Grievance Administrator,

Petitioner/Appellant

v

Geoffrey N. Fieger, P-30441,

Respondent/Appellee

94-186-GA

Decided: September 2, 1997

BOARD OPINION

This case has been before the Board previously. The formal complaint alleges that respondent made knowingly false or reckless statements about various judges and a county prosecutor in violation of MRPC 8.2(a) and other rules. Respondent moved for summary disposition under MCR 2.116(C)(8) and (10). The hearing panel granted respondent's motion for summary disposition under MCR 2.116(C)(10), but did not address the arguments based on MCR 2.116(C)(8). Our previous opinion ("Fieger I") stated in part:

> We conclude that summary disposition under MCR 2.116(C)(10) as to the question whether respondent made the alleged statements with actual malice is not appropriate in this case. If respondent's intent becomes the dispositive issue in this case, we conclude that a full hearing is the appropriate and necessary means for the panel to decide the question.
>
> Accordingly, we vacate the panel's order granting summary disposition and remand for further proceedings, which may include additional proceedings under MCR 2.116(C)(8).

After remand, the panel received further briefing and heard arguments on respondent's motion under MCR 2.116(C)(8). The panel granted the motion and dismissed all three counts of the formal complaint. We now affirm the dismissal of Count III, reverse the dismissal of Counts I and II, and remand this matter to the panel

for hearing.

I. Panel Proceedings and Arguments on Review.

The panel made several rulings in dismissing the complaint pursuant to MCR 2.116(C)(8), including the following:

> Some of the statements allegedly made by respondent are not prohibited by MRPC 8.2(a);
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> Some of the statements allegedly made by respondent are constitutionally protected;
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> Rule 8.2(a) is violative of the First Amendment and the Equal Protection Clause; and,
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> The MRPC 8.4 and MCR 9.104 claims should be dismissed because they fail to state a claim or are overbroad.

Respondent challenges the rules he is alleged to have breached as overbroad and violative of the First Amendment. Amicus Curiae, the American Civil Liberties Union of Michigan, argues that the rules relied on by the Grievance Administrator are overbroad, vague, and violative of the First Amendment as applied.

II. The Constitutionality of Rule 8.2(a): Our Prior Holding and the Applicable Law.

In Fieger I, we held:

> In this case, each of the three counts in the formal complaint allege a violation of MRPC 8.2(a), which provides:
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> > 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, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.
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> Under New York Times v Sullivan 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), a person may not be held civilly or criminally liable for defamatory statements unless the statements were made with "actual malice," i.e., unless the person made "a false statement . . . with knowledge that it was false or with reckless disregard of whether it was

> false or not." Garrison v Louisiana, 379 US 64, 67; 85 S Ct 209, 212; 13 L Ed 2d 125 (1964) (overturning criminal libel conviction of district attorney for disparaging comments regarding 8 judges).
>
> According to a leading commentator,[8] "Rule 8.2(a) incorporates the First Amendment standard for criticism of public officials, as articulated by the Supreme Court in New York Times v Sullivan and its progeny."[9] Although other rule violations are alleged against respondent, the Administrator appears to concede that discipline may only be based on statements regarding the integrity or qualifications of persons denominated in MRPC 8.2(a) if the scienter requirement of that rule, which is to say the actual malice standard of New York Times v Sullivan, is established. This is a proper concession. The rules of professional conduct are subject to the First Amendment. Moreover, if a specific rule governs the alleged conduct, its terms should take precedence over those of a more general rule.
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> [8] Geoffrey C. Hazard, Jr., who served as Reporter for the American Bar Association Special Commission on Evaluation of Professional Standards (Kutak Commission), which proposed to the ABA House of Delegates what eventually became the Model Rules of Professional Conduct.
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> [9] Hazard & Hodes, The Law of Lawyering (2d ed), §8.2:201, p 934. Although a literal reading of the second prong of the rule (proscribing statement made "with reckless disregard as to its truth or falsity,") may suggest that recklessness is disciplinable regardless of falsity, the commentators agree that "Rule 8.2(a) is limited to matters of fact that can be proven false, as is the case with libel and slander." Id.; see also Wolfram, Modern Legal Ethics, p 601 n 51, p 602 n 54.
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This passage from our previous opinion resolves several issues raised by respondent below, raised by the panel opinion now before us, and raised by respondent and amicus in this review.

A. Does Rule 8.2(a) Incorporate, or Violate, the First Amendment?

Respondent's argument that rule 8.2(a) violates the First Amendment lacks merit.

1. New York Times, Gentile, And The Clear And Present Danger Doctrine.

Respondent argues that "lawyer speech may [only] be penalized through the disciplinary mechanism . . . [where] . . . there is a substantial likelihood of materially prejudicing an adjudicative proceeding, Gentile v State Bar of Nevada, 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991), or where there is a clear and present danger to the administration of justice. Bridges v California, 314 US 252 (1941)." (Respondent's Supplemental Post-Argument Memorandum, p 5.) Amicus also urges that Gentile is dispositive.

The Supreme Court has never treated First Amendment guarantees as absolute. Instead, it has employed various formulations, tests, or doctrines to balance First Amendment rights against other critically important values. "One of the standards the Supreme Court first developed to justify abridgement of freedom of expression for the benefit of society is the 'clear and present danger' test." 4 Rotunda & Nowak, Treatise on Constitutional Law: Substance & Procedure (2d ed), § 20.12, p 52.

The clear and present danger doctrine had its origin in cases involving resistance to US involvement in World War I, and it was for a time applied to cases not involving sedition. 4 Rotunda & Nowak, supra, § 20.13, p 61 n 39. Today, the test may still be applied in contempt of court cases involving criticism of judges where it is alleged that the speech will be prejudicial to the administration of justice. Id., at pp 61-62. "However, outside of the contempt of court cases, different tests had to be developed to evaluate the competing interests where the governmental restraints are placed on different types of speech, such as obscenity or defamation." Id., at p 62.

In Gentile, supra, Justice Rehnquist, writing for the Court, acknowledged that the First Amendment has been held "to require a showing of 'clear and present danger' that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial." 111 S Ct at 2743. However, Justice Rehnquist's majority opinion concludes that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press . . . ." 111 S Ct at

2744.

The Gentile decision offers only a little guidance in this case. Gentile, a Nevada lawyer, held a press conference shortly after his client was indicted. Six months later, Gentile's client was acquitted on all counts following a jury trial. The State Bar of Nevada then filed a complaint against Gentile alleging a violation of Nevada's version of Model Rule of Professional Conduct 3.6 on pretrial publicity.[1] The Court found that the rule's "substantial likelihood of material prejudice" standard struck "a constitutionally permissible balance between the First Amendment rights of attorneys and the state's interest in fair trials." 111 S Ct at 2745.

In contrast to Gentile, the formal complaint in this case does not charge respondent with violation of MRPC 3.6 or any other rule dealing with statements by an attorney which could have an impact on the outcome of a trial or which could influence a jury. Rather, the formal complaint alleges that respondent made false statements with knowledge of their falsity or with reckless disregard as to their truth or falsity.

