STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Geoffrey N. Fieger, P 30441,

Respondent/Appellant,

Case No. 01-55-GA

Decided: November 8, 2004

Appearances:

Robert E. Edick,, for Grievance Administrator, Petitioner/Appellee
Norman L. Lippitt, F. Philip Colista, Kenneth M. Mogill, Mayer Morganroth, and Michael Alan Schwartz, for the Respondent/Appellant

BOARD OPINION

Respondent made disrespectful, discourteous and crude remarks about a panel of the Michigan Court of Appeals several days after the three judges issued their opinion reversing a judgment for respondent's client. The comments were aired on a radio program respondent hosted at the time. Following the filing of a Formal Complaint alleging violations of MRPC 3.5(c) and MRPC 6.5(a), among other rules, the parties consented to a reprimand for the conduct alleged in the Formal Complaint. The consent order of discipline was conditioned upon respondent's right to pursue appellate review based on constitutional issues raised below. Respondent has filed a petition for review arguing that the rules do not apply to his conduct, and, if so applied, would be unconstitutional. We vacate the order of reprimand and dismiss the formal complaint.

I. Factual Background

On August 20, 1999 a panel of the Michigan Court of Appeals issued Badalamenti v Wm Beaumont Hosp, 237 Mich App 278; 602 NW2d 854 (1999), lv den 463 Mich 980 (2001). Respondent represented the plaintiff in a medical malpractice jury trial which resulted in a $15 million verdict and judgment. The Court of Appeals vacated the trial court's judgment in favor of

plaintiff because the evidence was legally insufficient to support a verdict in favor of plaintiff. The case was remanded for entry of judgment on behalf of defendants notwithstanding the verdict. The Court then proceeded to address one other assignment of error raised by defendants on appeal:

> Because our resolution of the foregoing issue is dispositive of this case, we need not consider the parties' remaining issues on appeal except defendants' claim that they were denied a fair trial because of the persistently improper and highly prejudicial conduct of plaintiff's lead counsel at trial. We must agree that the conduct of plaintiff's lead counsel was truly egregious--far exceeding permissible bounds--and we will therefore address this issue. We hold that even if defendants were not entitled to JNOV, defendants would be entitled to a new trial because of pervasive misconduct by plaintiff's lead trial counsel that denied defendants a fair trial. [Badalamenti, supra, 237 Mich App at 289.]

The Court of Appeals summarized some of respondent's actions in the trial court:

> Throughout the entire trial, plaintiff's lead trial counsel completely tainted the proceedings by his misconduct.[4]
>
> Footnote
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> [4] As was the case before the Court in *Wayne Co Bd of Rd Comm'rs v GLS LeasCo*, 394 Mich 126, 131; 229 NW2d 797 (1975), "'to recite all such instances [of misconduct] would result in a restatement of the entire record of proceedings,'" (quoting LeasCo's contention).
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> For example, through innuendo and direct attack, plaintiff's lead trial counsel repeatedly and with no basis in fact accused defendants and their witnesses of engaging in conspiracy, collusion, and perjury to cover up their alleged malpractice. Plaintiff's lead trial counsel continually accused defense witnesses of fabricating, in response to the instant litigation, the defense that plaintiff had a rare, severe reaction to streptokinase that caused his injuries. Indeed, this appeared to be his main theme. Plaintiff's lead trial counsel also repeatedly belittled defense witnesses and suggested, again, with no basis in fact, that they destroyed, altered, or suppressed evidence. Plaintiff's lead trial counsel further insinuated, relentlessly, outrageously, and with no supporting evidence, that while plaintiff lay "neglected" in the coronary care unit of the hospital, Dr. Forst "abandoned" plaintiff to engage in a sexual tryst with a nurse during the afternoon of March 16. Plaintiff's lead trial counsel repeatedly argued that money and greed were the defendants' prime motivation and the overriding interest guiding their treatment of plaintiff and their desire to cover up their "mistakes." Counsel in turn linked these concepts with references to Beaumont Hospital's corporate power and

> with defendants' ability to hire the "dream team" to defend them and to raise as many defenses as they wanted no matter how "preposterous." Plaintiff's lead trial counsel also inappropriately appealed to the jurors' self-interest as taxpayers where, in response to a defense witness' testimony regarding vocational rehabilitation services available to plaintiff through a state-funded agency, counsel lambasted the defense for suggesting that the "taxpayers" should pay for vocational rehabilitation services for plaintiff rather than the "wrongdoers." Again, we emphasize that these accusations, allegations, and insinuations had no reasonable basis in the evidence presented and were completely improper. [Badalamenti, supra, 237 Mich App at 290 - 291.]

Respondent addressed the Court's decision in live radio broadcasts of a show he hosted on August 23, 1999 and on August 25, 1999. In his remarks he mentioned Judges Talbot, Bandstra and Markey by name and "declare[d] war" on them. Among other things, respondent told the judges to "kiss [his] ass," called them "jackasses," and made crude anatomical references. Paragraphs 10 and 11 of the Formal Complaint set forth the statements at issue:

> 10. On or about August 23, 1999, during a radio broadcast program, Respondent made the following statements:
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> a) He stated, "Hey Michael Talbot and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too."; and,
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> b) While speaking about his client, Salvator Badalamenti, he stated, "He lost both his hands and both his legs, but according to the court of appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses."
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> 11. On or about August 25, 1999, during a radio broadcast program, Respondent made the following statements and references:
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> a) He referred to Chief Judge Bandstra, and Judges Markey and Talbot, as "three jackass Court of Appeal Judges";
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> b) After another member of his broadcast team suggested the word "innuendo" to describe part of the Court of Appeals findings in the Badalamenti matter, Respondent said, "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist."; and,

c) He said, "They say under their name, Court of Appeals Judge, so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think - - what was Hitler's - - Eva Braun, I think was, is now Judge Markey. I think her name is now Markey, she's on the Court of Appeals."

II. Issues Presented

The arguments of the parties raise the following principal issues:

I. Do respondent's statements constitute violations of

> MRPC 3.5(c) proscribing "undignified or discourteous conduct toward the tribunal," and/or,
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> MRPC 6.5(a) which provides that "[a] lawyer shall treat with courtesy and respect all persons involved in the legal process"?

II. If the conduct here appears to be in violation of one or both of these rules, may the rules be read in a manner consistent with the First Amendment and the Due Process Clause?

Additionally, the Administrator argues, as a preliminary matter, that the Board cannot "engage in constitutional review." At the same time the Administrator gives the Board credit for "adopt[ing] a saving construction of MRPC 6.5(a) in [Grievance Administrator v Cheryl Warren, 01-16-GA (ADB 2003)]." Thus, the Administrator's position seems to be that the Board can engage in constitutional review of Rules of Professional Conduct so long as it upholds, saves, and enforces the rules, but it cannot ever find that a rule conflicts with constitutional requirements or refuse to enforce it on these grounds. If the question is one of subject matter jurisdiction, as the Administrator has in fact framed it, then it would seem that the Board is powerless to uphold rules or even to reject patently frivolous constitutional claims. That has not been the Board's practice. See Grievance Administrator v James A. Tucker, 94-12-GA (ADB 1995), lv den 449 Mich 1206 (1995) (recognizing that, while the Board has no inherent or common law powers, and cannot order declaratory or injunctive relief, it has repeatedly been faced with and considered cases raising constitutional issues).

Nor does it appear to be of concern to the Michigan Supreme Court that the Board or its panels may entertain constitutional argument. MCR 9.113(B)(1) provides that a respondent may

refuse to answer a request for investigation "on expressed [sic] constitutional or professional grounds." And, Rule 9.113(B)(3) continues, "If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication." Finally, federal courts recognize that discipline proceedings may entail claims involving the constitution. See Middlesex County Ethics Comm v Garden State Bar Ass'n, 457 US 423, 434; 73 L Ed 2d 116; 102 S Ct 2515 (1982).[1] See also, Fieger v Thomas, 74 F3d 740, 746-748 (CA 6, 1996).[2]

"As a general rule, however, the Board's deference to the Court will include a presumption that the rules and procedures promulgated by the Court, as they concern the Board and lawyer regulation, are constitutional." Grievance Administrator v Cheryl Warren, supra, p 6. Also, we start with the guiding principle that "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 (1985)). See also, Ryan v Ore Lake, 56 Mich App 162, 167; 223 NW2d 637 (1974).

Respondent argues that MRPC 3.5(c) and MRPC 6.5(a) do not apply to public statements about judges on a radio program. Respondent further argues that, if so applied, the rules would violate the First Amendment. Respondent also argues that the rules are void for vagueness (i.e., that

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[1] In discussing whether a New Jersey respondent had an opportunity to raise constitutional questions in that State's disciplinary proceedings, the United States Supreme Court stated:

> Under New Jersey's procedure, its Ethics Committees constantly are called upon to interpret the state disciplinary rules. Respondent Hinds points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the [New Jersey] Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees. . . . [I]t is difficult to conclude that there was no "adequate opportunity" for respondent Hinds to raise his constitutional claims. [Middlesex, 457 US at 435.]

