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Standing Committee on Discipline v. Yagman: The Ninth Circuit Provides Substantial First Amendment Protection for Attorney Criticism of the Judiciary

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NOTE

STANDING COMMITTEE ON DISCIPLINE v. YAGMAN: THE NINTH CIRCUIT PROVIDES SUBSTANTIAL FIRST AMENDMENT PROTECTION FOR ATTORNEY CRITICISM OF THE JUDICIARY

I. INTRODUCTION

In *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, the Ninth Circuit Court of Appeals held that an attorney who publicly criticized a federal judge did not commit sanctionable conduct.¹ In determining whether the attorney, Stephen Yagman, had violated a local rule of professional conduct for lawyers, the court applied a “reasonable attorney” standard, rather than a subjective malice standard.² The court held that Yagman’s statements, in light of this higher standard, did not violate the rule’s prohibition against impugning the integrity of the court.³ The Ninth Circuit also held that the attorney’s statements did not violate the rule’s prohibition against attorneys interfering with the administration of justice.⁴ In finding no interference with the administration of justice the Ninth Circuit announced a new standard. Under this new standard the attorney’s conduct must pose a “clear and present danger”

1. Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (hereinafter “Yagman”) (opinion by Kozinski, J., joined by Thompson, J.; dissent by Wiggins, J.).

2. See *id.* at 1437; see *infra* text accompanying notes 66-71.

3. *Yagman*, 55 F.3d at 1438-42.

4. *Id.* at 1445.

to the administration of justice to be sanctionable.⁵ This note examines the Ninth Circuit's analysis of Yagman's statements and questions whether the newly-created "clear and present danger" standard is stringent enough to prevent attorneys from forum shopping. Accordingly, the Ninth Circuit reversed the holding of the district court.⁶

II. FACTS AND PROCEDURAL HISTORY

In 1991, Los Angeles-based civil rights attorney Stephen Yagman filed a lawsuit in which he was the party plaintiff against several insurance companies.⁷ The case was assigned to Judge Manuel Real, who was Chief Judge of the Central District of California at that time.⁸ Yagman subsequently filed a motion to disqualify Judge Real on grounds of bias.⁹ The motion was randomly assigned to Judge William Keller.¹⁰ Judge Keller denied the motion¹¹ and issued an Order to Show Cause why Yagman should not be sanctioned for failing to notify the judge that another court had previously rejected an attempt by Yagman to disqualify Judge Real.¹² On May 31, 1991, Judge Keller filed an order in which he found Yagman in

5. *Id.* at 1443.

6. *Id.* at 1445.

7. Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 856 F. Supp. 1384, 1385 (C.D. Cal. 1994) (hereinafter "Standing Comm."); Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1433 (9th Cir. 1995).

8. *Yagman*, 55 F.3d at 1433.

9. *Id.* Yagman based his claim of bias on an earlier case in which Judge Real granted a directed verdict for Yagman's opponents and sanctioned Yagman personally in the amount of \$250,000. *Id.* at 1434 n.1. The Ninth Circuit reversed the sanctions and remanded the case for assignment to another judge. *Id.* (citing *In re Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986)). The court found no evidence that Judge Real held any personal animosity toward Yagman, but reassigned the case "to preserve the appearance of justice." *Id.* On remand, Judge Real challenged the Ninth Circuit's authority to reassign the case. *Yagman*, 55 F.3d at 1434 n.1. Yagman then petitioned for, and was granted, a writ of mandamus. The dispute came to an end when the U.S. Supreme Court denied Judge Real's petition for certiorari. *Id.* (citing *Real v. Yagman*, 484 U.S. 963 (1987)).

10. *Id.* at 1433-34 (citing *Yagman v. Republic Ins.*, 137 F.R.D. 652, 657-58 (C.D. Cal. 1991)).

11. *Id.* On appeal, Judge Keller's denial of the disqualification order was affirmed. *Id.* at 1434 n.2 (citing *Yagman v. Republic Ins.*, 987 F.2d 622 (9th Cir. 1993)).

12. *Standing Comm.*, 856 F. Supp. at 1385.

violation of Federal Rule of Civil Procedure 11,¹³ 18 U.S.C. section 401(3)¹⁴ and the inherent authority of the court.¹⁵

A week after Judge Keller issued his sanctions order, the Los Angeles Daily Journal quoted Yagman as stating that Judge Keller “has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-Semitism.”¹⁶ The district court also found that Yagman accused Judge Keller of being “drunk on the bench,” although the Daily Journal article did not publish this charge.¹⁷

Around the time that the Daily Journal published the article, Prentice Hall, publisher of the Almanac of the Federal Judiciary, requested comments from Yagman for a profile of

13. *Id.* (citing *Republic Ins.*, 137 F.R.D. 310 (C.D. Cal. 1991)). As a basis for the recusal motion, Yagman relied on *Real v. Yagman*, characterized in his moving papers as a case in which “Judge Real sued me personally.” *Republic Insurance*, 137 F.R.D. at 314. Judge Keller found this characterization to be “grossly negligent.” *Id.* The judge held that Yagman’s attempt to use that case as a basis for recusal was not “to the best of Yagman’s knowledge, information and belief, formed after a reasonable inquiry, well grounded in fact and warranted by existing law or good faith extension thereof,” in violation of Federal Rule of Civil Procedure 11. *Id.*

