

LAWYERS' CRITICISM OF JUDGES: IS FREEDOM OF SPEECH A FIGURE OF SPEECH?

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Every lawyer sometimes feels anger, frustration, and despair with our courts. Undoubtedly, some of this indignation is unjustified. Lawyers are mandated by the code of ethics to zealously advance their clients' interests and, try as they may, it is difficult to remain detached from their clients' causes. When the heat of battle dissipates, lawyers often find that their disappointment is not the fault of the judicial system.

However, sometimes the disquietude remains, leaving a lawyer with serious questions about the judge or the law involved. Sometimes a lawyer expresses these strongly held views publicly, or privately brings them to the judge's attention. And sometimes a lawyer's criticism leads to needed reforms. But surprisingly often, the result instead has been disciplinary proceedings against the lawyer, chilling the speech of many lawyers who are understandably concerned about incurring the wrath of someone who has tremendous power over their professional careers and livelihood.

In a striking example, the Eighth Circuit recently suspended a lawyer from practice in the federal courts of that circuit for a letter that the court found disrespectful. The case, *In re Snyder*,¹ has caused considerable controversy and concern about the power of courts to discipline attorneys for critical remarks. Although the Eighth Circuit's decision is one of the most egregious, because of the relatively mild language at issue and the extraordinary punishment, it is by no means an isolated incident. Many other courts have imposed disciplinary sanctions for lawyers' statements about judges.

The circumstances and sanctions have varied widely. For example, an attorney was disbarred by the Tenth Circuit for unsupported bribery accusations. Based on a similar allegation against

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1. 734 F.2d 334 (8th Cir. 1984).

a judge in connection with a specific case, a Louisiana attorney was suspended from practice for one year, with readmission predicated upon proof of rehabilitation.² A Wyoming attorney was suspended for six months for complaining about the "horrible breakdown of justice in the Supreme Court of Wyoming." On the other hand, a South Dakota lawyer was merely censured for his statement in a newspaper that the state courts were "incompetent and sometimes downright crooked." Similarly, a Kentucky attorney's attribution of "highly unethical and grossly unfair" conduct to a trial judge resulted only in a public reprimand and a direction to pay the costs of the proceeding against him.³ An attorney was disbarred from the Second Circuit for filing a complaint in the district court charging a number of people, including several Connecticut Supreme Court justices, with conspiracy to conceal a murder. But similar false accusations in California were punished by a one-year suspension, with all but the first thirty days stayed and probation imposed instead.⁴

Some of these sanctions may seem appropriate. But what is disturbing is the lack of legal analysis in the cases, and the absence of any clear standards to guide lawyers and courts. These cases point up the need for careful analysis of the competing concerns and the formulation of appropriate standards that, with a few notable exceptions, have been sadly lacking in this area. *Snyder* is somewhat atypical in its severity, but not in its paucity of legal analysis. Thus it provides a good model for analyzing this recurring deficiency in disciplinary cases based on criticism of the judiciary.

I

On October 6, 1983, after two previous attempts to collect his statutory fee under the Criminal Justice Act for representing a defendant in a federal district court case in North Dakota, attorney Robert Snyder sent a letter to the district court judge's secretary with additional documentation relating to the fee. Snyder said that he was responding to a letter from the Eighth Circuit re-

2. Compare *In re Grimes*, 364 F.2d 654, 655-56 (10th Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967), with *Louisiana State Bar Ass'n v. Karst*, 428 So.2d 406, 408, 412 (1983).

3. Compare *State Board of Law Examiners v. Spriggs*, 155 P.2d 285, 289 (Wyo.), *cert. denied*, 325 U.S. 886 (1945), with *In re Lacey*, 283 N.W.2d 250, 251 (S.D. 1979); and *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 168-69 (1980), *cert. denied*, 449 U.S. 1101 (1981).

4. Compare *In re Whiteside*, 386 F.2d 805, 806 (2d Cir. 1967), *cert. denied*, 391 U.S. 920 (1968), with *Ramirez v. State Bar of California*, 169 Cal. Rptr. 206, 213, 619 P.2d 399, 400, 406 (1980).

turning his latest attempt to justify his time and expenses relating to the case. He wrote that he was "appalled" by the amount of money the federal court pays for indigent criminal defense work, asserting that it was necessary to go through "extreme gymnastics" to receive even the "puny amounts" authorized. He further stated that he had sent everything he had concerning the representation, adding, "You can take it or leave it." He remarked that he was "extremely disgusted" by the Eighth Circuit's treatment of him and requested that his name be removed from the list of attorneys who would accept criminal indigent defense work, concluding, "I have simply had it."⁵ An affidavit from District Judge Bruce Van Sickle indicates that he was aware of the letter to his secretary and hoped Snyder's comments would serve as a basis for some change in the fee schedule and paperwork process.⁶

This one-page letter drew a two-page response from Judge Donald Lay, chief judge of the Eighth Circuit. In a letter to the district judge, Judge Lay characterized Snyder's letter as "totally disrespectful to the federal courts and to the judicial system." The judge said he would honor Snyder's request that his name be removed from the list of attorneys in criminal indigent cases, but he added:

[I]n view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing . . . for a period of one year . . . in federal court in North Dakota.⁷

Judge Lay asked the district court to confer with Snyder to determine whether he would retract his "disrespectful" remarks to the court. Snyder refused. On December 22, 1983, the Eighth Circuit issued a rule to show cause why Snyder should not be suspended from the practice of law in the federal courts:

5. The letter of October 6 is attached as Addendum No. 1 to the May 31, 1984 order denying Snyder's petition for an *en banc* rehearing.

6. Judge Van Sickle explained in an interview with the *National Law Journal* that his secretary showed him the letter. After conferring with Snyder, Judge Van Sickle decided to send it along to Judge Lay, hoping it would go to the Administrative Office of the Courts in Washington. The district court judge viewed it as a letter of protest over low pay rates and administrative burdens. In direct contradiction of the Eighth Circuit's bald assertion that Snyder's "disrespectful" letter "speaks for itself" (734 F.2d at 343), Judge Van Sickle told the *National Law Journal*, "I did not view it as a letter of disrespect. . . . It never occurred to me that it would be seen as it was seen." *Nat'l L.J.*, July 9, 1984, at 47, col. 1.

7. 734 F.2d at 345. Judge Lay's letter, dated November 3, 1983, is attached as Addendum No. 2 to the denial of Snyder's petition for rehearing *en banc*. This and the remaining statements of fact and quotations are taken from the court's opinion, 734 F.2d at 335-37, 344.

(1) for his refusal to continue to perform services in indigent cases under the Criminal Justice Act . . . ; and (2) for his disrespectful refusal to comply with the guidelines under the CJA relating to the submission of expenses and attorney fees.

Snyder requested a hearing by the full court, which was denied, and the matter was referred to a panel headed by Judge Lay.

During oral argument in the Eighth Circuit, Snyder was asked "to purge himself" by agreeing to accept appointments under the Criminal Justice Act and comply with the act's guidelines, and "to demonstrate in writing that he would be respectful in his relations with the federal courts and to offer a retraction and sincere apology for his letter of October 6." As to the demand that Snyder "purge himself" by agreeing to accept cases under the CJA, the court admitted that because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compliance with the plan. On the issue of compliance with the CJA guidelines, the court imposed the obvious sanction for failure to document excess fees under the CJA: it denied the request for those fees.⁸

The court's request for an apology was not mentioned in the rule to show cause, but was added during oral argument, raising a serious due process question.⁹ Snyder's refusal to apologize was clearly the ground on which the court ultimately suspended him:

Snyder now conditionally has offered to serve in indigent cases and to comply with the CJA guidelines. However, in a letter to the court he has otherwise refused to retract or apologize for his disrespectful remarks to the court. . . . His refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly 'harsh' statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts.