[2] In this case involving the parties here, the Sixth Circuit Court of Appeals held that Mr. Fieger's federal court challenge to the Michigan discipline procedure should have been dismissed on abstention grounds, in part because his constitutional claims could have been raised in our proceedings:

> Like the Ethics Committee in New Jersey, the *[Michigan Attorney Discipline]* Board "constantly [is] called upon to interpret the state disciplinary rules." *Id.* Even if the Board could not declare a Rule of Professional Conduct unconstitutional--a proposition about which we are not convinced--"it would seem an unusual doctrine, and one not supported by the cited cases, to say that the [Board] could not construe [the Rules of Professional Conduct] in the light of federal constitutional principles." Ohio Civil Rights Comm'n v Dayton Christian Sch, 477 US 619, 629; 91 L Ed 2d 512; 106 S Ct 2718 (1986). The Board could, short of declaring a Rule unconstitutional, refuse to enforce it or, perhaps, narrowly construe it. We are not convinced, therefore, that Fieger is unable to raise his constitutional claims in the disciplinary proceedings. [Fieger v Thomas, supra. Italicized bracketed material added.]

they do not afford notice of the conduct prohibited) and that they are overbroad (i.e., reach a substantial number of applications barred by the First Amendment). The Administrator contends that "respondent's conduct is clearly covered even under the narrowest interpretations of [these rules]." Both parties argue that the rules could be construed narrowly to avoid constitutional problems, but in different ways and with different results. We conclude that the rules do not apply to statements made by respondent in this case. We base this conclusion on the text of the applicable rules and the ordinary usage of the words therein. We also discuss the development of the rules, First Amendment concerns, and problems with notice, fairness and consistency if the Administrator's broad reading of the rule were adopted. These considerations provide an alternative ground for our decision.

III. Do MRPC 3.5(c) & MRPC 6.5(a) Apply To Respondent's Remarks During The "Fieger Time" Radio Broadcasts?

A. MRPC 3.5(c)

Respondent argues that MRPC 3.5(c) does not apply to statements made outside the presence of the tribunal and that we should adhere to the previous decision of the Board in Grievance Administrator v Fieger, 94-186-GA (ADB 1997) ("Fieger II"). There, respondent was charged with making various public statements about judges in violation of both MRPC 8.2(a) and MRPC 3.5(c). In Fieger II, the Board said:

> 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:
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> > 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. [Fieger II.]

The Administrator contends that, notwithstanding this passage from Fieger II, MRPC 3.5(c) is applicable. Although focused on respondent's overbreadth and vagueness claims, the Administrator clearly argues that the rule is applicable, and should be held to be applicable to this case even if a narrowing construction is deemed appropriate by this Board. Also, citing the Michigan Supreme Court's order remanding a case to this Board in Grievance Administrator v Vos, 466 Mich 1211; 644 NW2d 728 (2002), the Grievance Administrator argues that there is no basis "to limit violation of MRPC 3.5(c) to acts physically taking place inside of a court." Vos, however, involved conduct in a magistrate's hearing room. The Court's order frames the issue: "On remand, the ADB shall address whether respondent's use of profanity directed at the presiding magistrate during a proceeding but off the record and his other conduct was discourteous in violation of MRPC 3.5(c) and/or MRPC 6.5(a), and, if so, what discipline is appropriate." Id.

Michigan Rule of Professional Conduct 3.5 provides that, "A lawyer shall not . . . (c) engage in undignified or discourteous conduct toward the tribunal."[3] Our rule differs from American Bar Association (ABA) Model Rule of Professional Conduct 3.5 which provides that "a lawyer shall not . . . (d) engage in conduct intended to disrupt a tribunal." Both the Michigan and Model rules were preceded by a version of the ABA's Model Code of Professional Responsibility. Michigan's

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[3] Michigan Rule of Professional Conduct 3.5 reads as follows:

> Rule: 3.5 Impartiality and Decorum of the Tribunal
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> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
> (b) communicate ex parte with such a person concerning a pending matter, except as permitted by law; or
> (c) *engage in undignified or discourteous conduct toward the tribunal*.
> [Emphasis added.]

version of DR 7-106(C)(6) was identical to the ABA Model Code provision, and is obviously the source of some of the language in our MRPC 3.5(c). The Code provided as follows:

> DR 7-106 TRIAL CONDUCT
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> * * *
>
> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
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> * * *
>
> (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

In terms of the structure of Rule 3.5 versus the comparable Code provision, we note that the former Code's DR 7-106 dealt entirely with "Trial Conduct," and subparagraph (C) contained seven prohibitions applicable when a lawyer was "appearing in his professional capacity before a tribunal."[4] Michigan and Model Rules 3.5 involve not only rules regarding conduct during a proceeding, but also rules which had previously been located elsewhere in the Code, such as prohibitions against influencing judges and other officials. Thus, the introductory paragraph of Rule 3.5 reflects a different, broader, scope than that of the comparable Code provision. That is, instead of saying (as the Code did), "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . ," MRPC 3.5 says simply, "*A lawyer shall not* . . . ." The ABA focused Model Rule 3.5(c) on conduct related to pending proceedings by prohibiting "conduct *intended to disrupt* a tribunal." Michigan's Rule, as we have mentioned, is different. Although Michigan largely adopted the ABA Model Rules, the text of MRPC 3.5(c) was modified so that it proscribes

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[4] For example, DR7-106(C)(1) stated that a lawyer appearing before a tribunal shall not: "State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence." In addition to the "DRs" (Disciplinary Rules), the Code contained aspirational Ethical Considerations designed to "constitute a body of principle upon which a lawyer can rely for guidance . . . ." One Ethical Consideration following DR 7-106(C)(6) states:

> **EC 7-36** *Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent the client zealously, the lawyer should not engage in any conduct that offends the dignity and decorum of proceedings.* While maintaining independence, a lawyer should be respectful, courteous, and above-board in relations with a judge or hearing officer before whom the lawyer appears. The lawyer should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration. [Emphasis added.]

"*undignified or discourteous conduct toward* the tribunal." This has the benefit of eliminating an inquiry into the lawyer's intent and instead focuses disciplinary adjudication on whether the conduct was (1) undignified or discourteous, and (2) "conduct toward the tribunal." One question before us is whether the Michigan language also represents an attempt to focus MRPC 3.5(c) on conduct having some nexus to a proceeding before a tribunal or whether it attempts to prohibit all discourteous statements *about* a tribunal by an advocate whether they were made after a matter has been disposed of or, indeed, whether the lawyer had any relationship to a proceeding before the court whatsoever.

In deciding whether to adhere to the precedent set down by this Board in Fieger II, we must again examine the text of the rule. The statements made by respondent are patently discourteous and disrespectful. Thus, the application of MRPC 3.5(c) turns on the meaning of the phrase "conduct toward the tribunal." The parties have not presented us with cases, other than Fieger II, construing the text of our rule[5] or of a similar rule. Perhaps this is because Michigan's rule appears to be unique. With a few exceptions discussed below, the 45 jurisdictions which base their rules of professional conduct on the ABA Model Rules have abandoned the language of DR 7-106(C)(6) and have followed instead ABA Model Rule 3.5. Commentators explain the reason for the redrafting:

> Model Rule 3.5(c) provides a disciplinary sanction as a supplement to the traditional power of judges to punish disruptive behavior as contempt of court. It is derived from DR 7-106(C)(6) of the Model Code of Professional Responsibility, but its focus is somewhat more narrow – and properly so. The Disciplinary Rule proscribed "undignified or discourteous" conduct that is "degrading to a tribunal." This vague language seemed to suggest that the feelings of the judge must be protected. But while a discourteous advocate brings the system of justice into disrepute, judges should be made of sufficiently stern stuff to survive affronts to their dignity. Contempt (and disciplinary action) should therefore be reserved for conduct that actually disrupts the proceedings. Rule 3.5(c) is so limited.
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> * * *
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> If a lawyer takes action outside a courtroom setting, it is virtually impossible that it could "disrupt" a tribunal or be intended to do so, and Rule 3.5(c) should not apply. In In re Snyder, 472 US 634

[5] Other than the Administrator's citation to Vos, supra, which involved conduct during a proceeding but off the record.

> (1985), a lawyer had complained about the "puny" fees paid to appointed counsel, and made a few other unlawyerlike remarks about the paperwork involved. The Eighth Circuit suspended the lawyer from practice, ruling that his failure to apologize was itself "conduct unbecoming a lawyer" under Fed R App P 46. The Supreme Court unanimously reversed, without reaching Snyder's claim that the order violated his right to freedom of expression. [1 Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering (3rd ed)*, § 31.6, pp 31-7 – 31.8.]

