *Id.* at 421.

75. *Id.* at 416.

76. *Id.* Primus wrote the letter after she met the potential client at a gathering to discuss the sterilization practices of South Carolina doctors. *Id.* at 415. According to news reports, welfare mothers in Aiken County, South Carolina were sterilized as a condition of the continued receipt of medical assistance under the Medicaid program. *Id.*

77. *Id.* at 428. The Court observed that the ACLU does not use litigation to

a fundamental right to engage in "collective activity undertaken to obtain meaningful access to the courts," as distinguished from the right to solicit clients for purely personal gain.⁷⁸

Primus was disciplined by the South Carolina Supreme Court because her letter could have led to a lawsuit and a possible financial benefit to the ACLU.⁷⁹ The United States Supreme Court stated that the level of constitutional scrutiny would not be lowered because of a possible monetary gain for the ACLU in the form of court-ordered attorney fees.⁸⁰ The opinion distinguished counsel fees awarded by a court from traditional fee-paying arrangements⁸¹ and found that the ACLU sponsored litigation to vindicate civil rights, not to make money.⁸² Primus' letter represented part of the organization's political expression; therefore, she could not be disciplined unless the state showed undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred.⁸³ While the state may impose reasonable restrictions on the time, place, and manner of solicitation by lawyers, it must regulate with greater precision in the context of political expression and association.⁸⁴

C. Advertising

The American Bar Association's *Code of Professional Responsibility of 1969* (the Code) and its predecessor, the *Canon of Ethics*, restricted virtually all attorney advertising.⁸⁵ Lawyers could only disseminate a limited amount of information to the public, such as addresses, phone numbers, educational degrees, and areas of practice.⁸⁶ The ABA modified the Code in 1976 to allow advertisements in the yellow pages of telephone directories.⁸⁷ The

merely resolve private disputes; litigation is a form of political expression for the group. *Id.*

78. *Id.* at 426 (citing *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 585 (1971)); *cf.* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

79. *Primus*, 436 U.S. at 428.

80. *Id.*

81. *Id.* at 429.

82. *Id.* at 430.

83. *Id.* at 434-35.

84. *Id.* at 437-38.

85. *Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A. J. 1538, 1539 (1978).

86. *Id.* at 1539.

87. *Code Amendments Broaden Information Lawyers May Provide in Law Lists, Directories and Yellow Pages*, 62 A.B.A. J. 309 (1976).

majority of states followed rules that were substantially equivalent to the ABA Code.⁸⁸

*Bates v. State Bar of Arizona*⁸⁹ altered the ability of states to regulate lawyer advertising⁹⁰. The attorneys who were disciplined in *Bates* advertised in a local newspaper that they offered "legal services at very reasonable fees" and listed fees for some services.⁹¹ This conduct violated an Arizona disciplinary rule that prohibited attorneys from advertising in the newspaper.⁹²

The United States Supreme Court recognized that solicitation and advertising by attorneys are subject to state regulation and rejected the appellants' claim that the restraint was a limitation on competition in violation of the Sherman Act.⁹³ The Court noted, however, that commercial speech is entitled to some protection because it may foster informed and reliable decision-making.⁹⁴ The Court noted the traditional justifications for such restrictions pointed to advertising's adverse effects on professionalism and the administration of justice, as well as the inherently misleading nature of such ads.⁹⁵ They found these reasons were not substantial enough to warrant complete restriction of attorney advertising.⁹⁶ The Court stated that "[s]ince the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled."⁹⁷

The *Bates* opinion recognized that misstatements in advertising may be more strictly regulated because the public lacks sophistication regarding legal services.⁹⁸ For instance, claims relating to the quality of legal services may be misleading to the public.⁹⁹ Reasonable restrictions on the time, place and manner of advertising are permissible, but a state cannot restrict a truthful

88. *See supra*, note 85, at 1538, 1540.

89. 433 U.S. 350 (1977).

90. *Id.* at 384.

91. *Id.* at 354.

92. *Id.* at 355. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976), incorporated in Rule 29(a) of the Supreme Court of Arizona, did not permit lawyers to use newspaper, magazine, radio or television advertisements. *Id.* It also prohibited display ads in city or telephone directories. *Id.*

93. *Id.* at 362-63.

94. *Id.* at 364.

95. *Id.* at 368-79.

96. *Id.* at 379.

97. *Id.* at 371-72.

98. *Id.* at 383.