In the panel opinion, the court offered little legal analysis in justification of its extreme response to Snyder's relatively harmless—and private—letter.¹⁰ The panel cited a disciplinary rule of

8. *Id.* at 336 n.3. Snyder had requested fees and expenses of \$1,898.55. Under the Criminal Justice Act, the chief judge of the Circuit Court of Appeals must review and approve any compensation in excess of the \$1,000 limit set forth in the act. 18 U.S.C. § 3006A(d)(3) (1982). See *Snyder*, 734 F.2d at 335.

9. *Id.* at 336. See *In re Ruffalo*, 390 U.S. 544, 551-52 (1968). This due process question and a first amendment issue are the two questions raised in Snyder's certiorari petition. *In re Snyder*, petition for cert. filed 53 U.S.L.W. 3169 (U.S. Aug. 20, 1984) (No. 84-310). On August 7, 1984, Justice Blackmun granted a stay of the Eighth Circuit's order pending action on a certiorari petition (unpublished).

10. See 734 F.2d at 344. Much of the panel's opinion relates to Snyder's suggestions for changing the method of selecting attorneys to represent indigent defendants in criminal cases. Despite its affront at his "harsh" language, the court considered the merits of the basic issue Snyder raised and found he was right on at least part of the substance of his claim. *Id.* at 339.

the ABA Model Code of Professional Responsibility prohibiting "conduct that is prejudicial to the administration of justice."¹¹ It relied on Federal Rule of Appellate Procedure 46(c) as its authority for imposing discipline on an attorney who "has been guilty of conduct unbecoming a member of the bar of the court."¹² Explaining that a display of disrespect to a judge "is an insult to the majesty of the law itself," the panel found "without hesitation" that Snyder's "refusal to show continuing respect" for the court and to demonstrate "a sincere retraction" of his "admittedly 'harsh' statements" was sufficient to demonstrate his unfitness to practice law in the federal courts. The court ruled that Snyder should be suspended from practice in the federal courts of the Eighth Circuit for six months, and that thereafter he could apply to the Eighth Circuit and the district courts for readmission.¹³ The panel did not mention the first amendment.

On May 21, 1984, the Eighth Circuit issued an order denying rehearing *en banc*, authored this time by Judge Heaney. The court gave Snyder one more opportunity to repent, but directed the clerk to reinstate the original six-month suspension if Snyder

11. *Id.* at 336-37 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1981) [hereinafter cited as "ABA MODEL CODE"]). The court also cited an Ethical Consideration of the Code that provides that a lawyer:

[O]wes 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

734 F.2d at 337 (citing ABA MODEL CODE EC 9-6).

12. This rule provides:

- (c) **Disciplinary Power of the Court over Attorneys.** A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the Court.

FED. R. APP. P. 46(c). The subsection of Rule 46 cited by the court applies to sanctions less serious than suspension or disbarment. However, subsection (b) of Rule 46 empowers the court to suspend or disbar an attorney based on the same standard. *See* FED. R. APP. P. 46 advisory committee note; 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 246.02(2)-(3) (2d ed. 1983).

13. The court does not indicate its authority for suspending Snyder from the federal district courts as well as the court of appeals. Rule 46 does not provide for suspension beyond the court of appeals. Generally, sanctions imposed by other courts of appeals have applied only in those courts. *See, e.g.,* *Hanson ex rel. U.S. v. Woolfolk*, 572 F.2d 192, 193 (9th Cir. 1977); *In re Bithoney*, 486 F.2d 319, 325 (1st Cir. 1973); *In re Chandler*, 450 F.2d 813, 814-15 (9th Cir. 1971) (suspending the attorney from practicing law before "this court" and additionally ordering that a copy of its opinion be sent to the chief judge of each of the district courts in the Ninth Circuit and to the State Bar of California); *In re Grimes*, 364 F.2d 654, 656 (10th Cir. 1966).

failed to apologize.¹⁴

The court devoted two paragraphs to the first amendment issue, finding it simple: "It is one thing for a lawyer to complain factually to the Court, it is another for Counsel to be disrespectful in doing so." Citing Justice Stewart's concurring opinion in *In re Sawyer*,¹⁵ the court added that it is "well settled" that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech.¹⁶

Apart from the first amendment, the sanction imposed by the

14. Snyder did not apologize. Although Judge Lay has said he cannot understand a lawyer who would refuse to apologize to a federal court, ("If a federal court asked me to apologize, I'd crawl on my knees from New York to Boston to do it." Nat'l L.J., July 9, 1984, at 47, col. 2), a significant number of lawyers do not agree. Many prominent lawyers and attorney organizations have offered Snyder their support, and the language some of them have used risks a fate similar to that which befell Snyder: *See, e.g.*, remarks of North Dakota Governor Allen I. Olson ("He [Snyder] doesn't feel it requires an apology, and neither do I. It's rather a clear case of overreaction"); Burt Neuborne, National Legal Director of American Civil Liberties Union ("inexplicable"); Michael Pancer, National Association of Criminal Defense Lawyers ("petty") (all quoted in Nat'l L.J., July 9, 1984, at 47, col. 2). Both the American Civil Liberties Union and the National Association of Criminal Defense Lawyers unsuccessfully sought *amicus curiae* status before the Eighth Circuit in support of Snyder. Additionally, both the local county bar where Snyder practices and the State Bar Association in North Dakota passed resolutions supporting Snyder. *Id.*

15. 360 U.S. 622, 647 (1959) (Stewart, J., concurring). In a footnote, the court cited as its other authority a Kansas case in which the attorney argued that ABA MODEL CODE DR 1-102(A)(5) created a chilling effect on first amendment freedoms. 734 F.2d at 343 n.1 (citing *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972)). The court neglected to mention that both of the decisions it cited reversed findings of attorney misconduct in cases where the attorneys' language was considerably "harsher" than in the *Snyder* case. Compare *In re Snyder*, 734 F.2d at 344, with *In re Sawyer*, 360 U.S. at 628-30, 641-46, and *State v. Nelson*, 210 Kan. at 638, 504 P.2d at 213.

16. 734 F.2d at 343. It is questionable whether Snyder was an "officer of the court" in this context since he was not acting in a representative capacity. *Cf. Cammer v. United States*, 350 U.S. 399, 404-05 (1956); *Polk v. State Bar of Texas*, 374 F. Supp. 784, 788 (N.D. Tex. 1974). *But cf. In re Shimek*, 284 So. 2d 686, 689-90 (Fla. 1973).

The court also rejected two other arguments. First, Snyder argued that Judge Lay should have recused himself. 734 F.2d at 343. Before any finding of misconduct, Judge Lay prejudged the matter to the point of indicating what he thought was an appropriate penalty. *See* 734 F.2d at 345. Compare the procedure employed by the Eighth Circuit in acting both as accuser and trier of fact with *Office of Disciplinary Counsel v. Pileggi*, 570 F.2d 480, 481 (3d Cir. 1978), and *In re Chandler*, 450 F.2d 813, 814 (9th Cir. 1971), in which the Third and Ninth Circuits appointed independent special masters who conducted proceedings and made findings, which were then reviewed by the respective courts of appeals. *See also In re Grimes*, 364 F.2d 654, 655 (10th Cir. 1966), *cert. denied* 385 U.S. 1035 (1967).