14. The statute reads: “A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.” 18 U.S.C. § 401.

15. *Standing Comm.*, 856 F. Supp. at 1385. In the sanctions order, Judge Keller stated that Yagman was being sanctioned for pursuing the matter in an “improper and frivolous manner.” *Republic Ins.*, 137 F.R.D. at 312. The order sharply reprimanded Yagman, further stating that “neither monetary sanctions nor suspension appear to be effective in deterring Yagman’s pestiferous conduct.” *Yagman*, 55 F.3d at 1434 n.2 (citing *Republic Insurance*, 137 F.R.D. at 318). The order also recommended that Yagman be “disciplined appropriately” by the California State Bar. *Id.* (citing *Republic Insurance*, 137 F.R.D. at 319). On appeal, the Ninth Circuit reversed the sanctions but affirmed the denial of the disqualification. *Id.* (citing *Yagman v. Republic Ins.*, 987 F.2d 622 (9th Cir. 1993)).

16. *Yagman*, 55 F.3d. at 1434 (citing Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar*, L.A. DAILY JOURNAL, June 6, 1991, at 1).

17. *Id.* at 1434 (citing *Standing Comm.*, 856 F. Supp. at 1386).

Judge Keller.¹⁸ Yagman responded with a letter to Prentice Hall in which he offered scathing criticism of the judge.¹⁹

In June of 1991, Yagman's law firm placed a half-page advertisement in the Los Angeles Daily Journal asking attorneys who had been sanctioned by Judge Keller to contact the law firm.²⁰ Approximately a month and a half later, Yagman spoke with attorney Robert Steinberg in a Los Angeles courthouse hallway.²¹ The district court panel believed Steinberg's claim that, at this time, Yagman told Steinberg that he publicly criticized Judge Keller in hopes of getting the judge to recuse himself in future cases.²² Steinberg, believing Yagman

18. *Id.* at 1434. The Almanac profiles federal judges, covering their backgrounds, noteworthy rulings and other items of interest. *Id.* at 1434 n.3. One section titled "Lawyers' Evaluation" publishes anonymous attorneys' comments which sometimes contain harsh criticism. Judges who believe the comments published in the "Lawyers' Evaluation" do not fairly represent their performance on the bench sometimes ask Prentice Hall to elicit additional comments from attorneys. Prentice Hall sent a letter to Yagman following such a request from Judge Keller. *Id.*

19. See *Standing Comm.*, 856 F. Supp. at 1386. In his letter, Yagman claimed that Judge Keller had sanctioned or sought to sanction three Jewish attorneys, including Yagman. *Id.* The letter further stated:

It is outrageous that the Judge wants his profile redone because he thinks it to be inaccurately harsh in portraying him in a poor light. It is an understatement to characterize the judge as "the worst judge in the central district." It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras were permitted in his courtroom, the other federal judges in the country would be so embarrassed by this buffoon that they would run for cover. One might believe that some of the reason for this sub-standard human is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed. One other comment: his girlfriend is, or was, the newly-appointed U.S. Attorney in Los Angeles, Lourdes Baird, who, like the judge, is a right wing fanatic.

Id. The district court also found that Yagman sent a copy of the letter to Judge Keller. *Id.*

20. *Id.* The advertisement read: "This office is gathering evidence concerning sanctions imposed by U.S. Dist. Judge William D. Keller. It would be appreciated if any attorney who has been sanctioned, or threatened with sanctions by Judge Keller fill out the form below and mail it to us. Thank you." *Yagman*, 55 F.3d at 1434 n.5.

21. *Standing Comm.*, 856 F. Supp. at 1386-87.

22. *Yagman*, 55 F.3d at 1434; See also *Standing Comm.*, 856 F. Supp. at 1392.

had committed misconduct, wrote a letter to the Standing Committee on Discipline which described his conversation with Yagman.²³

In September of 1991, Judge Keller wrote a letter to the Standing Committee which formally referred Yagman's conduct for disciplinary action, pursuant to the local rules of attorney professional conduct.²⁴ The letter described Yagman's anti-Semitism charge, the comments he made to Prentice Hall publishing, and Yagman's firm's advertisement in the Los Angeles Daily Journal.²⁵

The Standing Committee investigated the charges described by Steinberg and Judge Keller, and, in October of 1992, filed a Petition for Issuance of an Order to Show Cause why Yagman should not be suspended from practice or otherwise disciplined under Local Rule 2.6.4.²⁶ Pursuant to this rule, the matter was assigned to a panel of three Central District judg-

Yagman strongly denied saying this to Steinberg. *Yagman*, 55 F.3d at 1434 n.6.

23. *Yagman*, 55 F.3d at 1434.

24. *Id.* at 1435. Federal Local Court Rule for the Central District of California (Civil) section 2.6.3.1 provides, in pertinent part:

Role of the Standing Committee on Discipline. The Standing Committee on Discipline shall investigate any charge or information, whether referred by one of the judges or otherwise coming to its attention, that any attorney has been guilty of unprofessional conduct or has violated the Rules of Professional Conduct of the State Bar of California.