It appears that of the 45 jurisdictions basing their rules on the ABA Model Rules, three other than Michigan have altered MRPC 3.5(c)[6] by retaining references to "undignified or discourteous conduct." However, the language in those rules does not precisely track that of the Michigan rule. Vermont proscribes "undignified or discourteous conduct which is degrading or disrupting to a tribunal,"[7] and Delaware similarly provides that a lawyer shall not "engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."[8] Finally, the Kansas rule provides: "A lawyer shall not . . . engage in undignified or discourteous conduct degrading to the tribunal."[9]

Although none of these rules employ the phrase "conduct toward the tribunal," courts have used this phrase in discipline and contempt cases involving discourteous lawyer conduct toward the tribunal. In this context, those courts using the phrase seem to intend that there be proximity

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[6] ABA Model Rule 3.5 was recently amended to read:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
(c) communicate with a juror or prospective juror after discharge of the jury if:
  (1) the communication is prohibited by law or court order;
  (2) the juror has made known to the lawyer a desire not to communicate; or
  (3) the communication involves misrepresentation, coercion, duress or harassment; or
(d) engage in conduct intended to disrupt a tribunal.

In this opinion, references to Rule 3.5(c) will also, depending on the context, include similar rules in other jurisdictions which may be codified under a different number or letter, such as subparagraph (d).

[7] Vt Rule of Prof Conduct 3.5(c).

[8] Del Lawyer's Rule of Prof Conduct 3.5(c).

[9] Kan Rule of Prof Conduct 3.5(d).

between the lawyer and the target of the conduct. For example, in Iowa Bar v Rauch, 486 NW2d 39, 40 (IA 1992), the opinion summarized and essentially equated DR 7-106(C)(6) of the Code with the exact terminology of the Michigan Rule 3.5(c) by referring to the obligations in the Code provision as follows: "respondent's conduct toward a district judge was a violation of DR 7-106(C)(6) (undignified or discourteous conduct toward a tribunal)." The respondent in that case had "lost his temper in the chambers of a district judge, slammed a book on the floor, and used obscene language in criticizing the judge's refusal to grant a continuance." Id., at 39. This case and others illustrate the usage of "toward the tribunal" and show that the disrespectful conduct need not occur in a courtroom. Other decisions also demonstrate this point. See, e.g., In re Barnett, 233 Mich App 188; 592 NW2d 431 (1998) (suggesting that respondent's comment that "[the judge] is trying to sway the jury" made in the hallway outside the courtroom and in the hearing of the jury may have violated MRPC 3.5(c), and In re Hanson, 134 Kan 165; 5 P 2d 1088 (1931) ("contemptuous and insulting language" in a petition for rehearing was "used toward [the] court").

Both current and older cases reflect this usage. A Kansas attorney practicing in the 1870's suffered contempt, a fine, and suspension from practice for writing a letter to a judge informing him that his ruling was "directly contrary to every principle of law governing injunctions, and everybody knows it." In Re Pryor, 18 Kan 72 (1877). The Kansas Supreme Court stated:

> [T]he independence of the profession carries with it the right freely to challenge, criticise, and condemn all matters and things under review and in evidence. But with this privilege goes the corresponding obligation of constant *courtesy and respect toward the tribunal* in which the proceedings are pending. [In Re Pryor, supra. Emphasis added.]

The court then discussed the limits of an attorney's duty in this regard:

> Other considerations apply after the matters have finally been determined, the orders signed, or the judgment entered. For no judge, and no court, high or low, is beyond the reach of public and individual criticism. After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust. [In Re Pryor, 18 Kan at 76.]

MRPC 3.5(c) contains modifications to the language of the former Code. Instead of retaining a prohibition against "undignified or discourteous conduct which is *degrading to* a tribunal," the formulation was changed to prohibit such conduct "*toward a* tribunal." If the rule had been intended to prohibit discourteous *statements about* the tribunal, those words could easily have been chosen. However, "conduct toward the tribunal," connotes a more direct connection between the actor and the subject of the discourteous or disrespectful conduct.

Finally, the Court has "authorized publication of the comments as an aid to the reader." MRPC 1.0, comment, ¶ 1. However, "The text of each rule is authoritative. The comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions, and counsel found in the text of the rule." MRPC 1.0(c). Thus, while such detailed discussions of the scope, intent and philosophy of the rules will be consulted for guidance by any reader including lawyers and judges, we do not rely on the comment in reaching our decision, but we note at least that the comment to MRPC 3.5(c) does not attempt to expand the text of the rule by suggesting that the rule should be applied to public statements not directed to a judge and made after the opinion has been issued.

The comment to our rule does not suggest that cases like this one would fall within that rule. Indeed, it suggests a narrower application consistent with the interpretation of "conduct toward the tribunal" discussed above. The two paragraph comment to Michigan Rule of Professional Conduct 3.5 is nearly identical to the ABA Comment at the time of its adoption. The first paragraph deals with improper influence upon a tribunal. The second reads as follows:

> [2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from ***undignified or discourteous*** conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge, but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics. [Emphasis added.]

The only difference between this paragraph in the Michigan comment and the corresponding paragraph in the Model comment is that in the second sentence of the comment to the Model Rule, "abusive or obstreperous" takes the place of "undignified or discourteous" (emphasized in the above quotation).

We conclude that the conduct charged in the formal complaint does not fall within MRPC 3.5(c).

B. MRPC 6.5(a)

MRPC 6.5(a) provides, in pertinent part: "A lawyer shall treat with courtesy and respect all persons involved in the legal process."[10] "Treat" has been defined, and we think is most often intended to mean, "To act or behave in a specified manner toward." American Heritage Dictionary of the English Language (Houghton Mifflin Co, 4th ed, 2000). MRPC 6.5(a), like MRPC 3.5(c), seems clearly to extend to discourtesy toward and disrespect of participants in the legal system when such conduct interferes or has the potential to interfere with the orderly administration of justice. To apply this rule in this case, we would have to hold that "treat" means to make comments about a person outside their presence, after the conclusion of proceedings. This would sweep in any comment critical of a participant's role in the justice system even after that role had been concluded. In this country, many trials or other proceedings are subject to discussion and analysis after their conclusion. Nothing in Rule 6.5 suggests that "persons involved in the legal process" may not ever be criticized for their role in that process, not even after the involvement has ceased.

Turning to the comment for such guidance as may be appropriate, we find no evidence that MRPC 6.5 is to be read contrary to the interpretation we have just given it. Indeed, we find a focus on pending matters involving "clients and third persons," and we detect the recognition that this

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[10] The rule reads, in its entirety:

Rule: 6.5 Professional Conduct

> (a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.
>
> (b) A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

civility rule, while more than aspirational, requires careful application in order to put it on a sound footing.[11]

Our Supreme Court has clearly ruled that MRPC 6.5(a), in addition to MRPC 3.5(c), applies to conduct directed toward an adjudicator. Vos, supra. However, as we have noted, that case involved a lawyer's profane epithets directed toward a magistrate in court but off the record. We find no authority to extend the reach of Rule 6.5(a) to public remarks about judges on a radio program after the issuance of an opinion.

C. Conclusion Regarding Application of MRPC 3.5(c) & 6.5(a)

This is not a case involving rude or contumacious conduct in a courthouse evidencing and fostering disrespect. Nor is this a case involving any direct communication with a judge, such as

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[11] The comment crafted specifically for Michigan's non-uniform Rule 6.5 states, in large part:

> A lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality. It follows that such a professional must treat clients and third persons with courtesy and respect. For many citizens, contact with a lawyer is the first or only contact with the legal system. Respect for law and for legal institutions is diminished whenever a lawyer neglects the obligation to treat persons properly. It is increased when the obligation is met.
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> A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude. A lawyer's professional judgment must be employed here with care and discretion.
>
> A lawyer must take particular care to avoid words or actions that appear to be improperly based upon a person's race, gender, or other protected personal characteristic. Legal institutions, and those who serve them, should take leadership roles in assuring equal treatment for all.
>
> A judge must act "[a]t all times" in a manner that promotes public confidence in the impartiality of the judiciary. Canon 2(B) of the Code of Judicial Conduct. See also Canon 5. By contrast, a lawyer's private conduct is largely beyond the scope of these rules. See Rule 8.4. However, a lawyer's private conduct should not cast doubt on the lawyer's commitment to equal justice under law.

a letter,[12] or a pleading.[13] No person involved in a legal proceeding was insulted to his or her face or otherwise "treated" discourteously in the course of participating in the legal process. The Administrator asks us to apply these rules to comments – crude, disgusting and demeaning comments, to be sure – made about judges after their opinion had been entered and not in the presence of the judges, but rather broadcast on the radio.

We note that our dissenting colleagues have found cases in which discipline has been imposed in other jurisdictions for discourteous and/or disrespectful public statements regarding a judge. However, those few cases were not under rules with wording similar to our rules. For the reasons set forth above, we conclude that the rules involved here are not applicable. They were plainly written so as to preserve the integrity of specific proceedings, not to silence all criticism of the judiciary or to punish all manner of speech deemed offensive (or "disrespectful") by a complainant or by discipline prosecutors and adjudicators.