Second, Snyder argued that he did not receive proper notice. 734 F.2d at 343. The court did not discuss the question whether the rule relied on by the court provided notice sufficient to meet constitutional requirements that Snyder's letter could subject him to discipline, or the failure of the rule to show cause to mention the ground on which Snyder was ultimately suspended. *See In re Ruffalo*, 390 U.S. 544, 550-52 (1968). Compare the procedures required in contempt proceedings, *FED. R. CRIM. P.* 42(a), (b); *Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

Eighth Circuit simply does not fit Snyder's "crime." Even courts that see no first amendment problem in disciplinary proceedings have imposed relatively light sanctions for a single instance of disrespect in cases where the language was considerably harsher.¹⁷ For example in *In re Raggio*,¹⁸ after quickly dismissing the district attorney's free speech defense, the court simply reprimanded him for calling a Nevada Supreme Court decision "most shocking and outrageous"; "an example of judicial legislation at its very worst"; "semantical gymnastics"; and "unexplainable, and in my opinion totally uncalled for." In *Kentucky Bar Association v. Heleringer*,¹⁹ an attorney was merely reprimanded for calling a judge "highly unethical and grossly unfair" at a press conference. And in *In re Friedland*,²⁰ the court suspended a lawyer for thirty days for stating in open court that the paternity hearing in which he was engaged was "an ordeal," "a travesty," and "the biggest farce I've ever seen." He also shook his fist at the referee hearing the case, stating, "Judge, you're the biggest fool I've ever seen."

Apart from the unusual harshness of the penalty imposed by the Eighth Circuit, one of the most disturbing aspects of the case is the paucity of legal analysis by the second highest federal court in the nation. The court's analysis—or lack thereof—of Snyder's constitutional defense is reviewed below, along with a discussion of the appropriate analysis under first amendment principles.

II

Historically, courts frequently used their powers of contempt to deal with lawyers and nonlawyers who criticized the courts or transgressed the bounds of a judge's sensibilities, at least where any matter was arguably "pending" in the court. Both federal and state legislation was passed to check abuses of this summary contempt power after the famous impeachment trial of James H.

17. Some courts have held such instances do not warrant discipline at all. For example, in *Justices of the Appellate Division, First Department v. Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426, 427 (1973), the court stated in a short *per curiam* opinion: "Without more, isolated instances of disrespect for the law, Judges and courts expressed by vulgar and insulting words or other incivility uttered, written or committed outside the precincts of a court are not subject to professional discipline . . ." The attorney had stated in a magazine article, *inter alia*, that there "are few trial judges who just judge . . . and leave guilt or innocence to the jury," adding that the appellate division judges "aren't any better. They're the whores who became madams." For a discussion of the case, see Note, *In re Erdmann: What Lawyers Can Say About Judges*, 38 ALBANY L. REV. 600 (1974).

18. 87 Nev. 369, 371, 487 P.2d 499, 500 (1971).

19. 602 S.W.2d 165, 166 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981).

20. 376 N.E.2d 1126, 1128 (Ind. 1978). In imposing the relatively mild penalty, the court noted that the attorney had not deliberately set out to cause such disruption but had "let his emotions overrule his professional judgment."

Peck, a judge of the United States District Court for the District of Missouri. Peck had disbarred and imprisoned Luke E. Lawless for his published criticism of one of the judge's opinions. Judge Peck was acquitted by a one-vote margin, but the next day Congress took steps to change the statute on which Judge Peck relied for his summary action against Lawless.²¹ Since that time, judges have continued to use their contempt powers to punish individuals for speech or conduct deemed disrespectful, but there are more safeguards against abuse of the power.²²

Although the contempt and attorney disciplinary powers of courts are separate, in some situations either could be invoked and the cases are sometimes cited interchangeably.²³ Since the turn of the century, professional disciplinary proceedings against lawyers for criticizing judges have been common. The sanctions have varied considerably, ranging from disbarment to admonition, and frequently courts have been moved to leniency by appropriate showings of remorse.²⁴ Often, particularly in older cases, the constitutional defense of freedom of expression was either not raised or rejected rather summarily.²⁵

21. See A. STANSBURY, REPORT OF THE TRIAL OF JAMES A. PECK (1833). The trial is referred to in *Bridges v. California*, 314 U.S. 252, 266-67, 287-88 (1941), and *Nye v. United States*, 313 U.S. 33, 45-46 (1941).

22. A federal court has the power to punish summarily, by fine or imprisonment, contempt of its authority demonstrated by "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U.S.C. § 401(1) (1982). The contempt may be punished summarily only if the judge certifies that he or she saw or heard the conduct and that it was committed in the court's presence. FED. R. CRIM. P. 42(a). Except for cases falling under the courts' summary disposition powers, if the contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing without the defendant's consent. FED. R. CRIM. P. 42(b). In federal court a person cited for certain types of contempt is entitled, upon demand, to a trial by jury. 18 U.S.C. § 3691 (1982). States generally have similar statutes conferring the power to punish for contempt in state courts. See, e.g., MINN. STAT. § 588.01-588.04, 588.09-588.10, 588.20 (1982) (amended 1983); N.D. R. CRIM. P. 42, N.D. Cent. Code § 12.1-10-01, 27-10-06 to 27-10-09 (1974) (amended 1975).

23. For example, in *Snyder*, the Eighth Circuit cited a contempt case as authority for its claim that a lawyer may be punished for disrespectful remarks to or concerning a court. See 734 F.2d at 337 n.6 (citing *Commonwealth of Pennsylvania v. Rubright*, 489 Pa. 356, 364-65, 414 A.2d 106, 110 (Pa. 1980)).

24. See cases collected in Annot., 12 A.L.R.3d 1408, 1410-42 (1967). See, e.g., *Florida Bar v. Shimek*, 284 So.2d 686, 690 (1973); *In re Frerichs*, 238 N.W.2d 764, 770 (Iowa 1976). For dispositions in cases noting a refusal to apologize, see, e.g., *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165, 166 (Ky. 1980), cert. denied, 449 U.S. 1101 (1981); *State ex rel. Nebraska State Bar Ass'n v. Michaelis*, 316 N.W.2d 46, 55, cert. denied and appeal dismissed, 459 U.S. 804 (1982).

25. See, e.g., *Attorney General v. Nelson*, 263 Mich. 686, 249 N.W.439 (1933); *In re Greenfield*, 24 A.D.2d 651, 262 N.Y.S.2d 349 (1965); *In re Carrao*, 170 A.D. 545, 156 N.Y.S. 379 (N.Y. App. Div. 1915); *State Bar Comm'n ex rel. Williams v. Sullivan*, 35 Okla. 745, 752-53, 131 P. 703, 707 (1912); *State Board of Law Examiners v. Spriggs*, 155 P.2d 285, 290-91 (Wyo. 1945).