99. *Id.* at 366.

advertisement concerning the availability and terms of routine legal services.¹⁰⁰

The Court reaffirmed the *Bates* decision in *In re R.M.J.*¹⁰¹ and held that Missouri's rule regulating the content of attorney advertising was unconstitutional because it placed an absolute prohibition on some types of potentially misleading information, even though the information could be presented in a non-deceptive manner.¹⁰²

Missouri's disciplinary rule was revised after the *Bates* decision to permit attorneys to advertise in newspapers and telephone directories.¹⁰³ An addendum to the revised rule limited the descriptions an attorney could use for areas of practice and required a disclaimer of certification of expertise for the specific listings.¹⁰⁴ In *In re R.M.J.*, the attorney was disciplined because he placed ads in the local telephone directories and newspapers listing areas of practice such as "personal injury" and "real estate" instead of "tort law" and "property law" as required by Missouri's rule.¹⁰⁵ The attorney also listed some areas of practice that were not permitted by the rule and failed to include the disclaimer of certification of expertise required by the rule. The attorney further stated in his ads that he was "admitted to practice before the United States Supreme Court," a claim that, while true, was challenged as misleading.¹⁰⁶ He was charged with unprofessional conduct and received a private reprimand.¹⁰⁷

The United States Supreme Court noted that even when a communication is not misleading, the state has some authority to regulate it.¹⁰⁸ The regulation, however, must be in proportion to the substantial state interest

100. *Id.* at 384. Justice Rehnquist in his dissent said that such an expression, even if truthful, was not protected by the First Amendment. *Id.* at 404 (Rehnquist, J., dissenting).

101. 455 U.S. 191 (1982).

102. *Id.* at 203-07.

103. *Id.* at 193. Missouri Supreme Court Rule 4, DR 2-101 stated that a lawyer could publish ten categories of information: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified "routine" legal services. *Id.* at 194. An addendum to the rule provided that if the lawyer chose to list areas of practice, those areas had to be generally described as civil and/or criminal practice, or taken from a list of 23 specific descriptions. *Id.* at 194-95 (citing Rule 4, Addendum III (adv. comm. Nov. 3, 1977)).

104. *Id.* at 195; *see also supra* note 99.

105. *Id.* at 197.

106. *Id.*

107. *Id.* at 197-98.

108. *Id.* at 203.

being furthered.¹⁰⁹ The Court observed that the use of terms such as "personal injury" and "real estate" rather than "tort law" and "property law" would not mislead the public.¹¹⁰ Furthermore, the use of specific listings such as "contracts" and "securities" that were not included in the rule's list were not inherently deceptive. Therefore, the Court held that the rule was an invalid restriction upon speech.¹¹¹

The attorney was also charged with a violation because he mailed announcement cards to persons other than "lawyers, clients, former clients, personal friends and relatives."¹¹² The Court found that it was not clear that such an absolute prohibition was necessary to properly supervise attorney advertising.¹¹³ The Court suggested that states might regulate mailings by requiring attorneys to file a copy of them with the state bar advisory committee.¹¹⁴

The opinion allows the states to retain authority to regulate advertising that is inherently misleading or that has proved to be so in practice, but the First and Fourteenth Amendments require that the regulations be no more extensive than is reasonably necessary to further a substantial government interest.¹¹⁵

D. Criticism of the Judiciary

Attorneys have always maintained the right to respectfully criticize the acts of courts and judges,¹¹⁶ but they have been disciplined for using improper outlets to question the judiciary.¹¹⁷ In 1871, the United States Supreme Court first observed that an attorney's speech is subject to restric-

109. *Id.*

110. *Id.* at 205. The Court noted that the portion of the advertisement that stated "admitted to practice before the United States Supreme Court" could be misleading, but the Missouri Supreme Court made no such finding. *Id.*

111. *Id.* at 205.

112. *Id.* at 206.

113. *Id.*

114. *Id.*

115. *Id.* at 207.

116. See William E. Shipley, Annotation, *Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action*, 12 A.L.R.3d 1408, 1411 (1967); see also *Bridges v. California*, 314 U.S. 252, 270-71 (1941) (stating that "an enforced silence . . . would probably engender resentment, suspicion, and contempt much more than it would enhance respect" for the judiciary).

117. Shipley, *supra* note 116, at 1418-33; see also *In re Whiteside*, 386 F.2d 805, 806 n.4 (2d Cir. 1967), *cert. denied*, 391 U.S. 920 (1968); *Louisiana State Bar Ass'n v. Karst*, 428 So. 2d 406, 410 (La. 1983); *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979).

tions in *Bradley v. Fisher*.¹¹⁸ Bradley brought a civil action against Judge Fisher after Fisher ordered Bradley's name struck from the criminal court of the District of Columbia.¹¹⁹ Judge Fisher entered the order after Bradley allegedly threatened him during a trial for the murder of Abraham Lincoln.¹²⁰ The Supreme Court held that Bradley was not entitled to damages and that the criminal court had the power to strike his name from its rolls of practicing attorneys.¹²¹ The Court stated that attorneys have an obligation to "maintain at all times the respect due to courts of justice and judicial officers."¹²²

After the *Bradley* decision, some states developed rules of legal ethics.¹²³ In 1908 the American Bar Association promulgated the Canons of Professional Ethics.¹²⁴ The Canons required attorneys to maintain respect for the courts, not to provide protection for individual judges, but to maintain the "supreme importance" of the courts in general.¹²⁵ Interpretations of the Canons tended to prohibit entirely criticism of the judicial system without weighing its actual effect on the administration of justice.¹²⁶

The United States Supreme Court once again addressed the issue of an attorney's right to criticize the judiciary in *In re Sawyer*.¹²⁷ Sawyer was one of the defense counsel for several people indicted under the Smith Act.¹²⁸ She gave a speech six weeks after the trial began, stating that "rather shocking and horrible things . . . go on at the trial."¹²⁹ Sawyer also said that

118. 80 U.S. (13 Wall.) 335 (1871).