We find nothing in Gentile which suggests that the framework for deciding all cases involving attorney speech must be found either in that decision or in cases applying the clear and present danger doctrine. The decision of the Ninth Circuit in Standing Committee on Discipline v Yagman, 55 F3d 1430 (CA 9, 1995), might be said support such a view, if the following paragraph were read literally and by itself:

> We conclude, therefore, that lawyers' 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. [Yagman,

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[1] Nevada Rule 177(1) prohibits an attorney from making:

> 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.

Other portions of the rule list statements ordinarily likely to cause material prejudice as well as statements that can be made without fear of discipline.

55 F3d at 1443.]

This passage from Yagman cannot be read literally, however. A rule prohibiting lawyer conduct that "interferes with the administration of justice" was at issue in that part of the opinion. Elsewhere in the same opinion, the court applied New York Times and other First Amendment authorities to a rule prohibiting attorneys from engaging in conduct that "degrades or impugns the integrity of the Court." A substantial body of caselaw has developed in which the courts have applied (or purported to apply) New York Times while construing MRPC 8.2(a) or similar rules in attorney discipline matters. See section III, infra.

Perhaps this trend was started by the Supreme Court's application of New York Times in a criminal case involving a New Orleans District Attorney who held a press conference at which he accused the eight judges of a criminal court of laziness, inefficiency, and worse. The District Attorney also accused the judges of hampering his vice investigations by refusing to disburse funds to his office. Among other things, he said: "'This raises interesting questions about the racketeer influences on our eight vacation-minded judges.'" Garrison v Louisiana, 379 US 64, 66; 85 S Ct 209, 211; 13 L Ed 2d 125 (1964).

In Garrison, the Court applied the rule of New York Times to a criminal libel prosecution, holding:

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . .," [New York Times,] 376 U.S. at 271-272, 84 S. Ct. at 721, 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. [Garrison, 379 US at 74-75; 85 S Ct at 216.]

The clear and present danger doctrine had been rejected by the Louisiana Supreme Court as irrelevant to Garrison's prosecution

under the criminal libel statute. Garrison, 379 US at 70; 85 S Ct at 213. Thus, the Court was confronted with a perfect opportunity to refine or extend the clear and present danger doctrine, and it applied New York Times instead.

None of this is to suggest that attorney speech is deserving of a low level of constitutional protection. We simply reiterate our choice of New York Times from among what has been called "the befuddling array of theories, methods, formulas, tests, doctrines and subject areas" which constitute modern free speech jurisprudence. 1 Smolla, Smolla & Nimmer on Freedom of Speech (3d ed), §2:2, p 2-3. The choice may not make much difference. As this treatise has explained:

> This ["actual malice"] standard, created in New York Times, is widely understood as extremely protective of freedom of speech, though it is not, technically, either the "strict scrutiny" or "intent to incite imminent lawless action" test familiar in other First Amendment contexts. It is perfectly sensible, nonetheless, to classify the Court's New York Times libel standard as a variant of "heightened scrutiny," supplying essentially the same level of protection . . . but adapted to the context of libel litigation. [Smolla & Nimmer, Freedom of Speech, supra, §2:12, p 2-9.]

Having reaffirmed our determination that New York Times governs here, we now examine whether MRPC 8.2(a) fits within its strictures.

2. Rule 8.2(a) Provides Only For Discipline Of Attorneys Who Make False Statements With The High Degree Of Culpability Which Renders The Statements Unprotected By The First Amendment.

Respondent argues that "MRPC 8.2(a) does not require that a statement about a government official be false," and that "in contrast to Sullivan, true statements may be penalized under MRPC 8.2(a)." Respondent's brief, pp 4, 6. This construction has been rejected by commentators and by this Board (see Fieger I, at p 8, quoted supra). We need not further address this portion of the argument.

Additionally, respondent contends:

> As regards Rule 8.2(a), the State cannot, consistent with the First Amendment, have any valid interest in prohibiting a lawyer from making a "knowingly false" statement concerning the qualifications or integrity of a judge. [Respondent's brief, p 12.]

Respondent further argues that "governmental sanctioning of 'knowingly false' statements could have a serious chilling effect on the discussion of issues of public concern." Id. The hearing panel's citation to the concurring opinions in New York Times may indicate that the panel agreed. However, the majority opinion in New York Times clearly establishes that false statements made with knowledge of their falsity, or with reckless disregard for their truth or falsity, are not constitutionally protected. 376 US at 279-280; 84 S Ct at 726. This proposition is simply not subject to debate.[2]

The state of the applicable law is generally set forth in the Court's relatively recent, and thoroughly unified, decision in Hustler Magazine v Falwell, 485 US 46, 50-52; 108 S Ct 876, 879-880; 99 L Ed 2d 41 (1988). After surveying and endorsing the Court's previous opinions, Justice Rehnquist summed up the reason for the actual malice standard:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for truth and the vitality of society as a whole." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-504, 104 S.Ct. 1949, 1961, 80 L.Ed.2d 502 (1984). We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea. Gertz v Robert Welch, Inc., 418 U.S. 323, 339, 94 S. Ct. 2997, 3007, 41 L.Ed.2d. 789 (1974).

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[2] See also, Garrison v Louisiana, 379 US 64, 75; 85 S Ct 209, 216; 13 L Ed 2d 125 (1964) ("the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection")

* * *

> "Freedoms of expression require 'breathing space.'" Philadelphia Newspapers, Inc. v Hepps, 475 U.S. 767, 772, 106 S.Ct. 1558, 1561, 89 L.Ed.2d. 783 (1986) (quoting New York Times, supra, 376 U.S. at 272, 84 S.Ct. at 721). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability. [Hustler Magazine v Falwell, 485 US 46, 50-52; 108 S Ct 876, 879-880; 99 L Ed 2d 41 (1988). Emphasis in original.]

Calculated falsehoods are not entitled to constitutional protection because "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." Garrison v Louisiana, 379 US at 75; 85 S Ct at 216.

The lines drawn by the Supreme Court are easily adapted to the field of attorney discipline. Few duties imposed upon lawyers serve to protect the public, the courts, and the profession more than the basic obligation to tell the truth. Our Rules of Professional Conduct proscribe knowingly false statements of material fact in numerous contexts. See, e.g., MRPC 3.3, 4.1, and 8.1. See also MRPC 8.4(b). This Board has taken an attorney's deliberate misrepresentations most seriously:

> "Truth is the cornerstone of the judicial system, and the practice of law requires an allegiance and a fidelity to truth." [Citation omitted.] In this case, Respondent has been untruthful to her client and untruthful in her response to the legitimate inquiry of our Supreme Court's investigative arm. Inasmuch as the license to practice law in Michigan is considered to be a proclamation to the public and the legal profession that the holder is fit to act in matters of trust and confidence, we believe that revocation of that license is an appropriate sanction when an attorney violates the fundamental obligation to be truthful. This would seem to be especially true when a deliberate, calculated intent to deceive is evidenced by the preparation of a forged document. [Grievance Administrator v Mary E. Gerisch, ADB 171-87; 197-87 (ADB 1988).]