In the last twenty years or so, more courts have addressed the constitutional question. Although the courts are still badly fractioned on this issue, the Constitution is emerging as a real contender, the Eighth Circuit opinion in *Snyder* notwithstanding.²⁶

Discussion of matters of public concern, including the administration of the courts, is entitled to the highest protection under the first amendment, and the Supreme Court has made it clear that discussion of public affairs should be "uninhibited, robust, and wide-open." Such speech loses protection only when it is knowingly false or made in reckless disregard of whether it is true or false.²⁷

It is firmly established that a significant impairment of first amendment rights must survive exacting scrutiny:

This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . . Thus encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' . . . The interest advanced must be paramount, one of vital importance and the burden is on the government to show the existence of such an interest.²⁸

Generally, to survive first amendment scrutiny, a restriction on speech must not only serve a compelling state interest, but also the expression must pose an imminent danger of bringing about the substantive evil that the restriction is designed to prevent.²⁹ Additionally, unless drawn precisely and narrowly, a restriction on free speech will be held void for vagueness or unconstitutionally overbroad.

Few courts have engaged in serious first amendment analysis of disciplinary proceedings against lawyers for criticism of the courts. A disturbing number of courts have in essence stated that the first amendment does not apply in attorney disciplinary

26. For disciplinary cases recognizing a basic right of attorneys to freedom of expression (subject, where applicable, to limitation when it poses a danger to fair trial rights) see, e.g., *Polk v. State Bar of Texas*, 374 F. Supp. 784 (N.D. Tex. 1974); *In re Hinds* 90 N.J. 604, 449 A.2d 483 (1982); *Justices of the Appellate Division, First Department v. Erdmann*, 33 N.Y.2d 559, 347 N.Y.S.2d 441, 301 N.E.2d 426, (1973); *State Bar of Texas v. Semaan*, 508 S.W.2d 429 (Tex. App. 1974) *cert. denied*, 325 U.S. 886 (1975). *But see, e.g., Ramirez v. State Bar of California*, 28 Cal. 3d 402, 169 Cal. Rptr. 206, 619 P.2d 399 (1980); *In re Shimek*, 284 So. 2d 686 (Fla. 1973); *In re Frerichs*, 238 N.W.2d 764 (Iowa 1976); *In re Raggio*, 487 P.2d 499 (Nev. 1971); *In re Lacey*, 283 N.W.2d 250 (S.D. 1979).

27. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

28. *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64-65, 94 (1976), and *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)).

29. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). In *Bridges v. California*, 314 U.S. 252, 261-62 (1941), the Court held that before speech may be restricted the state must show a "clear and present danger" to a substantial state interest.

cases.³⁰ But courts should not lightly infer that lawyers have waived basic constitutional rights by joining the bar. The first amendment contains no exception for speech by lawyers nor for criticism of the judiciary. Although recognizing some limitations on a lawyer's exercise of free speech, the Supreme Court has held in a variety of contexts that lawyers retain basic constitutional rights—including the right to freedom of speech. Before impinging on a lawyer's free exercise of a constitutional right, a state must show that a significant interest of the state is endangered.³¹ Several recent cases have specifically recognized lawyers' free speech guarantees and some have applied a first amendment analysis to disciplinary cases.³²

In a series of cases the Supreme Court has held that non-lawyers may not be sanctioned for judicial criticism, even when it relates to pending cases. And in the context of lawyer speech, the Court has held that lawyers may not be punished under disciplinary rules for criticizing the state of the law, or penalized for criticism of judges unless the statements were made with knowing falsity or reckless disregard of the truth.

A

*Bridges v. California*³³ involved the rights of newsmen and a union official to urge a certain disposition of a pending case and to criticize judicial decisions. They were fined for contempt of court, primarily on the ground that this conduct created the possibility of causing unfair dispositions of pending cases. The Supreme Court reversed the convictions. The Court began by considering the "substantive evils" that the contempt sanctions were designed to avert. It viewed these as (1) disrespect for the judiciary, and

30. In addition to *In re Snyder*, see, e.g., *In re Shimek*, 284 So.2d 686 (Fla. 1973); *In re Terry*, 271 Ind. 499, 394 N.E.2d 94 (1979), *cert. denied*, 444 U.S. 1077 (1980); *In re Frerichs*, 238 N.W.2d 764 (Iowa 1976); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); *In re Raggio*, 487 P.2d 449 (Nev. 1971).

31. See, e.g., *In the Matter of RMJ*, 455 U.S. 191, 203-04 (1982) (reversing reprimand against attorney for violating court rule regulating lawyer advertising as violation of first amendment in absence of showing advertising was misleading and restrictions were no more extensive than reasonably necessary); *NAACP v. Button*, 371 U.S. 415, 437-39 (1963) (Virginia statute designed to regulate illegal practices of barratry, maintenance, and champerty did not justify inhibiting lawyers' protected freedoms of expression).

32. See *Polk v. State Bar of Texas*, 374 F. Supp. 784 (N.D. Tex. 1974); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); *Justices of the Appellate Division, First Department v. Erdmann*, 33 N.Y.2d 559, 347 N.Y.S.2d 441, 301 N.E.2d 426 (1973) (*per curiam*); *State Bar of Texas v. Semaan*, 508 S.W.2d 429 (Tex. 1974).

33. 314 U.S. 252 (1941). See *id.* at 272-73, 278, 270, and 270-71, respectively, for the quoted passages.

(2) the disorderly and unfair administration of justice. The Court disposed of the first argument readily:

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

The Court next examined the question of the likelihood that the particular utterances would undermine the fair administration of justice. Stating that neither an "inherent tendency" nor a "reasonable tendency" to do so was sufficient to justify a restriction of free expression, it applied the "clear and present danger" test and held that such a danger had not been shown.

Justice Frankfurter, joined by three of his brethren, dissented. His concern was the protection of fair trial rights of litigants in pending cases, not the sensibilities of judges:

That a state may, under appropriate circumstances, prevent interference with specific exercises of the process of impartial adjudication does not mean that its people lose the right to condemn decisions or the judges who render them. Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their human frailties and fallibilities. There have sometimes been martlets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.³⁴

In *Pennekamp v. Florida*,³⁵ a publisher and associate editor of a newspaper were held in contempt for editorials and a cartoon criticizing a federal trial court. Although agreeing with the Florida Supreme Court that the editorials did not tell the full truth about pending cases, the Supreme Court held that the record failed to show a sufficiently clear and immediate danger to fair judicial administration.

Similarly, in *Craig v. Harney*,³⁶ the Supreme Court reversed contempt convictions of a publisher, editorial writer, and reporter for unfairly reporting a pending case and for an editorial attacking the trial judge while a motion for a new trial was pending. Again, the Court found that these publications did not constitute "serious and imminent" threats to the administration of justice:

34. *Id.* at 289. *Cf. In re Little*, 404 U.S. 553, 555 (1972).

35. 328 U.S. 331 (1946).

36. 331 U.S. 367 (1947).

“This was strong language, intemperate language and, we assume, an unfair criticism. But a judge may not hold in contempt one ‘who ventures to publish anything that tends to make him unpopular or to belittle him’”³⁷

Following this trilogy of the 1940’s, the Court again addressed the issue of judicial criticism in *Wood v. Georgia* in 1962.³⁸ There a sheriff had been found guilty of contempt for a press conference criticizing a judge’s instructions to a grand jury. The sheriff called the instructions “attempted intimidation” and “one of the most deplorable examples of race agitation” in the state in recent years. He also delivered an open letter to the grand jury implying that the judge’s charge was false.