Fed Local Ct Rules, CD Cal Rule 2.6.3.1

25. *Yagman*, 55 F.3d at 1435. In his letter, Judge Keller stated:

Mr. Yagman's campaign of harassment and intimidation challenges the integrity of the judicial system. Moreover, there is clear evidence that Mr. Yagman's attacks upon me are motivated by his desire to create a basis for recusing me in any future proceeding. . . . The Standing Committee on Discipline should take action to protect the court from further abuse.

Id.

26. *Id.*

es.²⁷ The panel subsequently reissued an Order to Show Cause and scheduled a hearing on the matter.²⁸

The hearing lasted two days, during which time both the Standing Committee and Yagman presented evidence.²⁹ After reviewing the evidence and the written arguments of the parties, the panel found that Yagman violated two separate prohibitions of Local Rule 2.5.2.³⁰ First, the panel held that certain of Yagman's criticisms constituted conduct which "degrades or impugns the integrity of the Court."³¹ Second, it found that Yagman violated the Rule's prohibition against "engag[ing] in any conduct . . . which interferes with the administration of justice."³² After reviewing arguments regarding the appropriate sanction, the panel suspended Yagman from practice before the United States District Court for the Central District of California for a period of two years.³³ Yagman appealed the panel's decision to the Ninth Circuit.³⁴

III. BACKGROUND

A. THE POLICY BEHIND REGULATING ATTORNEY SPEECH

Regulation of attorney criticisms directed at the judiciary necessarily implicates First Amendment concerns.³⁵ Because a

27. *Id.* Chief Judge Real originally referred the matter to Chief Circuit Judge Clifford J. Wallace for assignment to a panel of three judges from outside the Central District. *Standing Comm.*, 856 F. Supp. at 1387. After Yagman argued that this assignment violated Local Rule 2.6.4, the matter was referred back to Chief Judge Real, who assigned it to Central District Judges Rafeedie, Davies and Williams. *Yagman*, 55 F.3d at 1435 n.7.

28. *Standing Comm.*, 856 F. Supp. at 1387.

29. *Yagman*, 55 F.3d at 1435. Prior to the hearing, and on appeal, Yagman made several objections to the district court proceedings. First, he raised First Amendment objections to being disciplined for his statements regarding Judge Keller. Though both sides requested the opportunity to brief the issue, the panel did not act on these requests. The parties were thus forced to proceed without knowing the allocation of the burden of proof or the legal standard the court intended to use. *Id.*

30. *Standing Comm.*, 856 F. Supp. at 1385.

31. *Id.*

32. *Id.*

33. *Id.* at 1400.

34. *See Yagman*, 55 F.3d at 1433.

35. *See id.* at 1437-38, referring to *Oklahoma ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 966 (Okla. 1988).

major purpose of the First Amendment is to protect the free discussion of governmental affairs,³⁶ regulation of criticism which is directed at a governmental unit strikes at the center of First Amendment freedoms.³⁷ In addition to the speaker's right to communicate, the First Amendment inquiry takes into account the right of the listener to receive information.³⁸ Foreclosing an individual's right to hear an attorney's criticism of the judiciary prevents the public from receiving information on the judicial process from those who are intimately familiar with this branch of government.³⁹

Weighed against the attorney's right to criticize the judiciary is the societal interest in maintaining public confidence in the judicial system.⁴⁰ In *United States District Court v. Sandlin*,⁴¹ the Ninth Circuit struck a constitutionally permissible balance between these competing interests by holding that attorneys may freely criticize the judiciary if these criticisms are supported by a reasonable factual basis.⁴² So long as these criticisms have such support, an attorney who voices them will not be subject to sanctions, even if the attorney is mistaken.⁴³

B. THE DISCIPLINARY PROCESS

District courts possess the inherent power to discipline attorneys for unprofessional conduct in federal court.⁴⁴ The standards of professional conduct for attorneys practicing in the Central District of California are set forth in the Federal Local Court Rules.⁴⁵ The Central District provides a proce-

36. See *Porter*, 766 P.2d at 966-67.

37. *Id.*

38. *Id.* at 967.

39. *Id.*

40. Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. *Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995).

41. 12 F.3d 861 (9th Cir. 1993).

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

43. *Id.*

44. Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. *Yagman*, 856 F. Supp. 1384, 1387 (C.D. Cal 1994) (citing *In re Yagman*, 803 F.2d 1085 (9th Cir. 1986) and Standing Comm. on Discipline of the U.S. Dist. Court for the Southern Dist. of Cal. v. *Ross*, 735 F.2d 1168, 1170 (9th Cir. 1984), cert. denied and appeal dismissed, 469 U.S. 1081 (1984)).

45. *Standing Comm.*, 856 F. Supp. at 1387 (referring to Local Rules 2.5, 2.5.1

ture by which judges and others in the legal community may refer unprofessional conduct to the Standing Committee on Discipline for investigation.⁴⁶ If the Committee determines that the conduct merits discipline, it petitions for an Order to Show Cause why the attorney should not be subject to sanctions.⁴⁷ The case is then assigned to a panel of three judges, which holds a hearing in which the Committee acts as prosecutor.⁴⁸

IV. THE COURT'S ANALYSIS

In *Standing Committee v. Yagman*,⁴⁹ the Ninth Circuit first rejected Yagman's contention that the composition of the Standing Committee denied him due process.⁵⁰ The court further held that his statements did not violate the prohibition contained in Local Rule 2.5.2, which bars statements that impugn the integrity of the court.⁵¹ The court also found that Yagman's conduct did not violate the rule's prohibition against interfering with the administration of justice.⁵² In determining whether Yagman violated either of the local rule's prohibitions, the Ninth Circuit applied an objective "reasonable attorney" standard, rather than the subjective malice standard typically used in defamation actions.⁵³

and 2.5.2.).