Consistent with the Rules' other proscriptions against lying,

MRPC 8.2(a) prohibits an attorney from propagating falsehoods as to the qualifications or integrity of public legal officials when the attorney knows of the statement's falsity, or publishes the false statement "with reckless disregard as to its truth or falsity." In this context, "reckless disregard" means that the attorney "must have made the false publication with a 'high degree of awareness of . . . probable falsity,' . . . , or must have 'entertained serious doubts as to the truth of his [or her] publication.'" Harte-Hanks Communications, Inc v Connaughton, 491 US 657, 667; 109 S Ct 2678, 2686; 105 L Ed 2d 562 (1989).

Rule 8.2(a) does not violate the First Amendment.

B. Rule 8.2(a) Does Not Violate Equal Protection.

The panel concluded that Rule 8.2(a) violates the Equal Protection Clauses of the Michigan and federal constitutions. We conclude that it does not.

> Equal protection of the law is guaranteed by the federal and state constitutions. The Michigan and federal Equal Protection Clauses offer similar protection. Doe v Dep't of Social Services, 439 Mich 650, 670-671; 487 NW2d 166 (1992). Unless the discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry under the Equal Protection Clause is whether the classification is rationally related to a legitimate governmental purpose. Id, at 662. [Frame v Nehls, 452 Mich 171, 183; 550 NW2d 739 (1996).]

See also Guarino v Brookfield Twp Trustees, 980 F2d 399, 410 (CA 6, 1992).

A class is suspect "only if it exhibits 'the traditional indicia of suspectness. . . .'" American States Ins Co v Michigan Dep't of Treasury, 220 Mich App 586, 593-594; 560 NW2d 644 (1996). Clearly, respondent is not a member of a suspect class.

When a rule regulating the conduct of the bar "run[s] afoul of the First Amendment in a significant or substantial manner, then the courts are obliged to invoke strict constitutional scrutiny." Berger v Supreme Court of Ohio, 598 F Supp 69, 75 (SD Ohio, 1984). But, MRPC 8.2 does not "run afoul" of the First Amendment. It

provides for professional discipline only when an attorney makes statements not subject to constitutional protection. Accordingly, strict scrutiny is not triggered. Compare In Re Grand Jury Proceedings, 810 F2d 580, 587 (CA 6, 1987) (rejecting claim that statute interferes with fundamental right in light of court's reading of First Amendment caselaw).

The question remaining is whether the classifications inherent in the rule pass the rational basis test. Under this test, the statute or rule in question is "given a strong presumption of constitutionality." Rotunda & Nowak, supra, §18.3, p 21. See also Vargo v Sauer, 215 Mich App 389, 394-395; 547 NW2d 40 (1996). "This presumption requires the court to inquire whether '"any state of facts either known or which could reasonably be assumed affords support."'" Brown v Manistee Co Rd Comm'n, 452 Mich 354, 362; 550 NW2d 215 (1996). See also, In Re Grand Jury, supra, at 587. "The constitution '"is offended only if the classification rests on grounds wholly irrelevant to the achievement of the [legislative] objective."'" Vargo, supra, citing McGowan v Maryland, 366 US 420, 425-426 (1961).

We need not look far to find a legitimate governmental purpose for a rule which prohibits intentional lies, or statements that were made after the respondent "in fact entertained serious doubts as to the truth of his [statement]." St Amant v Thompson, 390 US 727, 731; 88 S Ct 1323; 20 L Ed 2d 262 (1968). The United States Supreme Court has recognized that a state "has an interest in protecting the good repute of its judges, like that of all other public officials." Landmark Communications, Inc., v Virginia, 435 US 839, 841-842; 98 S Ct 1535, 1543; 56 L Ed 2d (1978). However, "injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" Id (emphasis added). Therefore, when a state attempts to curtail First Amendment rights, strict scrutiny is required. But, where, as here, no such curtailment is attempted, the interest recognized by the Court as a valid one surely satisfies the rational basis test.

The panel was troubled by the fact that Rule 8.2(a) "creates an exalted class for judges, adjudicative officers, public legal

officers, and candidates for judicial or legal office" (Panel Op, p 23). It is true that knowingly false or reckless statements about most lawyers, and indeed all nonlawyers, are not covered by MRPC 8.2(a). However, this does not amount to an equal protection violation: a legislature or rulemaking body need not attack all aspects of a problem at once. In Re Grand Jury Proceedings, 810 F2d at 588, quoting Katzenbach v Morgan, 384 US 641 (1966).

Further, we are not certain that a false statement made with actual malice about a fellow attorney not specified in Rule 8.2(a), or a nonlawyer, would necessarily escape discipline. See MRPC 8.4(b) (proscribing conduct involving "dishonesty, fraud, deceit, [or] misrepresentation" and reflecting adversely on the lawyer's "honesty, trustworthiness, or fitness as a lawyer"). In determining the constitutionality of the Michigan Rules of Professional Conduct, this Board must "look to the provisions of the whole law." Frame v Nehls, supra, at 183. And, when we do so, we see ample condemnation throughout those rules for the type of conduct sanctionable under MRPC 8.2(a) and New York Times.

There is a rational basis for MRPC 8.2(a). The Supreme Court of Michigan, acting in its rulemaking capacity, may provide for the discipline of lawyers who make false statements not protected by the First Amendment about the integrity or qualifications of judges, other adjudicators, public legal officers, or candidates for judgeships.

III. The New York Times Standard As Applied To Attorneys In Discipline Proceedings.

We have repeatedly said that New York Times applies to this case. We must now explain the implications of this holding in some detail. In the interest of adjudicative economy, we will articulate our view of the applicable law to give guidance to the panel and the parties who must try this case on remand.

A state may discipline an attorney for a statement concerning the qualifications or integrity of the persons enumerated in MRPC 8.2(a), if the statement is (1) false, and (2) known by the attorney to be false or made "with reckless disregard as to its

truth or falsity." MRPC 8.2(a); New York Times, supra. The concept of knowing misrepresentation is familiar and the term is self-explanatory. However, "reckless disregard" is a term of art that cannot be loosely employed without seriously undermining the holding in New York Times and subsequent cases.

A. "Reckless Disregard."

In New York Times v Sullivan and subsequent cases, recklessness has a distinct meaning. "Reckless disregard" under these First Amendment cases is not based on what the reasonable speaker or publisher would have done. It is a subjective test, and the speaker's actual state of mind is paramount:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." [2 Smolla & Nimmer on Freedom of Speech, §23:3, p 23-12, quoting St Amant v Thompson, 390 US 727, 731; 88 S Ct 1323; 20 L Ed 2d 262 (1968).]

The Court has recognized that the standard is a high one:

> But, New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. [St Amant, 390 US at 732.]

Although the actual malice standard is a subjective one, a case may not be defeated by mere "[p]rofessions of good faith." Id. Courts may infer actual malice from objective facts. Smolla, Law of Defamation, §3.14, pp 3-38 -- 3-42. "Failure to investigate

does not itself establish" reckless disregard, St Amant, 390 US at 733. However, if it is coupled with other evidence which establishes -- to the requisite constitutional standard of proof -- subjective awareness of the probable falsity of the statement, then a finding of "reckless disregard" is permitted.