The Supreme Court reversed the contempt conviction. Although the Georgia court had found a “serious evil to the fair administration of justice,” the Supreme Court said the court had ignored the standard governing such a finding. The Court also rejected the claim that, as a sheriff, petitioner owed a special duty to the court and its judges which justified curtailing his freedom of expression. The Court noted that there was no evidence that the publications interfered with the performance of his duties as sheriff.

In *Landmark Communications, Inc. v. Virginia*,³⁹ the Court reversed the criminal conviction of a newspaper that published information about a confidential judicial disciplinary proceeding. The Court assumed that confidentiality served legitimate state interests, but questioned the sufficiency of the interests. The Court noted that Virginia offered little to support its claim that criminal sanctions were necessary. However, even assuming these sanctions enhanced the guarantee of confidentiality, the state’s interest in protecting the reputation of its judges and the integrity and reputation of its courts was not sufficient to justify the repression of speech.

B

None of the cases in the last section involved criticism of judges by lawyers. Two other Supreme Court cases, however, analyze sanctions against lawyers for allegedly disrespectful remarks about the judiciary.

37. *Id.* at 376 (citation omitted).

38. 370 U.S. 375 (1962).

39. 435 U.S. 829 (1978).

One of these cases, *In re Sawyer*,⁴⁰ was cited by the Eighth Circuit in its order denying Snyder's petition for rehearing *en banc*. Sawyer was an attorney for a defendant charged with conspiracy under the Smith Act. During the highly publicized trial in federal court in Hawaii, she made a public speech allegedly impugning the impartiality and fairness of the presiding judge. She was suspended from the practice of law for one year. The Court of Appeals for the Ninth Circuit affirmed the suspension. In a five-to-four decision, the Supreme Court reversed.

In her speech, Sawyer had said that she wanted to tell about some of the "rather shocking and horrible things that go on at the trial." She stated that the government would do anything and everything necessary to convict, and that "[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." Sawyer also complained about the exclusion of certain evidence, concluding that there was "no fair trial" in the case; "they just make up the rules as they go along."⁴¹

Justice Brennan, writing for a plurality of four, began his analysis with the proposition that lawyers are free to criticize the state of the law.⁴² Such criticism, he said could not be equated with an attack on the motivation, integrity, or competence of the judge. Although the Honolulu trial was the setting for the lawyer's remarks, Justice Brennan concluded Sawyer only referred to the case on trial as a typical present example of the evils attendant on such trials.

Concurring in the result, Justice Stewart stated that if, as the dissent suggested, the principal opinion contained an intimation that lawyers are immunized from discipline for unethical conduct, he did not join in that intimation. He added that obedience to ethical precepts may require abstention from what, in other circumstances, might be constitutionally protected speech. However, since he agreed that the record did not support the charge, he concurred in the judgment.

Justice Frankfurter's dissent argued that the suspension was fully supported by the record. Justice Frankfurter pointed out

40. 360 U.S. 622 (1959). See *In re Snyder*, 734 F.2d at 343 (citing concurring opinion of Justice Stewart, 360 U.S. at 646-47).

41. *Id.* at 628-30.

42. *Id.* at 631-33. Justice Brennan stated that the Court's review was limited to the narrow question whether the facts supported the finding that Sawyer impugned the trial judge's impartiality and fairness, thus reflecting on his integrity in dispensing justice. He added that the Court did not reach or intimate any conclusion on the constitutional issues presented. *Id.* at 626-27.

that the controversial trial had been front page news in the Hawaii press for weeks. He found it significant that the "attack" was made at a public gathering that had been advertised as a discussion of the particular trial then underway. To Justice Frankfurter, these facts were controlling.

Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer.⁴³

Justice Frankfurter again emphasized that a lawyer has the right to speak out when the remarks do not relate to a pending case: "Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so."⁴⁴

Sawyer furnishes scant support for the Eighth Circuit's action in *Snyder*. The five justices forming the majority might have agreed that the mere absence of a pending proceeding would not give an attorney license to slander judges. But given their view of the facts in *Sawyer*, those five justices almost certainly would not have concluded that Snyder's remarks had that effect. And the four dissenters clearly distinguished between comment on a pending case and the right (indeed the obligation) of lawyers to express their concerns about the administration of justice.

Furthermore, a later Supreme Court case, which was not cited by the Eighth Circuit, sheds important light on this issue. In *Garrison v. Louisiana*,⁴⁵ the Supreme Court reversed a conviction under the Louisiana criminal defamation statute for disparaging statements made by a district attorney at a press conference about the judicial conduct of eight criminal court judges. Garrison had attributed a large backlog of criminal cases to the judges' inefficiency, laziness, and excessive vacations. He also accused them of refusing to reimburse the expenses of his vice investigations, claiming that they were hampering his efforts to enforce the vice laws. The judges had, he said, made it "eloquently clear" where their sympathies lay in regard to enforcement of vice laws, adding that this raised interesting questions about the "racketeer influences" on the "eight vacation-minded judges."

43. *Id.* at 666 (Frankfurter, J., dissenting).

44. *Id.* at 669. In contrast, Justice Brennan wrote: "We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than they might tend to obstruct the administration of justice." 360 U.S. at 636.

45. 379 U.S. 64 (1964).

As in *Sawyer*, Justice Brennan wrote the lead opinion, this time for the Court:

Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And . . . only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that a debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."⁴⁶

Holding that judges are public officials, the Court rejected the Louisiana court's view that the statement was an attack upon the personal integrity of the judges rather than their official conduct.⁴⁷

Garrison did not involve disciplinary proceedings, and the Court did not directly address the import of a lawyer commenting from his professional experience on the administration of justice by the courts. Nonetheless, the Court's language is clear and unequivocal in this case involving a lawyer's criticism of the judiciary: neither civil nor criminal sanctions may be imposed for truthful statements—or false statements unless made with actual malice—concerning discussion of public affairs. Disciplinary proceedings are quasicriminal matters, with potentially severe sanctions, requiring application of due process principles.⁴⁸ Thus, such proceedings are clearly covered under the language and rationale of *Garrison*.

Although it was not cited by the Eighth Circuit in *Snyder*, *Garrison v. Louisiana* has been cited by other courts to support their findings that discipline may not constitutionally be imposed on an attorney for critical remarks about judges. For example, in *Eisenberg v. Boardman*,⁴⁹ two attorneys sought to enjoin a state disciplinary proceedings against them. The court stressed that derogatory statements about judges are protected by the first amendment unless a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or not." The court said that it had "no doubt that such protection against imposition of civil or criminal liability extends on the same terms to

46. 379 U.S. at 74-75 (citation omitted).

47. *Id.* at 76-77. See also *Rinaldi v. Holt, Rhinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 1305 (1977). The *Garrison* Court noted that, in view of its result, it did not decide whether the statement was factual or merely comment, or whether a state may provide any remedy—civil or criminal—for defamatory comment alone, however vituperative, made against public officials. 379 U.S. at 76 n.10.