46. *Yagman*, 55 F.3d at 1435 (citing Fed Local Ct Rules, CD Cal Rule 2.6.1 and 2.6.3). The Standing Committee consists of twelve attorneys who are members of the bar of the court. Fed Local Ct Rules, CD Cal Rule 2.6.1. The Committee is divided into four sections. *Id.* at 2.6.3.2. When a charge is referred to the Committee, the chair assigns a section to investigate the matter. At the conclusion of the investigation, the section makes a recommendation to the Committee regarding whether the attorney's conduct merits sanctions. The full Committee may approve the recommendation by a majority vote or take other action it deems advisable, also by a majority vote. *Id.* at 2.6.3.3.

47. *Id.*

48. See Fed Local Ct Rules, CD Cal Rule 2.6.4.

49. Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. *Yagman*, 55 F.3d 1430 (9th Cir. 1995).

50. See *id.* at 1436.

51. See *id.* at 1437-42.

52. *Id.* at 1445.

53. See *id.* at 1437.

A. THE MAKEUP OF THE STANDING COMMITTEE

In his appeal to the Ninth Circuit, Yagman challenged the composition of the Standing Committee.⁵⁴ He claimed that several of its members had conflicts of interest that could have affected their decisions to seek disciplinary action against him.⁵⁵ However, the court quickly rejected this due process claim, noting that none of the Standing Committee members represented Judge Keller, nor did the judge stand to benefit from any disciplinary action taken against Yagman.⁵⁶ Absent a conflict of interest, the court found no other support for Yagman's due process claim.⁵⁷

B. STATEMENTS WHICH IMPUGN THE INTEGRITY OF THE COURT

In determining that Yagman's statements were protected by the First Amendment, the court first discussed the validity of Local Rule 2.5.2 and the legal standard to be used in deciding whether Yagman's statements were sanctionable.⁵⁸ In discussing the prohibition in Local Rule 2.5.2 against conduct which "impugns the integrity of the court," the Ninth Circuit relied on its opinion in *Lewis v. Time, Inc.*⁵⁹ The *Lewis* court held that the First Amendment protects statements of opinion unless they imply a false assertion of fact.⁶⁰ Applying *Lewis*,

54. *Yagman*, 55 F.3d at 1435.

55. *Id.* The Chairman of the Standing Committee represented Judge Real in *Real v. Yagman*, 484 U.S. 963 (1987) and was alleged by Yagman to have close personal ties to Judge Real. *Yagman*, 55 F.3d at 1435 n.9. Yagman also claimed that several of the other Committee members had opposed his clients in previous actions, either as defendants or opposing counsel. *Id.*

56. *Id.* at 1436.

57. *Id.* The court noted that the function of the Standing Committee is merely to assist the district court in upholding attorney disciplinary standards by relieving judges of the ungainly task of acting as both arbiters and prosecutors in disciplinary proceedings; the Standing Committee itself has no authority to impose sanctions. *Id.* In addition, the fact that the members of the Standing Committee are drawn from the Central District bar reflected a constitutionally sound judgment that the benefits of having the prosecutorial body composed of peers of the attorney outweighs any potential loss of independence resulting from the Committee members' familiarity with the attorney subject to the proceedings. *Yagman*, 55 F.3d at 1436 n.11.

58. *See id.* at 1436-38.

59. *Yagman*, 55 F.3d at 1438 (citing *Lewis v. Time Inc.*, 710 F.2d 549, 555 (9th Cir. 1983)).

60. *Id.* (citing *Lewis*, 710 F.2d at 555 and *Milkovich v. Lorain Journal Co.*, 497

the court concluded that statements capable of being proved true or false which impugn the integrity of a judge may be the basis for sanctions.⁶¹ However, if the statements express an opinion based on fully stated facts they receive First Amendment protection, so long as the facts themselves are not false or demeaning.⁶²

1. Overbreadth of the Local Rule

The Ninth Circuit concurred with the district court's determination that a portion of Local Rule 2.5.2 is overbroad.⁶³ The district court reasoned that the rule's prohibition against conduct "which impugns the integrity of the court" proscribes much constitutionally protected speech.⁶⁴ The Ninth Circuit also affirmed the district court's holding that an attorney may be sanctioned for impugning the integrity of a court only if the rule can be given a limiting construction.⁶⁵

To save this portion of Rule 2.5.2, the district court read into it an "objective" version of the malice standard.⁶⁶ This standard was originally set forth by the U.S. Supreme Court in *New York Times Co. v. Sullivan*.⁶⁷ Relying on this "objective" standard, first applied by the Ninth Circuit in *United States District Court v. Sandlin*,⁶⁸ the district court held Rule 2.5.2

U.S. 1, 19 (1990)); see also RESTATEMENT (SECOND) OF TORTS § 566 (1977) which asserts that a statement of opinion is only actionable if it implies the existence of undisclosed defamatory facts. *Yagman*, 55 F.3d at 1438.