B. The Clear And Convincing Standard Of Proof Is Constitutionally Mandated.

> The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement. [Bose v Consumers Union of US, Inc, 466 US 485, 511 n 30; 104 S Ct 1949, 1965 n 30; 80 L Ed 2d 502 (1984).]

See also, New York Times v Sullivan, supra, at 285-286, Anderson v Liberty Lobby, 477 US 242, 244, 252; 106 S Ct 2508, 2512; 91 L Ed 2d 202 (1986), Gertz v Robert Welch, Inc, 418 US 323, 342; 94 S Ct 2997, 3008; 41 L Ed2d 789 (1974), Loccrichio v Evening News Ass'n, 438 Mich 84, 111; 476 NW2d 112 (1991).

C. Opinion Or Nonfactual Speech.

In addition to the right to be wrong in making certain factual assertions, the First Amendment gives persons the right to express their opinions, particularly as to matters of public concern. Although the Supreme Court has rejected a mechanistic and "artificial dichotomy between 'opinion' and fact," every formulation of the New York Times standard, contains -- as a matter of logic -- the requirement that a statement may be sanctioned only if it is "provable as false." Milkovich v Lorain Journal Co, 497 US 1, 19; 110 S Ct 2695, 2706; 111 L Ed 2d 1 (1990). See also Hustler v Falwell, 485 US at 56; 108 S Ct at 882 (First Amendment requires "that the publication contain a false statement of fact which was made with 'actual malice'").

Because a professed opinion can imply an assertion of fact, the Court held in Milkovich that no blanket privilege exists for "anything that might be labeled "'opinion,'" 110 S Ct at 2705, and

reversed the state court's grant of summary judgment for defendants. However, the Court first satisfied itself that the statements could reasonably be interpreted as implying an assertion of fact, and that the "the connotation . . . [was] sufficiently factual to be susceptible of being proved true or false." Milkovich, 110 S Ct at 2707. It has been said that "by steadfastly adhering to the requirement that actionable speech be factual speech, the Court did in fact create constitutional immunity for genuine opinion." Smolla, Law of Defamation, §23.11, pp 23-40.

At oral argument the Administrator suggested that Milkovich's protection for opinions, or nonfactual statements, may not be applicable because attorneys are involved here. We do not agree. Milkovich is only one of many cases which afford protection for expressions of opinion. Indeed, the "breathing space" afforded most false statements of fact is afforded in the service of the "'prized American privilege to speak one's mind.'" New York Times, 376 US at 269, quoting Bridges, supra. This is the essence of the First Amendment, and of a self-governing people. We reject the notion that an attorney -- or that anyone -- may be sanctioned for having incorrect opinions. "The First Amendment recognizes no such thing as a 'false' idea." Falwell, 108 S Ct at 879 (citation omitted).

D. Sawyer And Gentile Do Not Support Generally Weaker First Amendment Rights For Attorneys.

Counsel for the Administrator made a general assertion that an attorney's speech may be subject to greater restriction than that of other members of the public, and we deem it essential to address this issue. We find that the two cases cited in support of this view of the law do not compel this broad conclusion.

The first case relied upon by the Administrator, In Re Sawyer, 360 US 622; 79 S Ct 1376; 3 L Ed 2d 1473 (1959), does not stand for the proposition that attorneys presumptively have fewer or weaker First Amendment rights than nonattorneys. In Sawyer a four-justice plurality held that an attorney's remarks such as, "There'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,"

did not violate an ethics rule against impugning the integrity of the judge before whom she was trying such a case -- even though her remarks contained particular references to that case.

Justice Stewart concurred in this result, emphasizing that the case did not involve prejudice to the administration of justice by interfering with a fair trial. Justice Frankfurter and three other dissenters thought the plurality opinion contained "the strong intimation that if the findings are supportable, a suspension based on them would be unconstitutional." 260 US at 665; 79 S Ct at 1397. The dissenters would not have found the remarks constitutionally protected.

Some count Justice Stewart and the dissenters as five in favor of less free speech for lawyers, generally. It is true that Justice Stewart took pains to state that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." 360 US at 646-647; 79 S Ct at 1388. But Justice Stewart referred to ABA Canon 20 which "[g]enerally . . . condemned" publicity prior to or during trial. Nothing in his concurrence necessarily suggests that he would endorse broad restrictions on attorney speech outside that context.

Moreover, the dissenters were also focused on the pendency of the trial. Outside that context, the more general principles articulated by Justice Frankfurter apply:

> 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. 360 US at 669; 79 S Ct at 1399.

The second case relied upon by the Administrator, Gentile, supra, also involved a pending or impending trial. Relying in part on Sawyer, the Court upheld a version of the current rule on publicity adopted by many states (Model Rule of Professional Conduct 3.6) because "it imposes only narrow and necessary limitations on lawyers' speech." 111 S Ct at 2745. The rule applies only to speech substantially likely to materially prejudice a particular proceeding, is neutral as to points of view, and "merely postpones the attorney's comments until after the trial."

Id.

The Gentile majority noted that attorneys are officers of the court, and are subject to regulation by courts which may result in a different level of First Amendment protection. However, the Court referred only to two types of cases: (1) those involving an attorney's representation of a client in a pending matter; and (2) attorney solicitation and advertisement cases. 111 S Ct 2744. We cannot draw sweeping conclusions from the reference to lawyer solicitation and advertising cases. The scrutiny applied in such cases is at "a level commensurate with the 'subordinate position' of commercial speech in the scale of First Amendment values." Florida Bar v Went For It, Inc, 515 US ___; 115 S Ct 2371, 2381; 132 L Ed 2d 541 (1995). Speech relating to matters of public concern rests on "the highest rung of the hierarchy of First Amendment values and [is] entitled to special protection." Connick v Myers, 461 US 138, 145; 103 S Ct 1684, 1689; 75 L Ed 2d 708 (1983).

Given the extremely narrow restrictions upheld in Gentile to vindicate the critical right to a fair trial, the decision does not support an alteration of fundamental First Amendment doctrine.

E. The "Objective New York Times Reckless Disregard Standard."

Some courts have used an objective standard when assessing whether an attorney made false statements with reckless disregard as to their truth for purposes of MRPC 8.2(a). We believe that such a test violates the First Amendment and the intent of Michigan Rule of Professional Conduct 8.2.

In New York Times, the Court repudiated civil and criminal laws aimed at protecting the government and its officials from criticism -- even though it may be false and bring its subjects into "'contempt and disrepute.'" 376 US at 274 (quoting the Sedition Act of 1798). New York Times' actual malice standard has been hailed as extremely protective of speech. But it did not go far enough for the three concurring justices who opined that citizens possessed an absolute, unconditional right to criticize

government agencies and officials without fear of government sanction. Thus, the debate was not over whether falsity was sufficient to strip from speech its First Amendment protections. All agreed that it was not. The issue was whether the actual malice standard would adequately safeguard First Amendment rights.

Soon after New York Times, the Supreme Court distinguished an objective test from the "reckless disregard" standard. In Garrison, supra, the Court expressly disapproved of the Louisiana trial court's "reasonable-belief standard" ("a reasonable belief is one which 'an ordinarily prudent man might be able to assign a just and fair reason for'"). The Court explained that under such a standard immunity for false statements

> disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth. [Garrison v Louisiana, 379 US at 79; 85 S Ct at 218.]