48. See *In re Ruffalo*, 390 U.S. 544, 551-52 (1968).

49. 302 F. Supp. 1360 (W.D. Wis. 1969).

lawyers," at least for utterances made outside the course of judicial proceedings. Although uncertain whether lawyers enjoyed precisely the same constitutional protection, the court said that it was satisfied that the Wisconsin Supreme Court had construed the statute to prevent an attorney from being disciplined for derogatory expressions (outside of judicial proceedings) concerning a judge or court:

Courts would be entering upon a dangerous field if they assumed to disbar attorneys because of criticism of courts based upon improper motives. It best conforms to the spirit of our institutions to permit every one to say what he will about courts, and to leave the destiny of the courts to the good judgment of the people.⁵⁰

III

Although the Supreme Court has not directly addressed the question faced by the Eighth Circuit in *Snyder*, the cases discussed above point to the proper analysis. First, under *Bridges v. California* and later cases, individuals have a right to criticize courts, even when their comments relate to pending cases. Lawyers do not surrender their basic constitutional rights upon joining the bar, although their conduct sometimes may be subject to stricter regulation to avoid prejudice to litigants.⁵¹ Also, judges have the right to maintain courtroom order. This clearly justifies some

50. *Id.* at 1363-64. The court dismissed the federal complaint because it believed that the state court complaint against the attorneys went beyond charging derogatory expression. See also *State Bar of Texas v. Semaan*, 508 S.W.2d 429 (Tex. App. 1974).

51. For carefully considered opinions reaching different conclusions on the appropriate standard to be applied in cases involving pending criminal proceedings, compare *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), with *Hirschkop v. Snead*, 594 F.2d 356, 370 (4th Cir. 1979), and *In re Hinds*, 90 N.J. 604, 635, 449 A.2d 483, 494 (1982), all considering ABA MODEL CODE DR 7-107. In *Chicago Council of Lawyers*, the court rejected application of a "reasonable likelihood" standard, holding that only comments posing a "serious and imminent threat to the fair administration of justice" could be constitutionally proscribed. In considering DR 7-107, the *Hirschkop* court upheld the "reasonable likelihood" standard in connection with criminal jury trials, but rejected its application in other circumstances. *Hinds* was a disciplinary proceeding brought under DR 1-102(A)(5), relied on by the Eighth Circuit in *Snyder*, and DR 7-107(D), relating to public comments made outside of court concerning an ongoing criminal trial by a lawyer associated with the trial. The court held that the "reasonable likelihood" of interference standard was sufficient in examining speech restrictions under DR 7-107(D) because of the "special concern" relating to fairness of criminal trials. However, noting that DR 1-102(A)(5) applied to attorneys in their capacities as ordinary citizens, the court held that the "clear and present danger" test must be employed in disciplinary cases under that rule. For an analysis of *In re Hinds*, see Nemetz, *In re Hinds: New Jersey Establishes a Standard for Restricting Attorney Speech*, 35 RUTGERS L. REV. 661 (1983). For discussions of regulation of lawyers' speech relating to pending cases, see Scheurich, *The Attorney "No-Comment" Rules and the First Amendment*, 21 ARIZ. L. REV. 61 (1979); Note, *Judicial Restrictions on Attorneys; Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech*, 33 VAND. L. REV. 499 (1980).

temporary restrictions on attorney speech.⁵² But outside the courtroom, under *In re Sawyer*, lawyers are free to criticize the state of the law, even as it relates to a pending case, so long as their criticism is not directed at the judge's conduct of the case. And, under *Garrison v. Louisiana*, absent the appropriate showing of a compelling state interest, lawyers may not be subjected to civil or criminal sanctions even for attacks on judges unless made with knowing falsity or reckless disregard of the truth.

Under the traditional first amendment analysis that the Eighth Circuit failed to apply, the court should have first examined the nature of the state interest to determine whether it was sufficiently compelling. Next, assuming that test were met, the court should have determined whether Snyder's speech actually posed a danger to the state interest, and, if so, how great that danger must be to uphold a restriction on his speech. If that test were also satisfied, the court should then have determined whether the rule authorizing the sanction against Snyder was either unconstitutionally vague or overbroad.

A

Although some forms of speech are not fully protected, the court offered no explanation why Snyder's criticism of a court process, which is undeniably a matter of public concern, would fall outside the ambit of protected speech. Under Supreme Court cases it clearly is protected speech, even if there were some justification here for restricting it. If the court had recognized this basic principle, it presumably would have examined the authority on which the sanction was based to determine whether there was sufficient justification for abridging Snyder's first amendment rights.

Federal Rule of Appellate Procedure 46(b) provides in relevant part: "When it is shown to the court that any member of its bar . . . has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court." This rule, by itself, furnishes little indication of the particular state interest at stake. But when read in conjunction with the Model Code of Professional Responsibility, cited by the Eighth Circuit, it could be argued that the prohibited conduct is

52. See DR 7-106(C), which provides in pertinent part:

In appearing in his professional capacity before a tribunal, a lawyer shall not:

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

ABA MODEL CODE. Compare [ABA] MODEL RULES OF PROFESSIONAL CONDUCT (1981) [hereinafter cited as "ABA MODEL RULES"] Rule 3.5(c), providing that a lawyer shall not "engage in conduct intended to disrupt a tribunal."

that which "is prejudicial to the administration of justice."⁵³ To determine the validity of the restriction on speech, the specific interest relating to the "administration of justice" must be identified.

The state clearly has a substantial interest in ensuring fairness to litigants in pending judicial proceedings. But, based both on the Eighth Circuit's description of the issue and on common sense, fairness of judicial proceedings is not at stake here. The order denying rehearing does not attempt to pinpoint any prejudice to the administration of justice, but the panel opinion offers the following explanation: "Snyder's conduct not only constituted disrespect but served as well to impede the orderly processing of attorney fee applications. In this direct sense he has served to impede the administration of justice."⁵⁴ Since interfering with the processing of Criminal Justice Act vouchers was not the basis for the court's suspension order, the court's reference is confusing. The obvious solution to the fee processing problem is to deny compensation for improperly documented time or expenses. Also, the court does not attempt to explain how this alleged interference with voucher processing conceivably could justify a six-month suspension from the practice of law.

In any event, the court made it clear that impeding the processing of forms was not the basis for its sanction. Rather: "His refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly 'harsh' statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts." The tenor of the entire order denying rehearing also indicates that the suspension order was based on the alleged disrespect shown to the court. Thus the apparent interest at stake under the court's opinion in *Snyder* is the maintenance of respect for courts and judges.

Even if maintaining respect for judges and courts were held to be a compelling state interest, in order to restrict Snyder's right to free speech, there must be a showing that Snyder's letter posed an imminent threat to this interest. Here the Eighth Circuit offers no elucidation on how a letter sent to a judge's secretary com-

53. ABA MODEL CODE DR 1-102A(5). The Eighth Circuit also cited ABA MODEL CODE EC 9-6, but since ethical considerations are considered "aspirational" and not mandatory, this provision would not provide adequate notice that it could serve as a basis for suspension from practice. See ABA MODEL CODE, Preliminary Statement. *But see In re Frerichs*, 238 N.W.2d 764, 768-69 (Iowa 1976). Additionally, even if phrased as a mandatory rule, it is unlikely that requiring lawyers to "encourage respect for the law and for the court and the judges thereof" is a sufficiently compelling state interest to justify curtailing first amendment rights. Compare ABA MODEL CODE EC 1-5, with similarly general language.