II. Respondent's Remarks And The First Amendment

Although we have concluded that MRPC 3.5(c) and MRPC 6.5(a) do not apply under a plain reading of their text, we also conclude that even if the text of these rules could be construed to encompass disrespectful statements about tribunals which are made publicly after a decision has been rendered, a narrower construction of these rules is most consistent with the First Amendment decisions by the Michigan Supreme Court and the United States Supreme Court.

A. *Chmura I*

In re Chmura, 461 Mich 517; 608 NW2d 31 (2000), cert den 531 US 828 (2000) (Chmura I), is a judicial discipline case which involved a First Amendment challenge to a judicial canon that prohibited communications by judicial candidates which were, among other things, false, misleading, deceptive, or omitted a fact necessary to avoid misleading or creating unjustified

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[12] See, e.g, In re Shearin, 765 A2d 930, 938 n 7 (2000), and compare In Re Snyder, 472 US 634; 105 S Ct 2874; 86 L Ed 2d 504 (1985).

[13] See, e.g., Grievance Administrator v William A Ortman, 93-135-GA (ADB 1995) (scandalous and spurious allegations against judges in briefs and pleadings violated MRPC 3.5(c)).

expectations.[14] Noting that "[t]he United States Supreme Court has, in fact, considered facial challenges to attorney disciplinary rules that attach adverse consequences to public noncommercial speech," and citing Gentile v State Bar of Nevada, 501 US 1030; 111 S Ct 2720; 115 L Ed 2d 888 (1991), our Supreme Court found that "a realistic danger exists that Canon 7(B)(1)(d) will compromise recognized First Amendment protections of parties not before this Court," and therefore held that the "respondent may facially challenge the canon on overbreadth grounds." Chmura I, 461 Mich at 531-532.

The Court then explained that: "To determine the constitutionality of an ethics rule, we weigh the state's interests against the candidate's First Amendment interest in the kind of speech at issue. See Gentile, supra, at 1073." Chmura I, supra, at 533. Because the Canon "restrict[ed] political expression that 'occupies the core of the protection afforded by the First Amendment,'"[15] our Court applied exacting scrutiny and announced that it would uphold the judicial canon only if it was narrowly tailored to serve a compelling state interest. The Court then quoted a passage from Buckley v Valeo, 424 US 1, 14-15; 96 S Ct 612; 46 L Ed 2d 659 (1976), explaining the importance of political speech:

> "Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v United States, 354 US 476, 484; 77 S Ct 1304, 1308; 1 L Ed 2d 1498 (1957).

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[14] See Chmura I, n 1:

> Canon 7(B)(1)(d) provides that a candidate for judicial office should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

[15] Our Supreme Court cited McIntyre v Ohio Elections Comm'n, 514 US 334; 115 S Ct 1511; 131 L Ed 2d 426 (1995), a case involving a leaflet urging defeat of a school millage distributed by one Margaret McIntyre purporting to express the views of "concerned parents and taxpayers." The Court struck down a statute prohibiting anonymous campaign literature.

> Although First Amendment protections are not confined to 'the exposition of ideas,' Winters v New York, 333 US 507, 510; 68 S Ct 665, 667; 92 L Ed 840 (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course including discussions of candidates . . . .' Mills v Alabama, 384 US 214, 218; 86 S Ct 1434, 1437; 16 L Ed 2d 484 (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' New York Times Co v Sullivan, 376 US 254, 270; 84 S Ct 710, 721; 11 L Ed 2d 686 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." [Chmura I, 461 Mich at 532-533, quoting Buckley, supra.]

Next, the Court discussed the rationale for judicial elections, i.e., "that meaningful debate should periodically take place concerning the overall direction of the courts and the role of individual judges in contributing to that direction," and concluded that "[b]y chilling this debate, Canon 7(B)(1)(d) impedes the public's ability to influence the direction of the courts through the electoral process." Chmura I, 461 Mich at 540. In holding that the state's compelling interest in preserving confidence in the judiciary did not justify the restraints against false, deceptive and misleading campaign practices, the Court said:

> We recognize that the broad language of the canon is intended to promote civility in campaigns for judicial office. [Footnote omitted.] Nevertheless, the state's interest in preserving public confidence in the judiciary does not support the sweeping restraints imposed by Canon 7(B)(1)(d). The prohibition on misleading and deceptive statements quells the exchange of ideas because the safest response to the risk of disciplinary action may sometimes be to remain silent. [Chmura I, 461 Mich at 540.]

Thus, the Court narrowed, and in fact there amended, the judicial canon "to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is false." This formulation was determined by the Court to satisfy First Amendment requirements: "By limiting the scope of the canon to known and reckless false public statements, the canon provides the necessary 'breathing space' for freedom of expression." Chmura I, 461 Mich at 542.

B. *Chmura II*

Following a remand to the Judicial Tenure Commission, the Michigan Supreme Court revisited the Chmura case in In re Chmura, 464 Mich 58; 626 NW2d 876 (2001) (Chmura II).

Again, the Court expressed its concern that "under the existing canon, judicial candidates, rather than engaging in robust political give-and-take, might well conclude that the safer course of action was to remain silent on controversial issues lest the canon be inadvertently breached." Chmura II, 464 Mich at 66.

Our Supreme Court's decision in Chmura II affords significant protection to speech which might be in violation of professional canons or rules of conduct. The Court recognized that "before a judicial candidate's public communication is tested for falsity, the communication at issue must involve objectively factual matters. Milkovich v Lorain Journal Co, 497 US 1, 18-19; 110 S Ct 2695; 111 L Ed 2d 1 (1990)." The Court continued, noting the strong First Amendment protections for speech critical of government officials:

> *Speech that can reasonably be interpreted as communicating "rhetorical hyperbole," "parody," or "vigorous epithet" is constitutionally protected. [Milkovich] at 17. Similarly, a statement of opinion is protected as long as the opinion "does not contain a provably false factual connotation . . . " id. at 20.* We are mindful that in protecting hyperbole, parody, epithet, and expressions of opinion, some judicial candidates may inevitably engage in "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co, supra, at 270. [Chmura II, 464 Mich at 72-73; emphasis added.]

C. *Gentile v State Bar of Nevada*

Our colleagues cite Justice O'Connor's concurring opinion in Gentile v State Bar of Nevada, 501 US 1030; 1074-75; 115 L Ed 2d 888, 111 S Ct 2720 (1991) for the proposition that "Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech." But, the preceding sentences of Justice O'Connor's opinion are critical. Justice O'Connor writes: "I agree with much of the Chief Justice's opinion. In particular, I agree that a State may regulate speech by lawyers representing clients *in pending cases* more readily than it may regulate the press." 501 US at 1081 (emphasis added).

Gentile dealt with a pretrial publicity rule (similar to ABA Model Rule of Professional Conduct 3.6). Justice Kennedy delivered the opinion of the Court invalidating the Nevada rule as void for vagueness, and Justice Rehnquist authored a majority opinion concluding that the "substantial likelihood of material prejudice" to a proceeding test employed by Nevada and other states was compatible with the First Amendment. Citing In re Sawyer, 360 US 622, 646; 3 L Ed 2d 1473; 79 S Ct 1376 (1959), the majority joining the Chief Justice held that "the speech of lawyers *representing clients in pending cases* may be regulated under a less demanding standard than that established for the regulation of the press," 501 US at 1074 (emphasis added), i.e., clear and present danger of actual prejudice or imminent threat to a proceeding.[16]

The Court engaged in a balancing of the interests at stake, and found that the "substantial likelihood" test "imposes only narrow and necessary limitations on lawyers' speech" aimed at two principal evils:

> (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.

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[16] In reaching this holding, the Court quoted with approval the position and authority of the disciplinary authority in that case:

> Respondent State Bar of Nevada points out, on the other hand, that none of these cases involved lawyers who represented parties to a pending proceeding in court. It points to the statement of Holmes, J., in Patterson v Colorado ex rel. Attorney General of Colorado, 205 US 454, 463; 51 L Ed 879; 27 S Ct 556 (1907), that *"when a case is finished, courts are subject to the same criticism as other people*, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." [Gentile, 501 US at 1070 (emphasis added).]

The Court also quoted "[t]he four dissenting Justices who would have sustained the discipline" in Sawyer, supra:

> "*Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice*. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer. . . . [Gentile, 501 US at 1071 (emphasis added).]

Again and again the majority and concurring opinions in Gentile repeat the critical words "in pending cases."[17] Justice Rehnquist's conclusion at the end of his majority opinion clearly articulates the nature of the restrictions on lawyer speech that were tolerated by the Court:

> The restraint on speech is narrowly tailored to achieve those objectives. *The regulation of attorneys' speech is limited -- it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial.* While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, *the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding*. [Gentile, 501 US at 1076. Emphasis added.]

Gentile does not in any way support the proposition that discourteous speech may be curtailed in the general interest of promoting respect for, and confidence in, the judiciary. To the contrary, given the narrow restraints on lawyer speech upheld in that case and the strong countervailing interest (fair trial) required to justify such restrictions, it seems highly likely that the Gentile Court would not countenance an attempt to apply rules such as MRPC 3.5(c) and 6.5 to the facts of this case.