A more recent statement of the actual malice standard expressly spells out its subjective nature and the showing that must be made:

> The burden of proving "actual malice" requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement. [Bose Corp v Consumers Union, 466 US 485, 511 n 30; 104 S Ct 1949, 1965 n 30; 80 L Ed 2d 502 (1984). Emphasis added.]

The subjective standard is constitutionally compelled because "the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." St Amant, 390 US at 732.

Years after the majority opinion in New York Times, few would argue that deliberate lies are worthy of protection. The lasting

legacy of New York Times is its reaffirmation of the long-standing right to voice opinions, and, perhaps more important, its clear recognition of the right to err in making factual statements so that self-censorship does not impoverish our public discourse or permit civic wrongs and potential abuses to go unexamined for fear of government sanction. Thus, the bulk of New York Times' protection is afforded through its stringent definition of "reckless disregard," i.e., by requiring subjective awareness of the probable falsity of the statement.

We cannot brush off First Amendment concerns simply by stating that defamation is different than attorney discipline. "The test is not the form in which the state power has been applied." New York Times, 376 US at 265. The Court has given the applicable principle a broad formulation: "even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except for the knowing or reckless falsehood." Garrison, 379 US at 73 (emphasis added). Nor can we employ terms like "officer of the court" as a substitute for analysis. Cf. New York Times, 376 US at 269 ("'mere labels' of state law" such as "libel" do not afford "talismanic immunity from constitutional limitations").

In In Re Westfall, 808 SW2d 829 (Mo, 1991), cert den 502 US 1009; 112 S Ct 648 (1991), the court recognized that heightened scrutiny would apply to a departure from the subjective reckless disregard standard:

> Where unbridled speech amounts to misconduct that threatens a significant state interest, the state may restrict a lawyer's exercise of personal rights guaranteed by the Constitution. See NAACP v Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963). Restrictions on free speech, however, will survive judicial scrutiny only if the limitation furthers an important or substantial governmental interest and is no greater than necessary or essential to the protection of the particular governmental interest involved. Sable Communications of California, Inc v FCC, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). [In Re Westfall, 808 SW2d at 835-836.]

The court then concluded that "[t]he objective standard

survives first amendment scrutiny in light of the compelling state interests served." Westfall, 808 SW2d at 837. The interests identified were "protecting the public, the administration of justice, and the profession." Id. Recklessly false statements proscribed by Missouri's Rule 8.2(a) "can undermine public confidence in the administration and integrity of the judiciary, thus in the fair and impartial administration of justice," the court stated.

We do not underestimate the importance of maintaining confidence in the judiciary. Its inability to command troops or fiscal resources led to an early and enduring concern about how best to maintain the independence of this branch of government. The argument against judge-bashing has been forcefully stated in the past:

> "Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible, and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." [In Re Gilliland, 284 Mich 604, 611; 280 NW2d 63 (1938) (citations omitted).]

The media reportage in just the last few years contains too many disturbing examples of short-sighted attacks on members of the judiciary at the state and federal levels. Many mourn the passing of civility as the ranks of attorneys expand, and concern over cynicism in the populace generally seems widespread. No one wants to see more unfounded attacks on public officials, legal or otherwise. But, it is probably a mistake to assume that this time is profoundly different from others, or, if it is, that restricting speech will improve things.

The notion that courts must have special protection has been dispelled by the Supreme Court itself. In New York Times, the Court demonstrated its awareness of "[t]he climate in which public officials operate": "'Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually

have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent.'" 376 US at 273 n 14. In this context, the Court cited judicial criticism cases for the proposition that injury to official reputation does justify repression of speech.

In Landmark Communications, Inc v Virginia, supra, the Court, in an opinion by Chief Justice Burger, recognized that a state may have a legitimate interest in protecting the reputation of its judges and the bench in general, but held that neither interest would justify criminal sanctions for divulging "confidential" information about judicial discipline proceedings:

> As Mr. Justice Black observed in Bridges v California, 314 US at 270-271; 62 S Ct at 197:
>
> > "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . [A]n 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."
>
> Mr. Justice Frankfurter, in his dissent in Bridges, agreed that speech cannot be punished when the purpose is simply "to protect the court as a mystical entity or the judge as individual or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed." Id., at 291-292, 62 S Ct at 208. [Landmark, 435 US at 842.]

In addition to rejecting the notion that courts must be shielded from criticism, the Court, in Bridges and Landmark, has explained why this is so: such repression does not achieve the ends articulated to justify it. Simply put, it will do more harm than good. In making this point another way, one commentator has said:

> the special qualifications of attorneys to make perceptive criticisms may tend to validate even their unjust criticism of judges in the public eye, but these qualifications also provide the best resource of just criticism. It is reasonable to assume that the public is as likely to view a self-criticizing legal system as a self-improving one,

> as it is to view that type of system as untrustworthy. [J. Dodd, The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware, 15 N Ky L Rev 129, 144 (1988); emphasis added.]

See also Gentile, supra, 111 S Ct at 2735 (Opinion of Justice Kennedy).[3]

An objective recklessness test would fail to advance its asserted aims. And, even if suppression did enhance respect to some minor degree, it would not be worth the cost.

Unlike the limitation on speech upheld in Gentile, the objective reckless disregard test does not survive the heightened scrutiny mandated by the First Amendment. Affording attorneys the rights of other citizens to free speech under New York Times does not in fact "threaten . . . a significant state interest," Westfall, 808 SW2d at 835. Also, the objective test is not narrowly tailored. We must consider the "lawyer's First Amendment interest in the kind of speech . . . at issue." Gentile, 111 S Ct at 2744. As we have noted, speech concerning public officials and affairs deserves the greatest protection. In Gentile, the attorney's freedom to speak was postponed. Under an objective test, an attorney would be permanently muzzled.

The Michigan Supreme Court, citing New York Times, has rejected the argument that a statute was necessary to "preserve public confidence in the integrity of the government from being unnecessarily or prematurely diminished." In Re Advisory Opinion On 1975 PA 227, 396 Mich 465, 482; 242 NW2d 3 (1976). The Court stated:

> These are no doubt important considerations but they do not amount to "compelling state interests"

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[3] Justice Kennedy wrote:

> To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent. [111 S Ct at 2735.]

> sufficient to justify the substantial restrictions imposed by § 40 on the guarantees of free speech and press.
>
> Possible injury to the reputation of a public official does not afford a basis for repressing speech. New York Times v Sullivan, . . . [In Re Advisory Opinion, supra.]

The First Amendment protects even some "irresponsible" (i.e., unreasonable) statements that deserve the condemnation of the bar and the public. When an attorney, or anyone, levels charges which turn out to be false, and the charges are based on incomplete evidence or assumptions, then that speaker should be criticized for his or her sloppy thinking and rash speech. If the speaker is an attorney, his or her credibility and reputation should suffer.