54. Quoted passages are in 734 F.2d at 336, 337.

plaining about the difficulties of receiving payment for work under the Criminal Justice Act—no matter how “harsh” the language—could foster disrespect for the judiciary. Except for the Eighth Circuit’s unfortunate overreaction, no one outside of the court would have known about the letter. Furthermore, even if Snyder had published his letter on the front page of the *New York Times*, no imminent threat to the fair administration of justice would have existed. Nor was there even a “reasonable likelihood” of interfering with a fair trial or the fair administration of justice.⁵⁵ The letter had no effect on any pending case; and, as the Supreme Court has made clear, the unsubstantiated speculation that it might generally undermine respect for courts is insufficient to justify curtailment of free speech.⁵⁶

B

Even if Snyder’s conduct had posed an imminent threat to a compelling state interest, that does not end the constitutional inquiry. Unless drawn precisely and narrowly, a restriction on protected speech will be held void for vagueness or unconstitutionally overbroad.

Standing alone, Rule 46, on which the Eighth Circuit relied, offers virtually no guidance on what conduct it prohibits. Arguably however, this rule is supplemented by the Disciplinary Rules of the Model Code of Professional Responsibility, which furnishes the applicable standard of conduct.

In *In re Bithoney*,⁵⁷ the First Circuit considered the constitutionality of Rule 46. In *Bithoney*, a lawyer was suspended under Rule 46 for filing nine petitions for review in immigration cases in nine months, all of which were found to be frivolous, not diligently pursued, or both, and six of which were filed after the court’s explicit warning to the lawyer about filing frivolous petitions. The court addressed the question whether Rule 46 was “in terms so vague that men of common intelligence must necessarily guess at [the Rule’s] meaning,” thus denying due process when used as a basis for discipline. Noting that in the abstract the attorney might have a colorable claim, the court was convinced that in the context of the legal profession’s “complex code of behavior,”

55. In cases involving a danger to an ongoing criminal trial, some courts have held that a “reasonable likelihood” that a lawyer’s speech might interfere with a fair trial is sufficient to justify restrictions on speech. *See supra* note 51.

56. Even the certainty that this result would occur would be insufficient to justify the restriction. *Cf. Landmark Communications v. Virginia*, 435 U.S. at 842; *Bridges v. California*, 314 U.S. at 270-71.

57. 486 F.2d 319, 324-25 (1st Cir. 1973).

the terms take on "definiteness and clarity." Any ambiguity in Rule 46 was removed when read in context with the applicable disciplinary rule⁵⁸ and in light of the specific warning of the court. However, the court observed:

We also note that there is not involved here an infringement upon First Amendment rights, or a chilling effect upon such rights, such as prompted a considerably stricter application of the vagueness test in such cases as *Coates v. City of Cincinnati*, 402 U.S. 611 . . . (1971) and *Baggett v. Bullitt*, 377 U.S. 360 . . . (1964).⁵⁹

A comprehensive analysis of the constitutionality of Rule 46 is beyond the scope of this article. The *Bithoney* court's conclusion on the particular facts of that case appears sound. As the Eighth Circuit noted, a member of the bar is bound by the ethical code of the legal profession. The federal courts should be able to rely on an attorney's knowledge of the state code of ethics, and should not have to impose an entirely separate code. In general, lawyers should know that violation of specific disciplinary rules of their states could constitute "conduct unbecoming a member" of the federal bar. Thus, the focus in considering constitutionality should be on the particular disciplinary rule that is read in conjunction with Rule 46.

Accepting the correctness of the *Bithoney* analysis of the vagueness issue under the facts of that case, the question remains whether DR 1-102(A)(5), read in conjunction with Rule 46, passes constitutional muster in this case involving first amendment rights.

A potpourri of charges have been brought against attorneys under DR 1-102(A)(5), sometimes alone and sometimes in combination with other disciplinary rules. In addition to cases concerning criticism of the judiciary, it has been invoked, for example, in cases involving a lawyer's criminal activity, failure to appear at a hearing or trial, professional negligence and breach of fiduciary duty, and improper employment arrangements and conflicts of interest.⁶⁰ Because its proscriptions are so general, it has been criti-

58. (A) In his representation of a client, a lawyer shall not:

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense, if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

ABA MODEL CODE DR 7-102(A)(2).

59. 486 F.2d at 324 n.9.

60. See, e.g., *People v. Kane*, 638 P.2d 253 (Colo. 1981); *People ex rel. Buckley v. Beck*, 199 Colo. 482, 610 P.2d 1069 (1980); *In re Garber*, 95 N.J. 597, 472 A.2d 566 (1984); *In re Yengo*, 92 N.J. 9, 457 A.2d 457 (1983); *In re Hughes*, 90 N.J. 32, 446 A.2d 1208 (1982); *Bar Ass'n of Greater Cleveland v. Protus*, 53 Ohio St. 2d 43, 372 N.E.2d 344 (1978); *In re*

cized as vague and overbroad.⁶¹ Nonetheless, courts generally have upheld the rule in the face of such claims.⁶²

Although some conduct may be so clearly "prejudicial to the administration of justice" that application of DR 1-102(A)(5) could withstand constitutional scrutiny, cases involving protected speech should not be swept within this highly general proscription. Because of the possible chilling effect on first amendment rights, the rule should be held unconstitutionally vague when applied to attorney speech.⁶³

Aside from its questionable language, another indication of the uncertain perimeters of DR 1-102(A)(5) is the existence of separate disciplinary rules for certain types of expression by lawyers concerning judges and courts. This could reasonably lead lawyers to conclude that speech falling outside of these categories would not subject them to discipline. DR 8-102 of the Model Code, entitled "Statements Concerning Judges and Other Adjudicatory Officers," provides that lawyers shall not knowingly make false accusations against judges or false statements of fact about candidates for judicial office.⁶⁴ DR 7-106, under the heading "Trial Conduct," prohibits a lawyer appearing in a professional capacity before a tribunal from engaging in "undignified or discourteous

Paaue, 294 Or. 171, 654 P.2d 1117 (1982); *In re Krogh*, 85 Wash. 2d 462, 536 P.2d 578 (1975).

61. See, e.g., Sutton, *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 502 n.13 (1979); Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 275-76 (1970); Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671, 685-89 (1979). See generally ABA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 101:501 (1984) [hereinafter cited as "ABA LAWYERS' MANUAL"].

62. See, e.g., *In re Keiler*, 380 A.2d 119, 126 (D.C. 1977); *State v. Martindale*, 215 Kan. 667, 671, 527 P.2d 703, 706 (1974); *State v. Nelson*, 210 Kan. 637, 640; 504 P.2d 211, 214 (1972) (cited by the Eighth Circuit in *Snyder*); cases collected in ABA LAWYERS' MANUAL, *supra* note 61. *But cf.* Office of Disciplinary Counsel v. Campbell, 621 Pa. 1975, 345 A.2d 616, *cert. denied*, 424 U.S. 926 (1976) (holding provision constitutional as applied in that case, but noting it is "arguably vague" and in other situations "might be of uncertain constitutionality").

63. The only areas in which speech restrictions might arguably be upheld under this general proscription are those in which order in the courtroom or litigants' fair trial rights are jeopardized. However, it is not necessary to decide this question because the disciplinary code contains comprehensive rules regulating speech of that nature. See ABA MODEL CODE DR 7-107, DR 7-106; ABA MODEL RULES Rules 3.6, 3.5(c); text accompanying notes 64-65 *infra*.