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

62. See *id.* at 1439; See also *Lewis*, 710 F.2d at 555.

63. *Yagman*, 55 F.3d at 1436-37.

64. *Id.* The court noted that the rule purports to punish even true statements that reflect poorly on the integrity of a judge. *Id.*

65. *Id.*; Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. *Yagman*, 856 F. Supp. 1384, 1389 (C.D. Cal. 1994). The Ninth Circuit stated that a substantially overbroad restriction on protected speech is invalid unless it is "fairly subject to a limiting construction." *Yagman*, 55 F.3d at 1437 (quoting *Board of Airport Commr's v. Jews For Jesus Inc.*, 482 U.S. 569, 577 (1987)).

66. See *Standing Comm.*, 856 F. Supp. at 1389-90.

67. 376 U.S. 254 (1964). In *Sullivan* the Supreme Court held that a subjective standard would be used in defamation cases to determine whether the speaker acted with "actual malice", which is defined as having knowledge that his statement was false or with reckless disregard for the truth or falsity of the statement. See *Yagman*, 55 F.3d at 1389-90.

68. 12 F.3d 861 (9th Cir. 1993) (cited in *Yagman*, 55 F.3d at 1437).

to prohibit only false statements made with either knowledge of their falsity or statements made with reckless disregard as to their truth or falsity, as judged from the perspective of a "reasonable attorney."⁶⁹

Both the district court and the Ninth Circuit rejected Yagman's contention that the *New York Times* "subjective" malice standard should apply in attorney disciplinary proceedings.⁷⁰ Citing *Sandlin*, the Ninth Circuit noted that because the interests served in defamation actions are different from those served by the rules of professional ethics, the "objective standard" applies in attorney disciplinary proceedings.⁷¹

The Ninth Circuit also outlined other First Amendment protections ordinarily applicable in defamation actions that are available to attorneys accused of making statements which impugn the integrity of a court.⁷² The court noted that truth is a defense to sanctions imposed for violating this rule.⁷³ In addition, sanctionable statements must be capable of being proved true or false.⁷⁴ Thus, the First Amendment protects statements of opinion unless they "imply a false assertion of fact."⁷⁵ Guided by these principles, the court determined

69. *Yagman*, 55 F.3d at 1437 (citing *Standing Comm.*, 856 F. Supp. at 1389-90). Under this inquiry, the court must determine what a reasonable attorney would do in similar circumstances. *Sandlin*, 12 F.3d at 867. The inquiry focuses on whether the attorney possessed a reasonable factual basis for making the statements, taking into account their nature and the context in which they were made. *Yagman*, 55 F.3d at 1437 (citing *Sandlin*, 12 F.3d at 867).

70. See *Standing Comm.*, 856 F. Supp. at 1390; see also *Yagman*, 55 F.3d at 1437.

71. See *Yagman*, 55 F.3d at 1437-38. Defamation seeks to remedy a private wrong to an individual's reputation by compensating that person. *Id.* at 1437. Unlike defamation law, ethical standards proscribing false statements which impugn the integrity of a court are designed to maintain public confidence in the judicial system, rather than shield its judges from harsh criticism or compensate them in any way. *Id.* at 1438. In analyzing *Sandlin*, the Ninth Circuit in *Yagman* found that the objective standard maintained a constitutionally permissible balance between the right of attorneys to criticize judges and the public interest in preserving confidence in the judicial system. *Id.*

72. See *id.* at 1438.

73. *Yagman*, 55 F.3d at 1438 (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). In addition, the disciplinary body bears the burden of proving the statement false. *Yagman*, 55 F.3d at 1438 (citing *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) and *Oklahoma ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 969 (Okla. 1988)).

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

75. *Id.* (citing *Milkovich*, 497 U.S. at 19 (1990); *Lewis*, 710 F.2d at 555; and

whether the statements attributed to Yagman impugned the integrity of the court.

2. Accusation of Anti-Semitism

The Ninth Circuit first considered Yagman's statement in the *Daily Journal* accusing Judge Keller of anti-Semitism.⁷⁶ Though the district court concluded that this statement was entirely an assertion of fact, the Ninth Circuit viewed it as both an assertion of fact and an expression of opinion.⁷⁷ An opinion based on fully disclosed facts will be sanctioned only if the stated facts themselves are false and demeaning.⁷⁸ Because the Committee did not claim that Yagman's factual assertion was false, and because Yagman disclosed the basis for his view that Judge Keller is anti-Semitic, the Ninth Circuit found his remark to be protected by the First Amendment as an expression of opinion based on fully stated facts.⁷⁹

3. Accusation of Dishonesty

The Ninth Circuit disagreed with the district court's determination that Yagman's allegation of Judge Keller's "dishonesty" was sanctionable.⁸⁰ For such a statement to be the sub-

RESTATEMENT (SECOND) OF TORTS § 566 (1977)). The court also noted that statements which cannot reasonably be interpreted as stating actual facts about their subject are not sanctionable, even though they might initially appear to be factual assertions. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)). In *Hustler* the Supreme Court rejected a libel claim filed by a nationally known minister's against a magazine. The claim arose from the publication of an advertisement "parody" which, among other things, portrayed the minister as having a drunken, incestuous encounter with his mother in a outhouse. *Hustler*, 485 U.S. 46 (1988)). The court affirmed a jury verdict which found that the parody could not reasonably be interpreted as stating actual facts about the minister. *Id.* at 57.