Because of the importance of open discourse, particularly on matters involving government, the penalty for most of these false statements should be some degree of lowered esteem, imposed after a trial in the court of public opinion. The circumstances will dictate whether people will condemn or forgive the speaker. Here, as elsewhere, the First Amendment counsels that the best remedy is counterspeech not censorship. Our Rules of Professional Conduct adopt this approach as well.[4]

Only when the false statements are made knowingly or with "reckless disregard" as defined in New York Times and its progeny may the state sanction the speaker. The Supreme Court has repeatedly so concluded, emphasizing the right and duty of citizens to speak out about government, and the right of fellow citizens hear such speech.

Attorneys may at times be the only ones in possession of vital information pertaining to courts, prosecutors, and other legal officials with extensive powers. It would be unwise to abridge attorney speech about that which they collectively know best. We

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[4] MRPC 8.2 not only incorporates New York Times, it is followed by a comment which anticipates unjust criticism and prescribes the cure:

> To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. [MRPC 8.2, comment.]

believe that it would also be unconstitutional. An objective reckless disregard standard would allow the state to second-guess the reasonableness of a factual statement in direct contravention of New York Times, thereby chilling attorney speech impermissibly.

Having set forth our general view of the applicable law, we shall now consider whether the motion for summary disposition under MCR 2.116(C)(8) was appropriately granted by the panel.

IV. Does The Formal Complaint State A Claim On Which Relief Can Be Granted?

In reviewing the panel's decision to grant summary disposition, we are guided by the following standard:

> A motion for summary disposition under MCR 2.116(C)(8) may be granted if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Simko v Blake, 448 Mich 648; 532 NW2d 842 (1995). All factual allegations contained in the complaint must be accepted as true, together with any legitimate inferences which may be drawn therefrom. Boumelhelm v Bic Corp, 211 Mich App 175, 178; 535 NW2d 574 (1995). [Grievance Administrator v Rostash, ADB No 93-117-GA (ADB 1996).]

We review a hearing panel's decision on a motion for summary disposition de novo. Grievance Administrator v Bruce J. Sage, ADB No 96-35-GA (ADB 1997).

The Grievance Administrator concedes that the New York Times standard must be met in order for respondent to be disciplined under any of the rules set forth in the formal complaint.[5] See, e.g., Administrator's brief in support of petition for review, pp 2, 6, and 8. However, tribunals should not reach constitutional questions when a case may be fairly disposed of on other grounds. In Re Snyder, 472 US 634, 642; 105 S Ct 2874, 2880; 86 L Ed 2d 504

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[5] In Counts I and III the Administrator tracks the language of the rule and the First Amendment, and then also alleges, "There was no reasonable basis in fact for respondent to make the statement[s] . . . ." Formal Complaint, ¶¶11, 24. We assume that the Administrator would now acknowledge that these allegations are surplusage in light of his repeated acknowledgement that New York Times actual malice must be shown in order for discipline to be imposed. See Administrator's brief, p 2 quoting Fieger v Thomas, 872 F Supp 377, 387 (ED Mich, 1994), rev'd on other grds, 74 F3d 740 (CA 6, 1996).

(1985). Thus, we also consider whether any of the panel's rulings on the MCR 2.116(C)(8) motion may be affirmed on nonconstitutional grounds.

A. Count I.

The gist of Count I is that respondent -- while representing the family of an inmate at the Ionia correctional facility who was found dead, hanging from a bedsheet in his cell -- accused a county prosecutor of "covering up a murder." The complaint alleges that following an autopsy and investigation, several agencies, including the prosecutor's office, concluded that the death was a suicide. According to the complaint, respondent made several statements, including, "The prosecutor has done nothing. He's covering up a murder." (Amended Formal Complaint, ¶ 10(b).)

The claim is not so clearly unenforceable that, regardless of the facts adduced at the hearing in support of his allegation, the Administrator could not prove a violation of MRPC 8.2(a). However, we affirm the panel's disposition of the MCR 9.104(1) and MRPC 8.4(c) claims.

1. Prejudice To The Administration of Justice.

Count I alleges that in making the statements regarding the prosecutor, respondent violated MCR 9.104(1) (forbidding "conduct prejudicial to the proper administration of justice"), and MRPC 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice").

Some courts have limited the application of such rules to interference with civil or criminal judicial processes. See, e.g., In Re Haws, 801 P2d 818, 822 (Or, 1990) (substantial or repeated harm to "judicial proceedings and matters directly related thereto"), Howell v Texas, 559 SW2d 432, 436 (Tex Civ App, 1977) ("administration of justice consists in the trial of cases in the court, and their judicial determination and disposition by orderly procedure, under rules of law, and putting of the judgment into effect"), In Re Curran, 115 Wash 2d 747; 801 P2d 962 (1990) ("violations of practice norms and physical interference with the administration of justice").

We have previously noted the general nature of the rule, and have somewhat narrowed its application:

> While the rule is designedly a "catchall" provision, this breadth does not allow for the discipline of all types of attorney conduct viewed with suspicion and disfavor. Rather, the better view limits the sweep of this rule to "violations of well understood norms and conventions of practice." 2 Hazard & Hodes, The Law of Lawyering, § 8.4:501, p 957. [Grievance Administrator v Rostash, ADB No 93-117-GA (ADB 1996).]

We need not delineate the outer confines of the rule's reach in this opinion. Count I alleges that respondent falsely accused a prosecutor of misconduct with knowledge of the falsity of the statement or with reckless disregard as to its truth or falsity. However, the complaint contains no other allegations of fact to support the claim that respondent's conduct was prejudicial to the administration of justice.

Lawyers who make statements proscribed by MRPC 8.2(a) are subject to discipline in order to limit the unwarranted diminution of confidence in the judiciary and the legal system in general. But, we are unwilling to make all of the presumptions necessary to conclude that every knowing or recklessly published falsehood regarding a legal official's integrity or qualifications prejudices the administration of justice. Even if they result in a temporary reduction in public confidence, such statements do not inevitably translate into tangible harm to the legal system or the rule of law.

We conclude that Count I fails to allege sufficient facts to set forth a claim for discipline under MRPC 8.4(c) and MCR 9.104(1).

2. An Evidentiary Hearing Is Needed To Determine, Among Other Things, Whether The Statements Can Reasonably Be Interpreted As Stating Actual Facts About The Prosecutor.

The statements set forth in Count I could be construed in more than one way. For example, "He's done nothing" could be read literally, or it could be hyperbole. Similarly, "He's covering up

a murder" could be an allegation of criminal conduct and misfeasance in office, of affirmatively concealing the truth regarding the cause of death. Or, depending on the context, it could be extremely volatile rhetoric intended to convey that the investigation by the prosecutor's office was poorly handled, failed to account for all of the evidence, or otherwise reached the wrong conclusion. Cf. Watts v United States, 394 US 705; 89 S Ct 1399; 22 L Ed 2d 664 (1969) (alleged threat against the President).

Because we have an interest in "fostering energetic, tumultuous public debate to ensure continued scrutiny of police, prosecutors, and the courts through cherished constitutional rights guaranteeing freedom of speech and the press," Rouch v Enquirer & News, 440 Mich 238, 242; 487 NW2d 205 (1992), cert den 507 US 967 (1993), we must be careful not to stifle colorful or bombastic expressions, even though many in the community would find the choice of words irresponsible, unfair or demagogic. However, summary disposition under MCR 2.116(C)(8) is not appropriate.