64. EC 8-6 indicates that lawyers have a "right" to criticize judges, but should be restrained in their language. Compare ABA MODEL RULES Rule 8.2 ["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 . . . or of a candidate."] The Model Rules have adopted the defamation standard of *Garrison v. Louisiana*, 349 U.S. 64 (1964).

conduct which is degrading to a tribunal.”⁶⁵ DR 7-107, entitled “Trial Publicity,” sets forth detailed rules regulating comments by lawyers involved in the trial of a case, focusing on comments reasonably likely to “interfere with a fair trial” or “affect the imposition of sentence.”⁶⁶

No disciplinary rule deals specifically with the conduct at issue in *Snyder*. Due to the absence of a specific rule, the Eighth Circuit and other courts have been forced to rely on catch-all provisions such as DR 1-102(A)(5). There may be a very good reason why the American Bar Association did not specifically include the type of speech at issue here in the model codes. As recognized by Justice Frankfurter, lawyers are often in the best position to comment on the courts and their administration of justice. And they have not only the right, but also the obligation to do so.⁶⁷ Without such criticism, the public will be unaware of needed reforms which they, as the electorate, bear the ultimate responsibility for implementing.

Snyder’s “disrespectful” letter in fact led to a recommendation that changes in the implementation of the Criminal Justice Act be considered for the courts in the Eighth Circuit.⁶⁸ Considering the heavy workload of courts, an appropriately “respectful” letter might never have come to the attention of the chief judge of the circuit. Thus, Snyder’s letter is the type of speech that should be valued rather than sanctioned.

As indicated above, nothing in DR 1-102(A)(5) puts a lawyer on notice that criticism of the judiciary, which he or she reasonably believes true and which poses no danger of prejudicing or disrupting a pending case, may subject the attorney to suspension from practice. If such sanctions are upheld, lawyers will be subject to the whims, bad days, fragile sensibilities, and pettiness of judges.⁶⁹ As shown by comments on the Eighth Circuit’s order in *Snyder*—including one by the trial judge whose secretary received Snyder’s letter—many reasonable people would not consider Sny-

65. ABA MODEL CODE DR 7-106(C)(6). Compare ABA MODEL RULES Rule 3.5 (“A lawyer shall not: . . . (c) engage in conduct intended to disrupt a tribunal.”).

66. ABA MODEL CODE DR 7-107. See especially DR 7-107(D) and (E). Compare ABA MODEL RULES Rule 3.6. See especially Rule 3.6(a) (“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”). Additionally, some courts have local rules regulating comment by lawyers to the press on matters affecting pending cases. See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 247 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). Cf. ABA MODEL CODE EC 7-33.

67. See, e.g., *In re Sawyer*, 360 U.S. 622, 669 (Frankfurter, J., dissenting).

68. *In re Snyder*, 734 F.2d at 344.

69. Cf. *Bridges v. California*, 314 U.S. 252, 289 (Frankfurter, J., dissenting).

der's letter disrespectful. The fact that there have been findings by other courts that disciplinary sanctions were unwarranted in cases of much harsher language further indicates the vagueness of the rule. The rule offers no guidance in determining whether a violation has occurred, vesting the trier of fact with virtually unfettered discretion.

As Judge Newman has pointed out with reference to a similar California rule, this vagueness does not affect all lawyers equally:

Insofar as the profession purports to and to some extent does open up to minorities, the poor, and the working class, its implicitly racist and class-based rules of decorum operate as legal ethics had done for some time, either to eliminate the upstarts or to mold them into conformance with the tastes of the governors. . . . Those at the top have no need to be offensive. Those at the bottom—the poor, the workers, women, prisoners, criminals, children, and sometimes their lawyers (when they have any)—sometimes speak in less reassuring tones and terms.⁷⁰

Although the language of California's "offensive personality" statute is slightly different from Rule 46's prohibition against "conduct unbecoming a member of the bar" and DR 1-102(A)(5)'s proscription of conduct "prejudicial to the administration of justice," the import is similar. At the very least, Justice Newman points up the difficulty for individual lawyers from a variety of backgrounds to predict what comments might be considered so offensive by a particular judge that their mere utterance would subject a lawyer to suspension from the practice of law—with no showing whatsoever of any adverse effect other than bruised sensibilities.

Language that is likely to offend some listeners is fairly commonplace in many social gatherings.⁷¹ Requiring lawyers, outside of court and court pleadings, to use language that no judge could

70. *Ramirez v. State Bar*, 28 Cal. 3d 402, 426, 619 P.2d 399, 414, 169 Cal. Rptr. 206, 220 (1980) (Newman, J. dissenting), (quoting Black, *Attorney Discipline for "Offensive Personality" in California*, 31 HASTINGS L.J. 1097, 1135-37 (1980)). The case was brought under a provision of California's Professional Code prohibiting attorneys from violating their oaths and duties and from "falsely maligning" judges. See CAL. BUS. & PROF. CODE §§ 6067, 6068(b), (d) and (f) (West 1975). Chief Justice Bird also dissented in *Ramirez*. Stating that she might hope for a kinder and more thoughtful world, she did not view censorship as the best method of achieving that end. Nonetheless, she said she might be more sympathetic to the view of her colleagues if the court's own house were in order. "What was said here on behalf of a litigant is not materially different from what some judges and justices have been known to have said about each other or about members of the bar." She concluded that the "chilling effect" of the decision was "too high a price to pay for the fragile sensibilities of a judge or justice," adding that "it smacks of arrogance to so limit the bar while we ourselves carry on dialogues which match or exceed what was said here." 28 Cal. 3d at 427, 169 Cal. Rptr. at 220-21, 619 P.2d at 406, (Bird, C.J., dissenting). See also *In re Sawyer*, 360 U.S. at 635 ("Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed.").

71. See *Eaton v. City of Tulsa*, 415 U.S. 697, 700 (Powell, J., concurring).

possibly find offensive is irreconcilable with the "prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."⁷²

IV

The first amendment contains no exceptions for judges' sensibilities or the "majesty of the law." How can a distinction be justified between upholding the "majesty of the law" when the judiciary is involved, but not when the bodies that make or enforce the laws are criticized? Carried to its logical end, no one (or at least no lawyer) would be allowed to speak out against any law passed by Congress, or against any member of the executive branch. What would be forbidden, then, is the one thing that the Supreme Court has clearly held cannot be punished—good faith criticism of public officials.

The *Snyder* decision appears to be an arbitrary reaction to critical but sincere words that precipitated a recommendation that could lead to changes in the administration of the Criminal Justice Act.⁷³ The biggest loser here is the judicial system itself, not because of Snyder's letter, but because of the Eighth Circuit's overreaction to it. Even accepting limitations on lawyers' speech, it is difficult to countenance the Eighth Circuit's extreme response to the relatively mild criticism in Snyder's letter. It is at odds with Justice Frankfurter's words: "Certainly courts are not, and cannot be immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so."⁷⁴ And as a memorable pronouncement for the year 1984, the *Snyder* opinion may make the comment of the legal director of the ACLU prophetic: "[I]f this decision stands up, the entire bar can be silenced."⁷⁵

Editor's Note: On January 14, 1985 the Supreme Court granted certiorari in the *Snyder* case.

72. *Bridges v. California*, 314 U.S. at 270.

73. See 734 F.2d at 337-41. Cf. Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922, 923 (1974).

74. *In re Sawyer*, 360 U.S. at 669 (Frankfurter, J. dissenting).

75. Burt Neuborne, National Legal Director of the ACLU (*quoted in Nat'l L.J.*, July 9, 1984, at 47, col. 3.).