76. *Yagman*, 55 F.3d at 1438. See also *supra* text accompanying note 16.

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

78. *Id.* at 1439 (citing *Lewis*, 710 F.2d 549, 555-56 and RESTATEMENT (SECOND) OF TORTS § 566, cmt. c). The court explained the rationale behind this rule: "When the facts forming the basis of an opinion are disclosed, the readers will understand that they are getting the author's interpretation of the facts and, therefore, will not likely assume the statement is based on additional, undisclosed facts." *Id.* at 1439 (citing *Phantom Touring Inc. v. Affiliated Publications*, 953 F.2d 724, 730 (1st Cir. 1992) and *Lewis*, 710 F.2d at 555)).

79. *Yagman*, 55 F.3d at 1440.

80. *Id.* at 1441.

ject of sanctions, it must first be capable of being proved true or false.⁸¹ The district court found that the statement “contain[ed] provably false factual connotations . . . and plainly impl[ie]d] past improprieties.”⁸² However, the Ninth Circuit held that, when considered in context with the other statements, his remarks could only be understood as “rhetorical hyperbole.”⁸³ The Ninth Circuit found that, because Yagman’s allegation of dishonesty did not imply facts capable of verification, it was protected by the First Amendment as a statement of opinion.⁸⁴

4. Accusation Of Drunkenness

The Ninth Circuit noted that, unlike the string of colorful terms Yagman used to describe Judge Keller in the Prentice Hall letter, the accusation that the judge was “drunk on the bench” was not protected as a statement of rhetorical hyperbole because it implied facts capable of objective verification.⁸⁵ However, for the accusation to serve as a basis for sanctions, the Standing Committee was required to prove that the statement was false, which it failed to do.⁸⁶ Without proof of falsity, the court held that Yagman’s accusation of drunkenness could not support a sanction for impugning the integrity of the court.⁸⁷

81. *Id.* at 1438 (citing *Milkovich*, 497 U.S. at 19).

82. *Standing Comm.*, 856 F. Supp. at 1391.

83. *Yagman*, 55 F.3d at 1440. Yagman used a string of harsh terms to describe Judge Keller. See *supra* note 19.

84. *Yagman*, 55 F.3d at 1441. Unlike the district court, the Ninth Circuit believed the accusation could not reasonably be interpreted as accusing Judge Keller of criminal misconduct. *Id.* at 1440. At most, the appellate court thought the accusation could be construed to imply that the judge was “intellectually dishonest,” that is, Yagman might have been accusing Judge Keller of making rulings which were overly result-oriented. *Id.* at 1441. The court stated that such an allegation of “intellectual dishonesty” could not be proved true or false by reference to a “core of objective evidence,” and is thus not sanctionable. *Id.* (citing *Milkovich*, 497 U.S. at 21).

85. See *id.* at 1441. See *supra* note 19 for the text of the letter. The statement was not part of the letter to Prentice Hall, but was a remark allegedly made to a newspaper reporter. *Yagman*, 55 F.3d at 1441. The court also found nothing that took away from the literal meaning of the words used by Yagman. *Id.* The court held that the statement could reasonably be interpreted to imply that Judge Keller had taken the bench at least once while he was intoxicated. *Id.*

86. *Id.* The Ninth Circuit found that the district court improperly shifted the burden of proof on this issue to Yagman. *Id.* at 1441 n.21.

87. *Yagman*, 55 F.3d at 1441-42 (citing *Oklahoma ex rel. Oklahoma Bar Ass’n*

C. CONDUCT WHICH INTERFERES WITH THE ADMINISTRATION OF JUSTICE

The district court found that Yagman's statements interfered with the administration of justice because they were made in an attempt to cause Judge Keller to recuse himself from cases in which Yagman appeared as counsel.⁸⁸ In reaching its conclusion, the district court focused on Yagman's intent in making the statements.⁸⁹ However, the Ninth Circuit did not consider Yagman's intent to "judge shop" sufficient to support a sanction.⁹⁰ In reversing the sanction for interfering with the administration of justice the court instead focused on the likelihood that Yagman's conduct would actually prejudice the administration of justice, rather than on his purpose in making the statements.⁹¹

1. A New Standard

To determine whether the likelihood of Judge Keller's voluntary recusal was great enough to warrant sanctions, the Ninth Circuit had to decide what standard should be used to measure this probability.⁹² The court relied on the United States Supreme Court's decision in *Gentile v. State Bar of Nevada*⁹³ to resolve this issue.⁹⁴ *Gentile* held that speech otherwise entitled to constitutional protection may be prohibited if it obstructs or prejudices the administration of justice.⁹⁵ To determine the likelihood that an attorney's statements will prejudice a court proceeding, the *Gentile* Court rejected using a "clear and present danger standard."⁹⁶ Instead, the Court chose a lower standard, holding that lawyers involved in pending cases may be punished if their statements pose a "substan-

v. Porter, 766 P.2d 958, 969 (Okla. 1988)).

88. See *Standing Comm.*, 856 F. Supp. at 1392.

89. *Id.*

90. *Id.* at 1442-44.

91. *Id.* at 1442.

92. *Id.* at 1442-44.

93. 501 U.S. 1030 (1991).