D. *Yagman* & The Offensive Expression of Opinions

In Standing Committee on Discipline v Yagman, 55 F 3d 1430 (CA 9, 1995), a lawyer was found to have made numerous disparaging comments about a judge who had imposed Rule 11

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[17] The Administrator argues that "[w]e have a pending proceeding in this case because . . . these remarks were made . . . literally days after the Court of Appeals had issued its opinion. Pursuant to the court rules, the Court of Appeals still had jurisdiction over that case for 21 days." Review Hrg Tr (4/15/04), p 25. The Court of Appeals issued its opinion on August 20, 1999, and respondent made his remarks on August 23rd and August 25th of that year. In his brief, the Administrator quoted MCR 7.215 ("the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court") and pointed out that leave to appeal was not denied by the Michigan Supreme Court until March 21, 2001. Under this argument, a case might be "pending" until the time for petitioning for certiorari to the United States Supreme Court has expired. This was not what the Gentile court meant by a pending proceeding. The case is replete with references to the effect of pretrial publicity upon jurors and prospective jurors. It is fair to say that judges, particularly appellate judges, will not be swayed by a lawyer's brickbats.

sanctions against him.[18] The federal District Court based its sanction on two rule violations, one proscribing conduct that "degrades or impugns the integrity of the Court," and another prohibiting conduct which interferes with the administration of justice. In reversing the District Court, the Ninth Circuit, in an opinion authored by Judge Alex Kozinski, stated:

> The special considerations identified by Gentile are of limited concern when no case is pending before the court. When lawyers speak out on matters unconnected to a pending case, there is no direct and immediate impact on the fair trial rights of litigants. Information the lawyers impart will not be viewed as coming from confidential sources, and will not have a direct impact on a particular jury venire. Moreover, a speech restriction that is not bounded by a particular trial or other judicial proceeding does far more than merely postpone speech; it permanently inhibits what lawyers may say about the court and its judges - whether their statements are true or false. [n22 omitted.] 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 a pending matter. 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, 55 F3d at 1443.]

The Yagman court also addressed the constitutional protections afforded expressions of opinion:

> It follows that statements impugning the integrity of a judge may not be punished unless they are capable of being proved true or false; statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." See Milkovich v Lorain Journal Co, 497 US 1, 19; 111 L Ed2d 1; 110 S Ct 2695 (1990); Lewis v Time, Inc, 710 F2d 549, 555 (9th Cir. 1983); Restatement (Second) of Torts §§ 566 (1977) (statement of opinion actionable "only if it

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[18] Among these:

> 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 ever 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. [Yagman, 55 F3d at 1434 n 4.]

> implies the allegation of undisclosed defamatory facts as the basis for the opinion"). Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target. See Hustler Magazine, Inc v Falwell, 485 US 46, 50; 99 L Ed2d 41; 108 S Ct 876 (1988). Thus, statements of "rhetorical hyperbole" aren't sanctionable, nor are statements that use language in a "loose, figurative sense." [Yagman, 55 F3d at 1438.]

In Hustler Magazine v Falwell, 485 US 46, 50-52; 108 S Ct 876, 879-880; 99 L Ed 2d 41 (1988), the Court explained that attempts to narrowly confine First Amendment precepts to certain factual settings or legal contexts will not often prevail in order to justify government action against robust, offensive, perhaps even disgusting speech evoking images about public figures. Noting that the Court has "been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions," Justice Rehnquist's opinion for a unanimous Court explains why speech concerning public figures must be protected:

> The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Associated Press v Walker decided with Curtis Publishing Co v Butts, 388 U S 130, 164 (1967) (Warren, C.J., concurring in result). Justice Frankfurter put it succinctly in Baumgartner v United States, 322 US 665, 673-674 (1944), when he said that "one of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks," New York Times, supra, at 270. [Hustler Magazine v Falwell, 485 US 46, 50-52; 108 S Ct 876; 99 L Ed 2d 41 (1988).]

E. Conclusion – First Amendment

When our Supreme Court's opinions in Chmura I and Chmura II are read together and with the numerous United States Supreme Court opinions which support them, we must conclude that attorney statements which do not involve assertions of fact are protected by the First Amendment outside the context of a pending proceeding.

The Administrator argues, however, that the form of the respondent's remarks is so unacceptable in polite society that they may be regulated by the disciplinary authorities of this state. Again, Justice Rehnquist's opinion in Hustler illuminates basic concepts pertinent here:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. See NAACP v Claiborne Hardware Co, 458 U. S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). And, as we stated in FCC v Pacifica Foundation, 438 U. S. 726 (1978):
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> > "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." id., at 745-746.
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> See also Street v New York, 394 U. S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"). [Hustler, pp 55-57]

Like some falsehoods, offensive words which do little to illuminate a subject are "'nevertheless inevitable in free debate,'. . . and a rule that would impose strict liability . . . for false factual assertions [or discourteous or offensive speech] would have an undoubted 'chilling' effect on speech relating to public figures that does have constitutional value. 'Freedoms of expression require "breathing space."'" Hustler Magazine v Falwell, 485 US at 52. Chmura I, supra. Respondent's statements are churlish, crude and vile. It is easy to condemn the language used by respondent in this case, but it is far more difficult to apply our rules against discourteous, undignified, and disrespectful conduct in these circumstances, and to then enunciate the principles which would translate this condemnation into discipline without severely chilling significant amounts of arguably discourteous or disrespectful lawyer speech regarding the actions of a tribunal.

Indeed, we note that even if our Rules were broader in scope (i.e., retained the Model Code's wording, "undignified and discourteous conduct which is degrading to a tribunal," instead of the Michigan formulation, "undignified or discourteous conduct toward the tribunal"), most courts would not impose discipline under such a rule for an out of court statement causing no prejudice to the administration of justice. See, e.g., Tennessee Bd of Prof Resp v Slavin, 2004 Tenn Lexis 669 (Tenn August 27, 2004) (disciplining attorney under DR 7-106(C)(6) for statements made in pleadings and distinguishing statements in court during proceedings from out-of-court statements to the media). The Court in Slavin cited and distinguished its earlier decision, Ramsey v Bd of Prof Resp, 771 SW2d 116 (Tenn 1989), Slavin, supra, n 9. In Ramsey, the Court found that a respondent's remarks to the press "were disrespectful and in bad taste," but did not impose discipline because, "Use of the Disciplinary Rules to sanction the remarks . . . in this case would be a significant impairment of First Amendment rights." Ramsey, 771 SW2d at 122.

Our colleagues point out that attorney speech may be afforded fewer protections than that of non-lawyer citizens even outside the context of a pending trial. While we recognize that our Court and others have adopted an objective standard for "reckless disregard" when calling into question the qualifications or integrity of a public legal official[19], we cannot reason from this that lawyers may therefore simply be stripped of all of their First Amendment rights in every instance. Chmura I and Chmura II follow the well-established rule that discipline may not be imposed for a lawyer's remarks unless the utterances are statements of fact.[20] We can discern no statements of fact in respondent's vulgar rants.

In Chmura I and Chmura II, the Court has made its determination as to the appropriate constitutional balance and we would not extend Chmura I's rationale for diminished attorney speech rights further than the Court itself has thought wise.

III. Vagueness & Overbreadth

Respondent argues that the rules are overbroad, and that applying the rules to this case would violate his constitutional right to fair notice of what conduct is permitted.

The vagueness doctrine seeks to prevent arbitrary and discriminatory enforcement of laws:

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[19] See, Chmura I (discussing cases interpreting MRPC 8.2(a)), 461 Mich at 542-544.

[20] Of course, as noted above, different constraints apply in court or during pending litigation.

> Due process requires that [a federal court] hold a state enactment void for vagueness if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion. See Grayned v City of Rockford, 408 US 104, 108, 33 L Ed 2d 222, 92 S Ct 2294 (1972). Not only do "vague laws . . . trap the innocent by not providing fair warning," but laws that fail to provide explicit standards guiding their enforcement "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09; see also Leonardson v City of East Lansing, 896 F2d 190, 196 (6th Cir. 1990). The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors. See Leonardson, 896 F2d at 198. [United Food & Commercial Workers Union, Local 1099 v Southwest Ohio Regional Transit Auth, 163 F3d 341, 361 (6th Cir. 1998).]

"[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." Hoffman Estates v The Flipside, Inc, 455 US 489; 102 S Ct 1186; 71 L Ed 2d 362 (1982).

The United States Supreme Court has shown its willingness to strike down a disciplinary rule when "a lawyer seeking [to comply with it] must guess at its contours." Gentile, supra at 501 US at 1048. Although there appears to be a consensus in Michigan that certain statements prohibited elsewhere are protected or at least should not be the subject of disciplinary prosecution, we do not always find the dividing line between permissible and impermissible to be sufficiently clear. Lawyers in this state and in others have engaged in what Justice Frankfurter described as "a practice [publicly criticizing a Court's opinion] familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press." US v Morgan, 331 US 409, 421; 61 S Ct 999; 85 L Ed 1429 (1941). Some of these statements are set forth below. Many of them evidence some degree of disrespect and may be said to be discourteous.