119. *Id.* at 337-38.

120. *Id.* at 344. Bradley defended John Suratt, who was accused of assassinating Lincoln. *Id.*

121. *Id.* at 346-54.

122. *Id.* at 355. The Court said that this obligation included "abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." *Id.*

123. 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, 134 (1988).

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

125. CANONS OF PROFESSIONAL ETHICS No. 1 (1908); see, e.g., Shipley, *supra* note 116, at 1410 (1967).

126. Dodd, *supra* note 122, at 134.

127. 360 U.S. 622 (1959).

128. *Id.* at 623. The Smith Act, 18 U.S.C. § 2385 (1988) criminalizes the advocacy of overthrowing the government by force or violence, or assassination of a public officer. The Act also makes it a crime to organize a group to achieve these ends.

129. *Id.* at 628.

"[t]here's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the Government can't make a case."¹³⁰ The Court held that Sawyer could not be disciplined for making these statements because they only reflected general criticism of the state of the law and Smith Act trials.¹³¹ The Court noted, however, that its holding was based on a narrow question: whether Sawyer's speech impugned the integrity of Judge Wiig, who presided over the trial.¹³² The Court found that even if Sawyer's statements implied that Judge Wiig was erroneously interpreting the law, "attribution of honest error to the judiciary is not cause for professional discipline in this country."¹³³ The Court reasoned that appellate courts and law reviews often say that judges take an erroneous view of the law without "imput[ing] . . . disgrace."¹³⁴ The opinion noted that Sawyer did not directly criticize the competence of Judge Wiig.¹³⁵

In a concurring opinion, Justice Stewart stated that attorneys may be held to higher standards than the average citizen, reasoning that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."¹³⁶ Stewart said that if the principal opinion suggested an attorney might invoke the First Amendment to avoid discipline for proven unethical conduct, he would not support such an intimation.¹³⁷

In the dissent, Justice Frankfurter disagreed with the plurality's "narrow" holding and said that the issue was whether Sawyer interfered with the administration of justice by making the speech during a pending trial.¹³⁸ He stated that the issue could not be resolved by conducting a free speech analysis.¹³⁹ According to Frankfurter, Sawyer's statements directly attacked the integrity of the courts and impliedly questioned the integrity of the judge.¹⁴⁰ Therefore, he agreed with the imposition of a one-year suspension.¹⁴¹

Although the Court recognized some First Amendment protection for attorneys in *Sawyer*, lower courts have often refused to apply it in disciplinary

130. *Id.* at 629.

131. *Id.* at 633.

132. *Id.* at 626.

133. *Id.* at 635.

134. *Id.*

135. *Id.*

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

137. *Id.* at 646.

138. *Id.* at 652 (Frankfurter, J., dissenting).

139. *Id.* at 666.

140. *Id.* at 669.

141. *Id.* at 669.

actions.¹⁴² The American Bar Association adopted a new set of standards in 1970 to "strike a better balance" between the obligation of an attorney to maintain respect for the courts and the right to free speech.¹⁴³ States, however, have struck this balance employing widely divergent standards in disciplinary proceedings.¹⁴⁴

To date, the United States Supreme Court has not provided a clear test to balance an attorney's First Amendment right to criticize the judiciary with a state's right to enforce professional standards.¹⁴⁵

IV. THE INSTANT DECISION

Although Westfall claimed that his comments were directed at the court of appeals' opinion, and not at Judge Karohl personally, the court found no merit in this claim.¹⁴⁶ The court likewise rejected Westfall's argument that his statements were merely an opinion and could not be false.¹⁴⁷ The court found that Westfall's statements clearly implied an objective fact: that Judge Karohl demonstrated dishonesty and a lack of judicial integrity when he granted the writ of prohibition.¹⁴⁸ The court refused to "microscopically examine" each sentence and rejected Westfall's claim that he merely meant the opinion was "intellectually dishonest."¹⁴⁹

142. Dodd, *supra* note 123, at 138.

143. *Id.*

144. Sandra M. Molley, Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 NOTRE DAME LAW 489, 495-99 (1981). Some courts restrict all potentially harmful comments, whereas others impose discipline only when statements cause harm. *Id.* at 495-96. The courts have two bases for restricting an attorney's speech: (1) the attorney has voluntarily submitted to curtailment of speech by voluntary admission to the bar, or (2) the need to maintain public confidence in the legal system prevents the attorney from seeking the shield of the First Amendment. *Id.* at 496.

145. Molley, *supra* note 144, at 504; *see also In re Westfall*, 808 S.W.2d 829, 833 (Mo.) (en banc), *cert. denied*, 112 S. Ct. 648 (1991); Henry J. Reske, *Limited Free Speech for Lawyers*, 77 A.B.A. J. 22, 23 (Oct. 1991).