94. *Yagman*, 55 F.3d 1442-43.

95. *Id.* at 1442 (citing *Gentile*, 501 U.S. at 1074-75; see also *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966)).

96. *Id.* at 1442 (citing *Gentile*, 501 U.S. at 1075).

tial likelihood” of materially prejudicing the fairness of the proceeding.⁹⁷

Although the Ninth Circuit examined the reasoning of *Gentile* in the present case, it found the special considerations present in *Gentile* to be of limited concern in Yagman’s situation, since no case was pending before the court.⁹⁸ Of these considerations, the *Gentile* Court focused most strongly on the “fair trial rights of litigants.”⁹⁹ As there was no case before the court and thus no jury venire to prejudice, such rights were of little concern in Yagman’s case.¹⁰⁰

The Ninth Circuit also noted that speech restrictions not limited in duration by a particular trial may go far beyond postponing otherwise protected speech, as they may permanently inhibit any criticism of judges, regardless of whether the criticism is true or false.¹⁰¹ Due to the absence of these considerations, the Ninth Circuit concluded that the “substantial likelihood” standard would be unnecessarily restrictive in the present case.¹⁰² Upon rejecting the “substantial likelihood” test, the Ninth Circuit applied a new standard by holding that the “clear and present danger” test is applicable to attorney statements if no case is pending before the court.¹⁰³

2. The “Clear and Present Danger” Standard

Under the Ninth Circuit’s new standard, an attorney’s statements unrelated to a case pending before the court may only be sanctioned if they pose a clear and present danger to

97. *Id.*

98. *Id.* at 1443.

99. *Yagman*, 55 F.3d at 1443 (citing *Gentile*, 501 U.S. at 1068). The *Gentile* court was particularly concerned with the effect of extrajudicial statements on potential jurors. *Id.*

100. *Id.* at 1443.

101. *Id.*

102. *Id.* “Much speech of public importance – such as testimony at congressional hearings regarding the temperament and competence of judicial nominees – would be permanently chilled if the rule in *Gentile* were extended beyond the confines of the pending matter.” *Yagman*, 55 F.3d at 1443.

103. *Id.* The court found accord in *In re Hinds*, 449 A.2d 483, 498 (N.J. 1982). *Id.*

the court's administration of justice.¹⁰⁴ The Ninth Circuit noted that even the probability of harm does not amount to a clear and present danger;¹⁰⁵ the "substantive evil must be extremely serious and the degree of imminence must be extremely high before utterances can be punished."¹⁰⁶ The court observed that established precedent has held criticisms such as Yagman's to be insufficient to force the recusal of the judge at which it was aimed.¹⁰⁷ The majority noted: "Criticism from a party's attorney creates an even remoter danger that a judge will disqualify himself because the federal recusal statutes, in all but the most extreme circumstances, require a showing that the judge is (or appears to be) biased or prejudiced against a party, not counsel."¹⁰⁸ The court also noted that public criticism of judges is not uncommon and does not often lead to the judge's recusal.¹⁰⁹ Federal judges have been granted life tenure to shield them from the pressure of such criticisms.¹¹⁰ These factors led the Ninth Circuit to conclude that Yagman did not interfere with the administration of justice because any possibility that Yagman's statements would cause Judge Keller to recuse himself in future cases involving Yagman did not amount to a clear and present danger to the proper functioning of the courts.¹¹¹ Because his statements did not pose such a danger, Yagman could not be sanctioned for interfering with the administration of justice.¹¹²

104. *Yagman*, 55 F.3d at 1443.

105. *Id.* at 1444 (citing *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

106. *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)).

107. *Id.*

108. *Id.* (citing *United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985)). See also *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987); *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1398-99 (8th Cir. 1983). *Yagman*, 55 F.3d at 1444.

109. *Yagman*, 55 F.3d at 1444. The court also noted that Judge Real did not recuse himself in *Yagman v. Republic Ins.*, 137 F.R.D. 652 (C.D. Cal. 1991), despite being the target of harsh criticism by Yagman. *Id.* at 1444-45.

110. *Id.* (citing *In re Bernard*, 31 F.3d 842, 846 n.8 (9th Cir. 1994)).

111. *Yagman*, 55 F.3d at 1445. The Ninth Circuit acknowledged that after Yagman made the remarks at issue Judge Keller did recuse himself from a subsequent case in which Yagman was involved. Although the judge stated that his recusal was based on the fact that he had referred Yagman for discipline rather than Yagman's criticism itself, the court found the basis for recusal beside the point. Instead the majority's analysis "focuse[d] on objective probabilities: the extent to which the statements in question would be likely to cause a judge of average fortitude to disqualify himself." *Id.* at n.25.