> The judge's opinion is "irrational" and "cannot be taken seriously."[21]
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> The Court's decisions were "outrageous" and the "results were idiotic"[22]
>
> The Court engaged in "outrageous behavior" and "unethical" behavior.[23]
>
> "[T]he Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."[24]
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> "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members."[25]
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> "The Supreme Court of the land has said twice that our armed criminal statute is constitutional and that it does not constitute Double Jeopardy . . . but for reasons that I find somewhat illogical and a little bit less than honest, Judge X has said today that we cannot pursue armed criminal action. He has really distorted the statute and I think convoluted logic to arrive at a decision that he personally likes."[26]
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> "It's obvious with this decision that they (the majority members of the Supreme Court) will use any silly reason they can find to avoid

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[21] Justice Antonin Scalia, describing the work of Justice Sandra Day O'Connor. Webster v Reproductive Health Svcs, 492 US 490, 532, 536 n *. No public discipline.

[22] Justice Patricia Boyle as quoted in McAlpine & Bergen, Justice Patricia Boyle Leaves a Legacy of Decisions Laced with Principle, 78 Mich Bar J 404, 408 (May 1999). No public discipline.

[23] In Re Gershater, 256 Kan 512; 886 P2d 343 (1994) (one year suspension for this and other acts of misconduct including dishonesty).

[24] In re Wilkins, 777 NE2d 714 (Ind, 2002) (30 day suspension because "the respondent suggested that the judges on the Court of Appeals may have been motivated in their decision making by something other than the proper administration of justice, and, in fact, suggested unethical motivations.")

[25] Atkins v Virginia, 536 US 304, 338; 153 L Ed 2d 335; 122 S Ct 2242 (2002) (Scalia, J., dissenting). No public discipline.

[26] Respondent in Matter of Westfall, 808 S W 2d 829 (Mo 1991) (reprimand), cert den 502 US 1009 (1991).

> letting a death sentence stand . . . . [The] four justices have violated their oaths to uphold the Constitution . . . ."[27]
>
> "Judges determined to nullify statutes customarily feel constrained to ascribe their determination to neutral legal principles. Such constraint is not apparent today."[28]
>
> The judge is a "lunatic . . . I think he got his law degree from a mail-order law school."[29]

Our dissenting colleagues refer to enforcement policies in Michigan which have resulted in the dismissal of some grievances and formal complaints involving lawyer speech critical of judges. However, even if these policies could be relied upon[30] and we were we to stretch the language of Rules 3.5(c) and 6.5(a) to cover public statements regarding a completed case, an attorney would most certainly still have to guess at the contours of the rules in determining what statements might be deemed impermissibly discourteous or disrespectful by the Attorney Grievance Commission, or by a hearing panel, or this Board.

Lawyer speech is highly regulated during a pending proceeding. Gentile, supra, 501 US at 1071-1073[31]. Lawyers are accustomed to the orderliness demanded during proceedings such as

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[27] Ramirez v State Bar of California, 28 Cal 3d 402, 420; 169 Cal Rptr 206; 619 P 2d 399 (1980), dissenting opinion of Justice Newman quoting Welborn, *Prosecutor Plans Recall Drive Over Ruling on Death Penalty*, Santa Ana Register (June 11, 1980) pp. A 1, A 10. No discipline referenced in opinion.

[28] Indiana Chief Justice Randall T. Shepard (who joined the majority per curiam opinion in Wilkins, supra), dissenting in Covalt v Carey Canada, Inc, 543 NE2d 382 (IN, 1989). No reported discipline.

[29] Former Governor John Engler, describing a Circuit Judge. No discipline. Fieger v Thomas, 872 F Supp 377, 387 (ED MI 1994), remanded 74 F3d 740 (CA 6, 1996) (referencing letter cautioning respondent "regarding the adverse consequences that derogatory remarks such as those made by you . . . can have on the entire legal system of this state," and expressing confidence that he shared those concerns).

[30] We recognize that "when a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits." Lakewood v Plain Dealer Pub Co, 486 US 750, 770 n 11; 108 S Ct 2138; 100 L Ed 2d 771 (1988). However, we cannot say that such practices, if they are established at all, are sufficiently uniform or long standing.

[31] Opinion by Chief Justice Rehnquist for the majority approving the disciplinary rule departing from the clear and present danger standard and proscribing extrajudicial statements having "a substantial likelihood of materially prejudicing an adjudicative proceeding."

hearings, trials, and depositions, and the courtesy and respect for participants (including adverse parties and counsel) necessary to navigate such proceedings while doing one's job as an advocate.[32]

However, "courtesy" and "respect" have not been used to govern lawyer speech after a proceeding, in public, and regarding a matter of public concern, such as the performance of a judge or the outcome of a proceeding. As Justice Kennedy said, writing for the majority in Gentile, "In the context before us, these terms have no settled usage or tradition of interpretation in law." 501 US at 1049.[33] The majority opinion in Gentile found the rule there unconstitutionally vague, stating:

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, Kolender v Lawson, 461 US 352, 357-358; 361, 75 L Ed 2d 903, 103 S Ct 1855 (1983); Smith v Goguen, 415 US 566, 572-573; 39 L Ed 2d 605; 94 S Ct 1242 (1974), for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. [Gentile, 501 US at 1051.]

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[32] As the Maryland Court of Appeals recently explained in Attorney Grievance Commission v Link, 844 A2d 1197 (Md, 2004):

> It follows, therefore, and, indeed cannot be gainsaid, that attorneys are required to act with common courtesy and civility at all times in their dealings with those concerned with the legal process, . . . and that "conduct calculated to intimidate and distract those who, though in an adversarial position, have independent responsibilities and important roles in the effective administration of justice cannot be countenanced." . . . . Thus, "vilification, intimidation, abuse and threats have no place in the legal arsenal[,]" . . . , common courtesy and civility being expected from a member of the bar whether appearing before the State's highest court, some administrative body or proceedings ancillary to, but a necessary part of, the litigation. Id. This is so because the effectiveness of the adversary system depends on the effectiveness of adversary counsel and because conduct characterized by "the undue and extraneous oppression and harassment of participants involved in litigation" and "consciously and intentionally engaged in" perverts advocacy. . . . Moreover,
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> > "Such conduct redounds only to the detriment of the proper administration of justice, which depends vitally on the reasonable balance between adversaries and on opposing counsels' respect, trust, and knowledge of the adversary system. There cannot be genuine respect of the adversary system without respect for the adversary, and disrespect for the adversary system bespeaks disrespect for the court and the proper administration of justice."
>
> [Citations omitted.]

[33] Opinion of J. Kennedy writing for the majority as to the vagueness issue.

IV. Conclusion

We hold that the plain language of MRPC 3.5(c) and 6.5(a) does not apply to the statements for which discipline is sought in this case. We also believe an interpretation of these rules that would punish nonfactual utterances made about an appellate tribunal after issuance of its opinion would be unconstitutional. None of the Gentile considerations regarding the paramount importance of a fair trial in a particular proceeding are present here. Moreover, vagueness problems are also present. Accordingly, we reiterate our conclusion that the Michigan Supreme Court would not approve of the Administrator's construction of these rules even if it were supported by the plain text.

Of course, our conclusion that respondent's conduct does not violate MRPC 3.5(c) or MRPC 6.5(a) in no way constitutes an endorsement of his demagoguery and irresponsible comments. Three Court of Appeals judges did what they believed was their duty. They applied the law and found insufficient evidence for a verdict and, in the process, scolded respondent for conduct during trial that seemingly violated our Rules of Professional Conduct as well as established caselaw. Apparently having nothing more of substance to say and no other way to effectively counter what he perceives to be an injustice, respondent subjected these individuals to ridicule, epithets, and obscenities. An advocate can challenge authority without trashing the individuals and institutions that uphold the rule of law in our society. The finest lawyers use reasoned argument, eloquence, even humor or true satire to make their points. In this instance, respondent's arsenal is bereft of these attributes. Lacking wit or cleverness, respondent lashed out with comments that were base, vile, destructive and, in the end, quite ineffective. His childish scorched-earth tactics served no one well.

However, as strongly as we disapprove of respondent's methods and remarks, we are equally certain that the rules of professional conduct do not regulate the speech in this case. We must not let the respondent's revolting language stir our passions and warp our interpretation of the rules. Accordingly, we vacate the order of reprimand and dismiss the formal complaint.

Board Members Theodore J. St. Antoine, William P. Hampton, and George H. Lennon concur in this opinion.

Board Member Richard F. Suhrheinrich was voluntarily recused and did not participate.

Opinion of Board Member Lori McAllister, concurring in part and dissenting in part:

I agree with, and endorse fully, the dismay and disgust expressed by my colleagues regarding the comments made by the Respondent in this case. The credibility and integrity of the entire justice system are undermined by outrageous personal attacks made by a disgruntled litigant. Respondent's utter lack of respect for the profession and those judges who devote their talents and hard work to dispensing justice is offensive. Nonetheless, I agree with my colleagues that the case cannot be decided based on my disagreement with the vile nature of the content of the comments made by Respondent.