The Watts decision illustrates several points pertinent to our analysis. Watts attended a public rally in Washington, D.C., and stated in a small group discussion that he would not report for his upcoming draft physical, and that: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." 394 US at 706; 89 S Ct at 1401. He was convicted of violating a statute prohibiting threats against the President. The Supreme Court reversed the conviction in a per curiam opinion. The Court held that the statute was facially constitutional; the country's interest in protecting the President is valid. However, the statute, which regulates pure speech, must be interpreted in light of the First Amendment. Accordingly, true threats must be distinguished from "the kind of political hyperbole indulged in by [Watts]." 394 US at 708; 89 S Ct at 1401.

> For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement,

> caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times, [supra]. The language of the political arena . . . is often vituperative, abusive, and inexact. [Watts, 394 US at 708; 89 S Ct at 1401-1402.]

The Court continued by referring to the context of the statement (Watts and his listeners laughed), and its conditional nature, and concluded that it was a "'crude offensive method of stating political opposition to the President.'" 394 US at 708; 89 S Ct at 1402.

We do not provide an exhaustive list of the issues that might present themselves on remand.[6] For example, the proofs may raise the question whether respondent's statements are "based on assumed or expressly stated facts" or are "based on implied undisclosed facts." Yagman, 55 F3d at 1439.

Remand and a hearing are necessary, in part, so that the panel may ascertain the context in which respondent made the alleged remarks.[7] After hearing the evidence the panel will be able to make its findings of fact and conclusions of law on all issues presented.

3. Reckless Disregard.

The Grievance Administrator has alleged that respondent made the statements either with knowledge of their falsity or with reckless disregard as to their truth or falsity. Count I of the formal complaint states a claim under MRPC 8.2(a) and is not subject to dismissal on First Amendment grounds under MCR 2.116(C)(8). On remand, the panel shall hear evidence on the elements of the claim, such as whether the statements amounted to factual assertions, and whether respondent knowingly lied or made

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[6] Many of the cases cited at pp 12-17 of the panel's opinion may be as apt as Watts, if not more so.

[7] A hearing is also necessary to enable this Board and our Supreme Court to perform their functions. Appellate tribunals must conduct an independent review of the record and '"'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment protect.'"' Locricchio v Evening News Ass'n, 438 Mich 84, 110; 476 NW2d 112 (1991).

the statements with reckless disregard for the truth.

B. Count II.

In Count II, the formal complaint alleges that respondent accused a circuit judge of "conspir[ing] with [opposing counsel] to dismiss [a pending case in which respondent represented the plaintiff] in exchange for [opposing counsel] providing employment for [the judge's] daughter" (Formal Complaint, ¶19(a). The complaint further alleges that respondent said, "'This is an act of monumental judicial corruption that has got to be investigated,'" and that the judge's "'acts indicate as corrupt a judicial temperament as one could possibly imagine'" (Id., ¶19(b) & (c)).

The complaint also alleges that the statements were known by respondent to be false, or were made by him with reckless disregard as to their truth or falsity, and that they concerned the qualifications or integrity of the circuit judge.

The panel granted the motion to dismiss this count pursuant to MCR 2.116(C)(8) for two reasons specific to this count, and others.

1. Specificity In Pleading.

First, the panel found that paragraph 19(a) was insufficiently specific. In particular, the panel noted that the statements which were set forth in that subparagraph were not in quotation marks, unlike the alleged statements of respondent set forth in the other parts of paragraph 19. We agree with the panel that the law of defamation is generally instructive in this case, and that the degree of specificity required there should be required here. However, we disagree with the panel's conclusion that the law requires dismissal.

As a general rule, a libel or slander complaint must contain "'allegations as to the particular defamatory words complained of.'" Pursell v Wolverine-Pentronix, 44 Mich App 416, 421; 205 NW2d 504 (1973) (quoting 11 Michigan Pleading & Practice (2d ed) §78.09, pp 256-257). However, this general rule was modified by the Court of Appeals as to slander actions:

> Due to the fact that a slanderous statement cannot

> be retained verbatim in many instances since it is spoken, we hold that it is sufficient if the complaint sets out the substance of the alleged slander and it is not necessary to recite the exact words used. [Pursell, 44 Mich App at 422.]

This holding was recently reaffirmed by the Court of Appeals in Royal Palace Homes v Channel 7, 197 Mich App 48, 55; 495 NW2d 392 (1992). In that case, the Court wrote at length about the need for specificity in pleading defamation cases and in general. The touchstone is notice: "'Leaving a defendant to guess upon what grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice.'" Royal Palace, 197 Mich App at 54, quoting Dacon v Transue, 441 Mich 315, 329; 490 NW2d 369 (1992).

We wholeheartedly agree with the notion that justice requires a minimal degree of specificity in pleading. When that measure of detail is lacking in discipline cases, and the complaint does not provide notice of proofs proffered at hearing, this Board and our Supreme Court have not hesitated to dismiss the offending portions of the formal complaint. And, vague complaints are subject to dismissal prior to hearing under MCR 2.116(C)(8). However, the pleading in this case is not conclusory.

One allegation in paragraph 19 merely fails to contain quotation marks around some of the statements which are otherwise set forth in detail. This, without more, does not render it too general to withstand a motion to dismiss for failure to state a claim under either Royal Palace or Pursell, both of which were relied upon by the panel. Also, compare Draghetti v Chmielewski, 416 Mass 808; 626 NE2d 862, 866 (1994) (the "[p]resence of quotation marks is not an element of [a defamation action], and is not required"; trial court did not err in submitting case to jury).

Moreover, paragraph 19 alleges that the statements were made at a January 28, 1994, press conference. Accordingly, the Pursell rule allowing a slander complaint to set forth the substance of the statement rather than "the exact words used," 44 Mich App at 422, should apply by analogy.

2. MRPC 8.2(a) & the First Amendment.

As to subparagraphs 19(b) and (c), the panel found that "the speech alleged in [those paragraphs] is merely an expression of opinion and is rhetorical hyperbole and thus is not actionable under Rule 8.2(a) under the holdings in Milkovich, supra, and Yagman, supra." This may or may not be the correct determination to reach after the evidence has been presented. However, for the reasons set forth in our discussion of Count I, we conclude that the complaint sufficiently pleads a violation of MRPC 8.2(a), and that summary disposition should not have been granted.

3. Count II Fails To State A Claim On Which Relief Can Be Granted Under MCR 9.104(1) and MRPC 8.4(c).

We restate our analysis of the rules prohibiting conduct prejudicial to the administration of justice and apply it to Count II. The Administrator has not alleged how respondent's attacks on Judge Stempien and others prejudiced the administration of justice.