146. *Westfall*, 808 S.W.2d at 832. For a summary of Westfall's statements, see *supra* note 6.

147. *Id.* at 832-33. The court relied on *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705-06 (1990), where the Supreme Court refused to recognize an "artificial dichotomy" between opinion and fact. The Supreme Court found that even statements phrased in terms of an opinion could imply objective facts and constitute an action for defamation. *Id.* at 2706.

148. *Westfall*, 808 S.W.2d at 833.

149. *Id.* at 832-33.

After rejecting Westfall's interpretations of the television interview, the court conducted a First Amendment analysis.¹⁵⁰ The court first noted that no rigid rules govern the standards to be used when balancing state interests in the administration of justice with a lawyer's First Amendment rights.¹⁵¹ It is clear that attorneys receive the full protection of the First and Fourteenth Amendments when they are parties to civil or criminal cases,¹⁵² but their constitutional protection in a disciplinary proceeding has no clear standard.¹⁵³

The opinion outlined three different approaches to determining an attorney's constitutional rights in a disciplinary proceeding.¹⁵⁴ Some courts completely reject First Amendment claims in disciplinary proceedings.¹⁵⁵ Another group of opinions holds that attorneys waive their right to criticize the judiciary upon their voluntary entrance to the bar.¹⁵⁶ Other cases give an attorney the full protection of the First Amendment in a disciplinary action.¹⁵⁷ Finally, the Missouri Supreme Court noted that the United States Supreme Court has not specifically addressed this issue, but it found only peripheral guidance in some cases.¹⁵⁸

The United States Supreme Court cases "make [it] clear that speech concerning public officials, including judges, may be protected speech,"¹⁵⁹ but the Missouri Supreme Court tempered this comment by stating that "[e]ven protected speech may be regulated."¹⁶⁰ The regulation may only be imposed to further an important governmental interest, and this determination requires a balancing test.¹⁶¹ The Missouri Supreme Court in *Westfall* found a substantial state interest in maintaining public confidence in the administration of justice, including public confidence in the appellate process.¹⁶² This

150. *Id.* at 833.

151. *Id.*

152. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

153. *Westfall*, 808 S.W.2d at 833.

154. *Id.* at 833-34.

155. *Id.*; see, e.g., *In re Raggio*, 487 P.2d 499, 500 (Nev. 1971).

156. *Westfall*, 808 S.W.2d at 834.

157. *Id.*; e.g., *In re Hinds*, 449 A.2d 483, 489 (N.J. 1982).

158. *Westfall*, 808 S.W.2d at 834. The court outlined the history of the First Amendment's role in disciplinary proceedings. See *id.* at 834-36. For a discussion of this history, see *supra* notes 21-145 and accompanying text.

159. *Westfall*, 808 S.W.2d at 835.

160. *Id.*

161. *Id.* at 835-36.

162. *Id.* at 836; see *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (the judiciary and the public depend upon a state to enforce high standards of professional conduct).

interest must be balanced against an attorney's right to free expression, as contrasted with a layperson's right to free speech.¹⁶³ The court stated that attorneys must adhere to rules of professional responsibility to ensure the confidence of litigants and the public.¹⁶⁴ If an attorney questions the integrity or qualifications of a judge, knowing the statements are false, or with reckless disregard as to their truth or falsity, the administration of justice may suffer.¹⁶⁵

The *Westfall* court also noted that the government interest in administration of justice through a fair and impartial judiciary may be furthered by criticism of the judicial process.¹⁶⁶ Criticism unsupported by facts, however, does not further this state interest.¹⁶⁷

In construing Rule 8.2(a), the court found that the standard used in a defamation proceeding was not necessary in a disciplinary action, and defined the meaning of "reckless disregard" in the disciplinary context.¹⁶⁸ According to the court, a subjective standard of "reckless disregard" did not properly redress a public wrong such as interference with the administration of justice.¹⁶⁹ The court used the reasoning in *In re Disciplinary Action Against Graham*,¹⁷⁰ which differentiated a defamation action, a personal wrong with a personal redress, from professional discipline, correction of a public wrong.¹⁷¹ The purpose of professional discipline is not to punish the offender but to protect the public.¹⁷² The state interest in the administration of justice is compelling and therefore, an analysis of an attorney's statements using an objective standard would survive a constitutional challenge.¹⁷³

The court, applying this standard, held that *Westfall* violated Rule 8.2(a) of Missouri's Rules of Professional Conduct.¹⁷⁴ The court characterized *Westfall's* statements as implying a "deliberate, dishonest, conscious design

163. *Westfall*, 808 S.W.2d at 836; see also *In re Frerichs*, 238 N.W.2d 764, 769 (Iowa 1976) ("A lawyer acting in a professional capacity, may have some fewer rights of free speech than would a private citizen."). But cf. *In re Hinds*, 449 A.2d 483, 489 (N.J. 1982) (attorneys are entitled to the First Amendment protection every citizen enjoys even when they participate in the administration of justice).

164. *Westfall*, 808 S.W.2d at 836.