I dissent from the portion of the Board's Opinion that concludes that MRPC 3.5(c) and MRPC 6.5(a) do not apply to Respondent's remarks made during the "Fieger Time" radio broadcasts. I agree with the dissenting opinion that the plain language of these Rules applies to the conduct that is at issue in this case.[1]

This conclusion, however, does not end the analysis. If the comments are covered by the Rules of Professional Conduct, it then becomes necessary to determine whether this construction of the Rules is consistent with the First Amendment decisions by the Michigan Supreme Court and the United States Supreme Court. I agree with the portion of the Board's Opinion holding that the comments at issue fall within the protections of the First Amendment, and therefore, cannot be the subject of disciplinary action in this particular case. As a result, I concur that the order of reprimand should be vacated.

Board Member Billy Ben Baumann, M.D., joins in the opinion of Board Member McAllister.

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[1] I also note that I am troubled that the Grievance Administrator sought to bring the complaint to the Board in its current controversial form, rather than addressing the underlying behavior in the courtroom that led to the decision of the Court of Appeals in the *Badalamenti* opinion. Although the Court of Appeals found that Respondent's misconduct in the courtroom during the trial had "completely tainted the proceedings" justifying a reversal, apparently no disciplinary action was taken with respect to this issue.

Dissenting Opinion of Board Members Martell, Steffens, and Combs:

We respectfully dissent. We agree with our colleagues in the majority that we can, and sometimes must, address constitutional issues in applying the Rules of Professional Conduct. But, we are of the view that the conduct here is plainly prohibited by the Rules and we do not find a violation of either the First Amendment or of the Due Process Clause.

I. Does Respondent's Conduct Violate MRPC 3.5(c) & MRPC 6.5(a)?

Respondent first asks us to hold that his remarks are not reached by dictates of MRPC 3.5(c). That Michigan Rule of Professional Conduct reads as follows:

Rule: 3.5 Impartiality and Decorum of the Tribunal

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person concerning a pending matter, except as permitted by law; or
>
> ***(c) engage in undignified or discourteous conduct toward the tribunal.***

Nothing in the text of the rule suggests that its application is limited to proceedings or events taking place directly before a judge or tribunal. Of course, "[t]he catch lines of a rule are not part of the rule and may not be used to construe the rule more broadly or more narrowly than the text indicates." MCR 1.106. However, even this heading does not suggest the narrowed application respondent urges. And nothing in the comment or the history of the rule leads one to assume that the text does not mean what it says. Rather, if a reader should choose to delve into the history of the rule, he or she will immediately note the unambiguous departure from the language of the American Bar Association (ABA) Model Rule 3.5.[1] Michigan's Rule 3.5(c) reflects a conscious decision to retain language from the former Code of Professional Responsibility. Thus, a deliberate and quite obvious judgment was made by our Court not to limit the reach of MRPC 3.5(c) to conduct

[1] Prior to the recent "Ethics 2000" amendments, ABA Model Rule 3.5(c) provided: "A lawyer shall not . . . *(c) engage in conduct intended to disrupt a tribunal.*" The amendments adopted by the ABA House of Delegates in 2002 did not change the substance of the rule but moved it to paragraph (d). A new paragraph (c) deals with juror contacts.

"intended to disrupt a tribunal." That should serve notice that cases and commentary based upon the ABA Model Rule are of doubtful value given the sharply different language of the two rules.

Though the parties did not refer to them, other states have imposed discipline for disrespectful comments toward members of the judiciary under rules similar to our MRPC 3.5(c).

Delaware's Rule 3.5(c)[2], like Michigan's, differs from the ABA and prohibits "undignified or discourteous conduct which is degrading to a tribunal." The Delaware Supreme Court has held that this rule applies when an attorney writes a letter to the trial judge or makes disparaging comments in a brief. In re Shearin, 765 A2d 930, 938 n 7 (2000).

Kansas has adopted a version of Model Rule 3.5 which contains a subsection (d) providing that: "A lawyer shall not . . . engage in undignified or discourteous conduct degrading to a tribunal." The comment to the Kansas rule reads, in part, as follows:

> Section (c) of the Model Rule prohibited conduct intended to disrupt a tribunal and, therefore, impliedly would authorize undignified or discourteous conduct degrading to a tribunal, prohibited under DR 7-106(C)(6), unless the intent to disrupt is established. The Kansas committee is of the opinion that standards of lawyer conduct in the courtroom should not be lowered as the model rule would appear to do.

Although this comment mentions "conduct in the courtroom," the Kansas Supreme Court disciplined a lawyer under the plain language of the rule for, among other things, writing to her clients that the judge's conduct was "outrageous" and "unethical." In Re Gershater, 256 Kan 512; 886 P2d 343 (1994).

Ohio too has a rule, DR 7-106(C)(6), prohibiting "undignified or discourteous conduct degrading to a tribunal." A lawyer was reprimanded under this rule for comments to a reporter who quoted the lawyer as saying: "Your source is that sonofabitch [Judge] Heydinger. Why don't you get your information from him?" Office of Disciplinary Counsel v Grimes, 66 Ohio St 3d 607; 614 NE2d 740 (1993). See also, Office of Disciplinary Counsel v Gardner, 99 Ohio St 3d 416; 793 NE2d 425 (2003) (suspending lawyer for disparaging remarks about members of the court made in a brief contrary to DR 7-106(C)(6) and DR 8-102(B)).

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[2] Now renumbered 3.5(d).

Florida is yet another state imposing discipline under a similar rule. See Florida Bar v Weinberger, 397 So 2d 661 (Fla, 1981) (attorney who "filed various pleadings and made public statements denigrating the courts and the administration of justice" reprimanded under DR 7-106(C)(6)).

And, a New York lawyer who suffered an adverse ruling in a highly publicized palimony case involving the actor William Hurt was censured under that state's DR 7-106(C)(6) for his statements to the press concerning the judge "which were unprofessional, undignified, discourteous and degrading to the judge and the court." In Re Golub, 597 NYS2d 370, 371; 190 A2d 110 (1993). Respondent Golub had said "that the judge was 'star struck' and that her decision constituted a 'love letter' to the defendant" (internal quotation marks omitted).[3]

We note that in Grimes and Weinberger, even though statements were made publicly, and not to the judge's face, discipline was imposed under the Ohio and Florida versions of the Model Code of Professional Responsibility DR 7-106(C)(6) which provides: "*In appearing in his professional capacity before a tribunal*, a lawyer shall not . . . Engage in undignified or discourteous conduct which is degrading to a tribunal." (Emphasis added.) Similarly, discipline was imposed for remarks to the press in Golub, notwithstanding that the New York version of DR 7-106(C)(6) is prefaced with the phrase: "In appearing as a lawyer before a tribunal . . . ."

As respondent's counsel conceded at oral argument, the plain language of MRPC 3.5(c) is applicable to this case. No reasonable person could dispute that respondent's remarks were discourteous, disrespectful and clearly directed toward the appellate panel deciding Badalamenti, supra. These judges are clearly persons involved in the legal process. See Grievance Administrator v Vos, 466 Mich 1211; 644 NW2d 728 (2002) (order remanding case for consideration "whether respondent's use of profanity directed at the presiding magistrate during a proceeding but off the record and his other conduct was discourteous in violation of MRPC 3.5(c) and/or MRPC 6.5(a)" and calling Board's attention to the "plain language" of the rules). By leaving open only the question whether the profanity in Vos was discourteous, the Court implicitly determined that both rules involved here are otherwise applicable to adjudicators.

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[3] Hal R. Lieberman, *A Symposium on Judicial Independence: Should Lawyers Be Free To Publicly Excoriate Judges?*, 25 Hofstra L Rev 785, 789 (1997), n 26 and text accompanying.

Respondent argues that we are bound by our previous decision in one of his previous cases, Grievance Administrator v Fieger, 94-186-GA (ADB 1997) ("Fieger II"), in which this Board "agree[d] 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." The Board also "agree[d] with the panel's determination that MPRC 3.5 [was] not applicable to the facts alleged [in that case], and quoted with approval the panel's statement that MRPC 3.5(c) does not apply to statements about judges and not to them in a pending proceeding. The Administrator characterizes that portion of our decision as dicta. We agree that the statements regarding MRPC 3.5(c)'s applicability in Fieger II were not essential to the decision because the Board also stated: "we hold that the rule is circumscribed by [New York Times v Sullivan, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964)]. 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." The Administrator had conceded the applicability of New York Times in construing the rules.