4. The Formal Complaint Fails To State A Claim On Which Relief Can Be Granted Under MRPC 3.5.

We also agree with the panel's determination that MRPC 3.5 is not applicable to the facts alleged in Count II. That rule provides that an attorney shall not "engage in undignified or discourteous conduct toward the tribunal." The panel concluded:

> Reading subsection (c) in the context of the entire Rule and in light of the comment to the Rule, it is clear that subsection (c) is intended to prohibit conduct directed to "the tribunal" in a pending matter. Here Counts II and III of the Formal Complaint allege that Respondent made comments about judges, and not to them in pending matters.

We agree with the panel that the intent of the rule is to preserve the decorum of the tribunal so that proceedings may be conducted in an orderly fashion. Rude and undignified behavior can detract from the respect an adjudicator must possess in order to effectively manage a courtroom. The rule is obviously directed at preventing proceedings from devolving into chaos because of lack of respect for the judge. The complaint does not set forth sufficient facts to call this rule into play.

Alternatively, we hold that the rule is circumscribed by New

York Times. Therefore, even if applicable, it will not as a practical matter be dispositive. The Administrator's case will rise or fall on MRPC 8.2(a), which he acknowledges.

C. Count III.

Count III alleges that after the Michigan Court of Appeals reinstated murder charges against respondent's client, Jack Kevorkian, respondent took full advantage of the media spotlight and criticized two judges who participated in the Court's decision. The formal complaint sets forth specific comments allegedly made by respondent concerning individual judges and justices, and the Michigan Judiciary in general.

1. MRPC 3.5.

For the reasons set forth in our discussion of Count II, we conclude that the panel properly granted summary disposition under MCR 2.116(C)(8) as to the MRPC 3.5 claim in Count III.

2. Prejudice To The Administration Of Justice.

For the reasons set forth in discussing Count I, we also conclude that the formal complaint fails to state a claim under MCR 9.104(1) and MRPC 8.4(c). The statements alleged in Count III to have been made by respondent may be obnoxious, but they do not jeopardize the administration of justice.

Few if any members of the Michigan judiciary will be cowed by such outbursts. As we have said elsewhere in this opinion, our system of justice is not put at risk if these statements are not censored. The public and the profession can express their revulsion at such crudity, while at the same time feeling pride in belonging to a society that allows its expression. If we write rules governing speech to quell such antics, then we will have truly lost our bearings. The judiciary is not so fragile. It is the First Amendment that needs protection.

3. MRPC 8.2(a) & the First Amendment.

The panel concluded that the statements alleged to have been made by respondent in Count III were nonfactual assertions and thus

could not give rise to a violation of MRPC 8.2(a), and would, in any event, be protected by the First Amendment. We agree with these conclusions.

Unlike the allegations in Counts I & II, those in Count III enable us to confidently conclude that respondent's alleged statements are both outside the purview of MRPC 8.2(a) and within the ambit of Constitutionally protected speech. For example, the epithet "stupid," hurled by respondent at one or more of the judges, is not "susceptible of being proved true or false." Milkovich, 110 S Ct at 2707. Similarly, the statement "we got nobody who knows the law sitting in the higher court judiciary," is clearly figurative, hyperbolic speech conveying respondent's highly subjective opinion.

The Administrator's brief identifies two comments from Count III that he contends are assertions of fact.

First, paragraph 23(f) of the Amended Formal Complaint alleges that respondent "knew in advance what [Judge Taylor] was going to do," and that the Judge has "a political agenda." Respondent's other statements -- that the Judge was appointed by the Governor, the Judge's wife is the Governor's legal adviser, and that "we know his wife advise [sic] him on the law" -- clearly formed the basis for respondent's comment that he knew in advance what this judge would do, consistent with his "agenda."

The statement that "Judge X has an agenda" is not necessarily an attack on integrity or qualifications. Nor is the claim that one can predict the judge's decisions. Moreover, we conclude that such statements cannot be proven true or false. Ostensibly "factual" charges regarding a person's intent should rarely be deemed actionable. See New York Times, 376 US at 272 ("'Errors of fact, particularly in regard to a man's mental states and processes are inevitable'"; quoting from a decision affirming dismissal of a member of congress' libel suit against someone who called him anti-Semitic).

It is fairly common to exclaim, "I knew it," after an event transpires which one anticipated with dread or hope -- even when one could not possibly have known what was going to happen. No one

who heard or read these statements could be misled into believing that the speaker truly did "know" what motivated Judge Taylor's decision. People understand that respondent is not a mind reader. The statements regarding this judge cannot reasonably be interpreted as implying an assertion of fact. Milkovich, 497 US at 21.

Even if these obvious declarations of opinion (e.g., that the judge has an agenda, or that respondent knew what the judge would do) were somehow to be interpreted as factual assertions, they plainly amount to inferences, the bases for which are set forth in the speaker's remarks. Those who hear them may draw their own conclusions. Compare Yagman, 55 F3d at 14-15.

Finally, we address the other statement that the Administrator contends is factual: "you know, I don't think that [Judges Taylor and Fitzgerald] ever practiced law, I really don't. . . ." A statement is not automatically to be considered nonfactual merely because it is preceded by the words, "I think." Milkovich, 497 US at 19. Nonetheless, it is absolutely clear to us that this statement, taken in context, is conjectural, hyperbolic, and cannot be seriously considered as stating actual facts about the judges.

The wide-ranging fulminations set forth in Count III do more to reflect on the speaker's character than they do to harm any of their targets. They are not actionable, and summary disposition of this count was properly granted.

The alternative to summary disposition is unacceptable. If Count III were the subject of an evidentiary hearing, then the Administrator would have the burden of proving that our justices are learned in the law, that Judge Taylor does not have "a political agenda," and that "our judiciary is [not] laughed at in the rest of the country," etc. We cannot imagine that the law would require us to spend resources on, or subject these persons to, the preposterous and demeaning spectacle this would entail. The Court of Appeals has said in another context:

> The . . . bench was made the subject of disparaging statements. The best defense judges may present to the public is the unsullied performance of their judicial duties. For ultimately it is that very

> public trust and confidence which plaintiff fears the erosion of, which must be depended upon to vindicate the court. [In Re Turner, 21 Mich App 40, 57; 174 NW2d 895 (1969). Footnotes omitted.]

V. Overbreadth Challenges To Various Rules.

Respondent asks us to hold that the rules under which misconduct is charged are overbroad. In light of our holdings in this opinion, and in Fieger I, we do not consider it necessary. We have held that the Michigan Rules of Professional Conduct must be interpreted in accordance with the Constitution. We believe that this construction narrows the rules so as to remove any apparent threat to constitutionally protected expression. Broderick v Oklahoma, 413 US 601, 613; 93 S Ct 2908; 37 L Ed 2d 830 (1973).

VI. Conclusion.

The hearing panel's dismissal of Count III of the formal complaint is affirmed. The panel's dismissal of Counts I and II is reversed, and this matter is remanded to the panel for a hearing.

Board Members Elizabeth N. Baker, C. H. Dudley, M.D., Barbara B. Gattorn, Miles A. Hurwitz, Michael R. Kramer, Nancy A. Wonch, and Roger E. Winkelman concur in this decision.

Board Member Albert L. Holtz dissents and would affirm the opinion and order granting summary disposition.

Board Member Kenneth L. Lewis was absent and did not participate.