165. *Id.*

166. *Id.*

167. *Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 969 (Okla. 1988).

168. *Westfall*, 808 S.W.2d at 836-37.

169. *Id.* at 837.

170. 453 N.W.2d 313 (Minn. 1990).

171. *Westfall*, 808 S.W.2d at 837 (citing *Graham*, 453 N.W.2d at 322).

172. *Id.* at 836.

173. *Id.* at 837.

174. *Id.* at 838.

on the part of the judge to serve his own interests."¹⁷⁵ The court noted that Westfall made the statements about the opinion and Judge Karohl without first investigating if Judge Karohl had (1) written previous opinions about the armed criminal action statute, (2) participated in any cases involving it, or (3) expressed any personal opinions about it.¹⁷⁶ This lack of investigation demonstrated Westfall's reckless disregard for the truth or falsity of his statement that the judge "made up his mind before he wrote the decision."¹⁷⁷

The court reasoned that Westfall's statements were false and without basis because Judge Karohl's opinion followed precedent.¹⁷⁸ The court observed that Westfall did not accuse the judge of criminal acts or engage in other forms of blatant misconduct.¹⁷⁹ The court noted, however, some aggravating circumstances, such as Westfall's failure to make a public apology and the timing of the statements while an appeal was still pending.¹⁸⁰ After balancing these factors and noting that this case addressed a matter of first impression, the court found that a public reprimand was appropriate.¹⁸¹ Judge Seiler, although agreeing with the result, stated that it was not "necessary or desirable" to determine what constitutional standard should be applied to an attorney in a disciplinary action.¹⁸² He found that Westfall's conduct was a violation of Rule 8.2(a) under any test.¹⁸³

V. THE DISSENTING OPINION

Chief Judge Blackmar¹⁸⁴ characterized Westfall's statements as the epitome of political expression.¹⁸⁵ Judge Blackmar took Brennan's approach

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* The court noted that the court of appeals opinion relied on *Missouri v. Hunter*, 459 U.S. 359 (1983). In that case the Supreme Court held that cumulative sentences imposed in a *single* trial for robbery and armed criminal action did not constitute double jeopardy because the intent of the Missouri legislature to authorize cumulative punishments under two statutes was clear. *Id.* at 368-69. Bulloch applied for the writ of prohibition when he was prosecuted in a *second* proceeding, however, and the Missouri courts held that a second trial for armed criminal action would constitute double jeopardy. *See Westfall*, 808 S.W.2d at 839; *see also Hunter*, 459 U.S. at 369 (Marshall, J., dissenting).

179. *Westfall*, 808 S.W.2d at 838.

180. *Id.* at 838-39.

181. *Id.*

182. *Id.* at 839 (Seiler, J., concurring).

183. *Id.*

184. The current Chief Judge of the Missouri Supreme Court is Judge Robertson.

185. *Id.* at 839-40 (Blackmar, C.J., dissenting).

in *In re Sawyer*¹⁸⁶ and analyzed the actual effect of Westfall's comments, rather than their potential for harm.¹⁸⁷

Judge Blackmar stated that Westfall was sharing his view of a course of decisions regarding a particular area of criminal law, which should not require detailed legal research beforehand.¹⁸⁸ Judge Blackmar thus disagreed with the majority's interpretation of Westfall's statements, finding that he did not impugn the integrity of Judge Karohl.¹⁸⁹ Nor did he find that the statements were easily described as implying objective facts.¹⁹⁰

Rule 8.2(a) requires that a statement be made with a purpose to cause harm through defamation.¹⁹¹ Judge Blackmar interpreted Westfall's statements as a criticism of the court of appeals opinion, without any intent to injure the judge's reputation.¹⁹² He found that the statements, while "intemperate" and "disrespectful,"¹⁹³ were merely negligent, not reckless.¹⁹⁴

186. 360 U.S. 622, 636 (1959) (Remarks made after the course of the trial would not tend to "obstruct the administration of justice."); *see also* Molley, *supra* note 144, at 493.

187. *Westfall*, 808 S.W.2d at 840 (Blackmar, C.J., dissenting). Judge Blackmar stated that the record did not support a finding that Westfall was trying to put public pressure on Judge Karohl or other members of the court of appeals to grant a rehearing. *Id.* He noted that "[m]otions for rehearing are usually formalities, often sought but seldom successful." *Id.*; *see also* Bridges v. California, 314 U.S. 252, 254 (1941) (a layperson who criticizes a case while a rehearing is pending may by experience know that a right to ask for a rehearing is illusory).

188. *Westfall*, 808 S.W.2d at 840 (Blackmar, C.J., dissenting). The course of decisions Judge Blackmar refers to are discussed in *Missouri v. Hunter*, 459 U.S. 359, 365-68 (1983). The Supreme Court outlined Missouri's interpretation of the armed criminal action statute and held that its use for cumulative punishments was constitutionally permissible. *Id.* at 368-69.