112. *Id.*

V. CRITIQUE

The Ninth Circuit applied a new standard in *Standing Committee v. Yagman*¹¹³ by holding that an attorney's statements unrelated to a matter pending before the court may be punished only if they pose a clear and present danger to the administration of justice.¹¹⁴ An examination of Yagman's past experiences concerning the recusal of judges before whom he has appeared casts doubt on whether the clear and present danger standard is low enough to prevent attorneys from improperly influencing the justice system.¹¹⁵

In September 1981, Yagman simultaneously filed five substantially similar complaints in the Central District of California and dismissed four of them within 73 minutes after they had been assigned to judges.¹¹⁶ The Standing Committee pursued disciplinary action which was resolved by a stipulated settlement.¹¹⁷ The settlement provided that Yagman would be suspended from the practice of law for one month, pay a \$500 fine and perform twenty-five hours of pro bono service.¹¹⁸

Following the settlement, Yagman represented the plaintiff in a civil rights case before Judge Harry L. Hupp.¹¹⁹ After the jury rendered a verdict for the defense, Yagman immediately filed a new action charging the defendants and their lawyers with racketeering, mail fraud and obstruction of justice.¹²⁰ The action also alleged that Judge Hupp conspired with the defendants and their counsel to obstruct justice.¹²¹ A

113. *Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

114. *Id.* at 1443 *accord*, *In re Hinds*, 449 A.2d 483, 498 (N.J. 1982).

115. *See* *Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman*, 856 F. Supp. 1384, 1392-1394 (C.D. Cal. 1994) and *infra* text accompanying notes 121-33.

116. *Standing Comm.*, 856 F. Supp. at 1393.

117. *Id.* The American Bar Association Model Rules of Professional Conduct prohibit filing frivolous or non-meritorious claims and contentions. *See, e.g.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1994).

118. *Id.* Yagman admitted he had committed acts in violation of Local Rule 2. *Id.*

119. *Id.*

120. *Standing Comm.*, 856 F. Supp. at 1393.

121. *Id.*

motion to dismiss was granted, but Judge Hupp recused himself from all post-trial proceedings and has since declined to hear any case in which Yagman represents a party.¹²²

In addition to Judge Hupp's recusal, approximately one year after the decision, the Ninth Circuit removed Chief Judge Manuel Real from a case involving Yagman.¹²³ The appellate court issued the recusal order after Yagman criticized the judge and accused him of bias.¹²⁴ Finally, the Ninth Circuit acknowledged that Judge Keller did disqualify himself from one of Yagman's cases after the criticisms in the present case were made.¹²⁵

Given this history, it appears that under the clear and present danger standard, an attorney may still force the recusal of a judge, so long as the judge does not recuse himself immediately after the statement is made.¹²⁶ But even under the clear and present danger standard, Yagman's statements should be sanctionable, since in the cases involving Judge Real, Judge Hupp and even Judge Keller, Yagman's accusations either directly or indirectly forced their recusal from future proceedings.¹²⁷ Considering Yagman's record with the recusal of judges, it appears likely that his allegations of bias pose a clear and present danger to the administration of justice even if no matter is pending before the court.¹²⁸

122. *Id.* (citing Hupp Declaration, September 20, 1993, at 2).

123. *Id.* at 1393.

124. *Id.* The circumstances of the removal are discussed in more detail in Facts and Procedural History. See *supra* text accompanying note 9. Yagman also issued a statement to the press which stated that the judge "consistently has been held in the lowest regard by virtually the entire legal community since he took the bench," and accused him of suffering from "mental disorders". *Standing Comm.*, 856 F. Supp. at 1394.

125. *Yagman*, 55 F.3d at 1445 n.25. However, Judge Keller stated that his recusal was motivated by the fact that he had referred Yagman for disciplinary action. *Id.*

126. See generally *id.*

127. See *id.* at 1445; See also *Standing Comm.*, 856 F. Supp. 1393-94.

128. See *Yagman*, 55 F.3d at 1444-45 for the court's discussion of the clear and present danger standard as it applied to Yagman's statements.

VI. CONCLUSION

In *Standing Committee v. Yagman*,¹²⁹ the Ninth Circuit held that an attorney's criticisms of a judge were statements of opinion which are protected by the First Amendment.¹³⁰ The court found that, taken together, Yagman's calling Judge William Keller a "buffoon," a "sub-standard human" and "dishonest" can only be viewed as rhetorical hyperbole, and thus prove nothing more substantive than Yagman's contempt for the judge.¹³¹ However, the Ninth Circuit did not view his accusation of anti-Semitism as rhetorical hyperbole, but as an assertion of both fact and opinion.¹³² The court held this assertion to be protected by the First Amendment because Yagman had stated the facts on which he based his opinion.¹³³ Similarly, the Ninth Circuit did not view Yagman's accusation that Judge Keller was "drunk on the bench" as rhetorical hyperbole, because it implied facts capable of objective verification.¹³⁴ However, because the Standing Committee failed to prove the statement false, a sanction for "impugning the integrity of the court" could not stand.¹³⁵

The Ninth Circuit also reversed a sanction for "interfering with the administration of justice."¹³⁶ In reaching this conclusion, the court announced a new application of an old standard: "[l]awyers' statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice."¹³⁷ Ap-

129. *Standing Comm. on Discipline of the U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

130. *See id.* at 1437-42.

131. *Id.* at 1440.

132. *Id.* at 1438.

133. *Id.* at 1440.

134. *Yagman*, 55 F.3d at 1441.

135. *Id.* at 1441-42.

136. *Id.* at 1445.

137. *Id.* at 1443.

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plying this standard, the Ninth Circuit concluded that the probability of this danger occurring did not reach the level of "clear and present."¹³⁸ Therefore, attorney sanctions were inappropriate.¹³⁹

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138. *See id.* at 1444.

139. *See Yagman*, 55 F.3d at 1444-45.

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