189. *Westfall*, 808 S.W.2d at 841 (Blackmar, C.J., dissenting). Westfall testified at the hearing before the advisory committee that he apologized personally to Judge Karohl and told him that he only meant to criticize the written opinion. *Id.* at 840. Judge Karohl testified that he thought Westfall's statements were a criticism of the opinion. *Id.* at 841-42.

190. *Id.* at 842-43. He noted that Missouri has always recognized a difference between defamatory statements of fact and those of opinion that have no basis in objective fact. *Id.* at 842. Judge Blackmar emphasized that the United States Supreme Court does not require abandonment of the fact/opinion distinction. *Id.* at 843 (citing *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990)).

191. *Id.*

192. *Id.* Judge Blackmar reasoned that many analyses of court opinions refer to the author rather than the opinion. *Id.* at 842. He also characterized Westfall's statement that Judge Karohl "made up his mind before he wrote the decision" as a "realistic analysis of the decisional process." *Id.*

193. *Id.* at 844.

The dissent distinguished Westfall's statements from those contained in the cases the majority opinion cited, where attorneys charged judges with fraud or other illegal conduct.¹⁹⁵

Judge Blackmar also rejected the court's First Amendment analysis.¹⁹⁶ He found that the principal opinion "adduce[d] scanty and obsolescent authority for the proposition that the First Amendment does not apply to, or has limited application to, lawyer discipline cases."¹⁹⁷ He found that the Advisory Committee failed to enunciate a compelling state interest¹⁹⁸ or prove that Westfall knowingly or recklessly made false statements.¹⁹⁹

According to the dissent, an attorney should be able to benefit from the *New York Times* standard²⁰⁰ if he or she has criticized a judge.²⁰¹ Judge Blackmar found the majority's reliance on *In re Disciplinary Action Against Graham*²⁰² misguided, because the *Graham* court was faced with an attorney who had charged a judge with illegal conduct, based solely on his subjective belief in the truth of the charges.²⁰³

194. *Id.* at 843. Judge Blackmar noted that the court, as the fact finder, should not disregard Westfall's testimony as to the intent he had when making the statements. *Id.*

195. *Id.* at 834.

196. *Id.* at 845.

197. *Id.* To support this contention, Judge Blackmar noted a trilogy of Supreme Court cases that refused to uphold contempt sanctions given for criticism of a judge's conduct during a pending case. *Id.*; see *Craig v. Harney*, 331 U.S. 367, 378 (1947) (range of permissible comment does not depend on whether the litigation is civil or criminal); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (freedom of discussion should be given greater weight than the possibility of influencing a pending trial); *Bridges v. California*, 314 U.S. 252, 261-63 (1941) (forbids punishment by contempt unless the statements create a clear and present danger).

198. *Westfall*, 808 S.W.2d at 846 (Blackmar, C.J., dissenting).

199. *Id.* Judge Blackmar argued that the interpretation of "recklessness" was "casually attributed" to Westfall's statements, since it was "apparently found in his failure to think things through or to study the case law." *Id.*

200. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). The standard set forth requires a public official to prove "actual malice" to recover damages for defamatory falsehoods. *Id.* at 279. Actual malice means that a person made statements with knowledge of their falsity or with reckless disregard as to their truth or falsity. *Id.* at 279-80.

201. *Westfall*, 808 S.W.2d at 846. Judge Blackmar stated that the *New York Times* principle and its progeny represent good policy that should apply to attorney disciplinary actions. *Id.* at 847.

202. 453 N.W.2d 313 (Minn.), cert. denied sub nom. *Graham v. Wernz*, 111 S. Ct. 67 (1990).

203. *Westfall*, 808 S.W.2d at 845 (Blackmar, C.J., dissenting).

Notwithstanding the reasoning of the majority opinion, Judge Blackmar found an additional reason to refrain from issuing a public reprimand.²⁰⁴ He stated that the Advisory Committee chose to file charges of misconduct as a type of "punishment" after Westfall refused a written admonition.²⁰⁵ He found that the Committee's conduct had a "strong potential for chilling freedom of expression."²⁰⁶

VI. COMMENT

In the absence of a constitutional mandate from the United States Supreme Court, state courts have imposed divergent standards in actions to discipline attorneys who have criticized courts or judges. Although it may be the duty of an attorney to expose the weaknesses of the judicial system,²⁰⁷ this apparent duty is hindered by the threat of disciplinary action for inaccurate statements.

A disciplinary proceeding is not a civil or criminal trial.²⁰⁸ Its purpose is not to punish an attorney, but to determine one's fitness to practice law and protect the courts and public from unfit practitioners.²⁰⁹ Courts recognize, however, that an attorney's constitutional rights must be considered in a disciplinary action.²¹⁰ Therefore, courts will not permit the complete restriction of a constitutional right as a means to prohibit professional misconduct.²¹¹

The Supreme Court recognizes that states have an interest in regulating areas of legal practice that involve free speech, such as advertising, solicitation, and trial publicity.²¹² These cases, however, narrowly construe disciplinary rules to achieve substantial state interests when the speech is a

204. *Id.* at 847.

205. *Id.* at 847-48.

206. *Id.* at 848. Judge Blackmar analogized the Committee's actions to those of prosecutorial misconduct in criminal cases. *Id.* The dissent feared that attorneys would accept admonitions rather than defend themselves against potentially more serious charges. *Id.*

207. *See, e.g.,* Shipley, *supra* note 116, at 1411; *see also* MODEL RULES OF PROFESSIONAL CONDUCT (Preamble 1989).

208. *In re Moore*, 453 N.E.2d 971, 973 (Ind. 1983).

209. *Id.*

210. *In re Ruffalo*, 390 U.S. 544, 550 (1968) (attorney must receive procedural due process which includes fair notice of the charge).

211. *NAACP v. Button*, 371 U.S. 415, 439 (1963).

212. *See, e.g.,* *Gentile v. State Bar of Nev.*, 111 S. Ct. 2720 (1991) (trial publicity); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (solicitation); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (advertising).

form of political expression.²¹³ For example, states may prohibit in-person solicitation for pecuniary gain, but precise regulations are required to prohibit solicitation that involves political expression or freedom of association.²¹⁴ The Supreme Court states that "broad prophylactic rules in the area of free expression are suspect," and that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."²¹⁵ In addition, the Court holds that purely commercial speech, although entitled to less protection, cannot be completely forbidden to an attorney.²¹⁶

The history of these cases shows that ethical considerations must be balanced with the constitutional rights of the individual, even though the purpose of professional discipline is to protect the public. The cases also demonstrate that the public's right to know about legal processes is an important factor in this balancing process.²¹⁷ Criticism of the judiciary will often involve political expression. The criticism may foster debate, improve our judicial system, and lead to a more informed public. Such speech should be protected by a narrow interpretation of disciplinary rules that serve to protect the administration of justice.

The preamble to the ABA *Model Rules of Professional Conduct* invites attorneys to improve the law and "be mindful of the deficiencies in the administration of justice."²¹⁸ The preamble notes that an independent legal profession is an important asset, because abuse of legal authority is more easily challenged when lawyers are not dependent on government for the right to practice.²¹⁹ When courts broadly interpret the rules of professional conduct, however, an attorney may choose not to challenge an apparent abuse of legal authority. The threat of loss of reputation or the right to practice may silence the attorney who seeks to reform the law through public commentary. The threat is made even more real when an attorney considers that a single act may serve as a basis for discipline.²²⁰

213. See, e.g., *In re Primus*, 436 U.S. 412, 438 (1978).

214. *Id.* at 432.

215. *Id.* (citing *Button*, 371 U.S. at 438).

216. *Bates*, 433 U.S. at 379.

217. See, e.g., *Gentile v. State Bar of Nev.*, 111 S. Ct. 2720, 2742 (1991) (people wish to be informed about the criminal justice system and may want to make changes within it); *Primus*, 436 U.S. at 431 (ACLU engages in litigation as a means of communicating useful information to the public); *Bates*, 433 U.S. at 364 (advertising may carry important information).

218. MODEL RULES OF PROFESSIONAL CONDUCT (Preamble 1989).

219. *Id.*

220. ARONSON ET AL., *supra* note 31, at 234-35.

An attorney cannot make frivolous accusations and subsequently find shelter under a First Amendment claim.²²¹ Judicial decisions have made it clear that disciplinary actions are proper to maintain respect for the courts²²² and to prevent adverse effects on the administration of justice.²²³ When courts try to protect the administration of justice through disciplinary measures, however, they frequently focus on the potential for harm to the judicial system and fail to look to another important goal: public debate should be "uninhibited, robust, and wide-open, and [it] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."²²⁴ When political expression is at issue, an attorney should not be disciplined unless the state can show that the administration of justice actually suffered because of the statements made.²²⁵ In addition, an attorney who criticizes a court or judge should benefit from the subjective *New York Times* standard; discipline should not be based on an objective standard that restricts speech according to what a "reasonable attorney" would say.

Clearly attorneys have a responsibility to maintain respect for the courts and should not casually criticize judicial opinions or judges. Attorneys should base their conduct on professional pride and fidelity to the court and client.²²⁶ An attorney has taken an oath that a member of the press or an ordinary citizen has not. *New York Times*, however, did not hold that the press alone may benefit from the standard set forth in the case. The decision protects everyone who chooses to criticize a public official.²²⁷ The responsibility to maintain respect for the courts may be enforced by holding an attorney to the standards of every citizen: a statement cannot be made when its falsity is known, or when serious doubts are actually entertained as to its truth or falsity.²²⁸ An objective standard that compares an attorney's speech to what the "reasonable" attorney would say chills an individual's freedom of

221. See *In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J., concurring).

222. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 355 (1871); *In re Lacey*, 283 N.W.2d 250, 251-52 (S.D. 1979) (attorney who said state courts were "incompetent" and "crooked" not justified in taking criticisms directly to the press).

223. E.g., *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 322 (Minn. 1990).

224. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

225. *In re Primus*, 436 U.S. 412, 434 (1978).

226. *Oklahoma State Bar Ass'n v. Porter*, 766 P.2d 958, 970 (Okla. 1988).

227. *New York Times*, 376 U.S. at 272-273. This case specifically mentioned criticism of judges, noting that the concern for the reputation of the courts did not justify punishment for criminal contempt. *But cf.* *State v. Nelson*, 504 P.2d 211, 215 (Kan. 1972) (*New York Times* is inapplicable to a disciplinary proceeding).

228. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

expression. The First Amendment "license to comment is broader than the traditional correct demeanor expected of an officer of the court," and some remarks that may be in "bad form" may nevertheless be protected.²²⁹ The objective standard allows courts to interpret the rule too broadly and infringe on constitutional rights.

The press is subject to a civil action for damages when it violates the subjective standard; likewise, an attorney faces disciplinary proceedings and possible disbarment. The goal of protecting the administration of justice may be furthered by encouraging debate that is limited by the *New York Times* standard.

This standard finds support in the rules promulgated by the American Bar Association. The ABA chose to use the words of the *New York Times* case in the *Model Rules of Professional Conduct*.²³⁰ The ABA has also stated that "it would be an unusual case [involving criticism of a judge] which would be held sanctionable, since as long as a statement is made in a way which accords with the First Amendment, it would be permissible."²³¹ The legal background of Model Rule 8.2 reveals that the drafters intended that a subjective standard would apply to the constitutional analysis.²³² The drafters stated that the critical factors in the analysis were the statement's falsity and the individual's knowledge of the falsity at the time the statement was made.²³³ The drafters added that the rule does not adhere to the previous standard, which stated that a lawyer "who criticizes judicial officials should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms . . ."²³⁴ They noted that the rule was consistent with the *New York Times* limitation.²³⁵

229. *Porter*, 766 P.2d at 970.

230. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1983). The rule states that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. . . ." *Id.*

231. A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT § 5.11 (1984).

232. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 (Proposed Final Draft 1981).

233. *Id.*

234. *Id.*

235. *Id.*

Although recent cases have rejected this level of protection,²³⁶ others have recognized the importance of requiring this standard for attorneys.²³⁷ The Supreme Court's recent observations in *Gentile* may indicate that the majority would find that the objective standard applied in *Westfall* passes constitutional muster.²³⁸ Only Justices Kennedy, Marshall, Blackmun and Stevens joined in the part of the opinion that stated, "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law."²³⁹ The majority stated that attorneys, as officers of the courts, may expect more strict regulations in many areas that involve First Amendment issues.²⁴⁰ Therefore, the Court may well find that an attorney who has criticized the judiciary cannot benefit from the subjective *New York Times* standard that the media and other citizens enjoy.

But *Gentile* can be distinguished from *Westfall* because *Gentile* involved two competing individual rights: an attorney's right to free speech and a defendant's right to a fair trial.²⁴¹ *Westfall* examines an attorney's right to free speech balanced with the state's interest in the administration of justice.²⁴² *Westfall* was disciplined because his statements might affect state interests, not because he injured the reputation of Judge Karohl. If the purpose of discipline is to protect state interests, the attorney should benefit from a narrow interpretation of a rule that restricts speech.

Westfall's comments reflect speech in the political forum.²⁴³ Disciplinary Rule 8.2(a) should be construed narrowly, under a subjective standard, to determine if *Westfall* made these statements knowing their falsity or with reckless disregard as to their truth or falsity. As Judge Seiler reasoned, *Westfall's* conduct may have been a cause for discipline even if a more stringent test were applied.²⁴⁴ But the result of the case may be that all attorneys will refrain from making legitimate criticism, fearing that any factual

236. See *Louisiana State Bar Ass'n v. Karst*, 428 So. 2d 406 (La. 1983); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 322 (Minn. 1990); *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1991).

237. *Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 967 (Okla. 1988) (attorney called judge a racist); *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989).

238. *Gentile v. State Bar of Nev.*, 111 S. Ct. 2720, 2744 (1991).

239. *Id.* at 2734.

240. *Id.* at 2744.

241. *Id.* at 2742-43.

242. *Westfall*, 808 S.W.2d at 837.

243. *Id.* at 840 (Blackmar, C.J., dissenting).

244. *Id.* at 838 (Seiler, J., concurring).

errors they mistakenly impart will be a cause for disciplinary action. Attorneys will be unsure of what the "reasonable" attorney would say under the circumstances and refrain from speaking entirely. The unfortunate consequence will be repression of speech of those who may be uniquely qualified to enhance public debate regarding judicial officers and the courts.

VII. CONCLUSION

The statements Westfall made were negligent and disrespectful. It may be hard to look at what Westfall actually said and understand why the statements deserve any protection. Therefore, the most troubling aspect of the case is not necessarily its result, but the standard used to reach that result. The case tips the scales heavily in favor of state interests without adequate consideration for constitutional rights. In the future, attorneys may be very hesitant to criticize courts or judges. Respect for judges and courts is important, but when legitimate criticism is in order, it should not be hindered by overly restrictive professional rules of conduct.

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