In any event, we believe that Fieger II is at odds with the plain language of the rule, and thus should not be accorded the weight respondent urges. "Stare decisis is not to be 'applied mechanically to forever prevent [a tribunal] from overruling earlier erroneous decisions interpreting the meaning of statutes.'" Robertson v DaimlerChrysler Corp, 465 Mich 732, 757-756; 641 NW2d 567 (2002). While predictability is indeed served by adherence to previous decisions, so too is this value served by construing a rule in accordance with its plain language. A plain reading, in the long run, will afford readers of a law more confidence and stability in its understanding. We do not believe the interpretation set forth in Fieger II's dicta (assuming for the sake of argument that it was a holding) has taken root such that disavowing it now "would work an undue hardship because of reliance interests or expectations that have arisen." Robertson v DaimlerChrysler, supra, at 757. Accordingly, we choose to read the rule plainly here rather than perpetuate the error. Id.

Also, MRPC 6.5(a) is, by its unambiguous terms, obviously applicable to the facts of this case. The rule provides:

Rule: 6.5 Professional Conduct

> (a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and

> nonlawyer assistants to provide such courteous and respectful treatment.
>
> (b) A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.

Announcing to the public that judges can "kiss my ass" is the very definition of discourtesy and disrespect. This comment and the others made by respondent put this case so far beyond the bounds of decency that there can be no serious question as to the impropriety of respondent's conduct under this rule.

"While a lawyer is certainly free to register his disagreement with a court's ruling, he must do so without showing disrespect to the court." In Re Garaas, 652 NW2d 918, 927 (ND, 2002) (reprimand imposed under a rule that incorporates a statutory obligation of attorneys to "maintain respect for courts of justice and judicial officers" when lawyer stated to the trial court that the Supreme Court "made a false representation of what the issue was being appealed").

II. Are MRPC 3.5(c) & 6.5(a) Constitutional As Applied In This Case?

Respondent argues that the rules are violative of his First Amendment right to free speech and are overbroad and vague. The Administrator argues that the state has a compelling interest in curtailing discourteous and disrespectful comments directed by members of the bar toward tribunals, and that these rules can be read in a manner consistent with the constitution. Respondent contends that these rules should be given a saving construction that renders them consonant with what he considers to be constitutional requirements. Similarly, the Administrator takes the position that we can also adopt a saving construction of these rules. Of course, respondent's saving construction leads to a different result than the Administrator's construction. We conclude that the rules as applied in this case do not violate the First Amendment or the Due Process Clause.

A. First Amendment

Michigan has a "compelling interest in preserving public confidence in the judiciary." Chmura I, 461 Mich at 544. The Grievance Administrator points us to an admittedly imperfect analogy between public employees and lawyers, citing Committee on Legal Ethics v Douglas, 370 SE 2d 325 (W Va 1988). See also, *Standing Committee on Discipline v Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary*, 54 Wash & Lee L Rev 817 (1997) (analogizing attorney speech questions to federal Hatch Act cases). While courts have not always consistently articulated the nature of the First Amendment standards governing lawyer comments, there is little question that a lawyer's "obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech" In re Sawyer, 360 US 622, 646; 3 L Ed 2d 1473; 79 S Ct 1376 (1959) (Stewart, J., concurring).

Cases under Model Rule 8.2(a) (prohibiting false statements regarding the integrity or qualifications of an adjudicator) are one apt illustration of diminished lawyer speech rights, or, to put it another way, increased lawyer responsibilities, as to statements regarding the judiciary. These cases illustrate that significant restrictions may be imposed upon what a lawyer can say about judges even when a case is no longer pending. Our experience with such cases in this state includes one of respondent's own, Fieger II, which he relies on heavily in this case.

In Fieger II this Board held that the term "reckless disregard" in MRPC 8.2(a) meant what it means in First Amendment cases which evolved out of defamation, criminal libel, and tort cases (such as intentional infliction of emotional distress).[4] This holding was based on (1) the language

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[4] The Board held:

> Under New York Times . . ., 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, "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." [Grievance Administrator v Fieger, No 94-186 (ADB 1997) ("Fieger II"), pp 2-3 (footnotes omitted).]

As the Supreme Court explained in Bose Corp v Consumers Union, 466 US 485, 511 n 30; 104 S Ct 1949, 1965 n 30; 80 L Ed 2d 502 (1984):

of the rule, (2) the history of its adoption, including the writings of the Reporter for the ABA committee which proposed the Model Rules, and (3) First Amendment cases discussing the limitations on laws aimed at protecting the reputation of judges or other public officials and rejecting an ordinary care or reasonable person standard for imposing governmental sanctions upon those who attack such officials and make false statements in the process.

Our opinion in Fieger II must be read in light of In re Chmura, 461 Mich 517; 608 NW2d 31 (2000), cert den 531 US 828 (2000) (Chmura I), a judicial discipline case which contained a passage effectively (but not expressly) overruling the Board's interpretation of "reckless disregard" as used in MRPC 8.2(a):

> The determination whether a candidate recklessly disregarded the truth or falsity of a public communication is an objective one. We reject as inappropriate the subjective "actual malice" standard employed in defamation cases. Bose Corp v Consumers Union of United States, Inc, 466 U.S. 485, 511, n 30; 104 S. Ct. 1949; 80 L. Ed. 2d 502 (1984); New York Times, supra at 280. [Chmura I, 461 Mich at p 542.]

Any question about whether this passage, which was followed by citations to attorney discipline cases using the objective standard, should apply to charges of lawyer misconduct under Rule 8.2(a) was answered when the Court remanded respondent's case No. 94-186 to the Board in Grievance Administrator v Fieger, 462 Mich 1210; 613 NW2d 723 (2000) (order remanding to ADB for consideration under Chmura in lieu of granting leave to appeal from the Board's May 3, 1999 opinion ("Fieger III")).

In Chmura I, our Court followed numerous state and federal court decisions applying an objective standard for "reckless disregard" under MRPC 8.2(a). This is no mere change in verbiage. The United States Supreme Court's actual malice standard is subjective, and allows rash statements of fact without investigation in order to afford our citizens breathing space for First Amendment freedoms and to prevent their self censorship in speaking out about matters of public concern. Our point in retracing the history of these decisions in Michigan and elsewhere is that in case after case throughout the country lawyers have been disciplined for disparaging remarks about the judiciary under standards markedly different from those applicable to nonlawyers and these decisions remain undisturbed by the United States Supreme Court. Many of these cases present relatively mild criticism when compared to the remarks in this case. Plainly then, Justice Stewart's view in Sawyer prevails generally in the United States. As Justice O'Connor opined in Gentile:

> 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. [Fieger II, p 18.]

> Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. See In re Sawyer, 360 U.S. 622, 646647, 3 L. Ed. 2d 1473, 79 S. Ct. 1376 (1959) (Stewart, J., concurring in result). This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies. [Gentile v State Bar of Nevada, 501 US 1030, 1081-82; 115 L Ed 2d 888; 111 S Ct 2720 (1991) (O'Connor, J., concurring).]

It is against this constitutional backdrop that we must decide the present case. We acknowledge that this case differs from Fieger II and many others, including those cited in Chmura I. This is because this case does not involve allegations that there were statements of fact regarding the integrity or qualifications of the members of the judiciary here attacked. Thus, MRPC 8.2(a) is not at issue. Rather, rules imposing a duty of courtesy and respect toward participants in the legal process are at issue. We agree with the Administrator that this case should be easier, in terms of First Amendment concerns, than the MRPC 8.2(a) cases.[5] The remarks involved here contributed nothing of value to the public's understanding of the Badalamenti case (about which respondent was venting) or the judges deciding it. They were purely venomous and crude insults devoid of any meaningful content other than disrespect and discourtesy.

The views set forth in the concurrences of Justices Sawyer and O'Connor reflect the state of the law articulated by courts for years. See, e.g., US Dist Ct v Sandlin, 12 F3d 861 (CA 9, 1993) ("[O]nce a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct."). Another court put it quite simply:

> Unjust criticism, insulting language and offensive conduct toward the judges, personally, by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity, cannot be permitted. [In Re Evans, 801 F2d 703, 707 (CA 4, 1986) (quoting People v Metzen, 291 Ill 55; 125 NE 734, 735 (1919) which involved, in part, a "write-

[5] Indeed, we note that in Michigan a consensus seems to have formed that serious criticism of a court or its rulings is not the proper subject of disciplinary action. The Attorney Grievance Commission (AGC) has dismissed requests for investigation arising out of a lawyer calling a decision "completely political," among other things. Other statements by attorneys that are critical of judges have also prompted requests for investigation but no discipline. The AGC eventually determined not to appeal the dismissal of the count against respondent in a previous case (No. 94-186) which alleged that he called two Court of Appeals judges "stupid" and questioned whether they had ever practiced law. He also stated that he "knew" how one of the judges was going to rule because of political ties. These kinds of statements might lead to discipline, or at least charges, under MRPC 8.2(a) in other states. But, the AGC's decision not to appeal the dismissal of that count in Fieger II suggests to us that the AGC is interpreting the Rules of Professional Conduct with sensitivity to First Amendment concerns and does not seek to squelch the expression of all lawyer comments and opinions unflattering to the judiciary.

> up in the Sunday papers" "intended and calculated to bring the court into disrepute with the public").]

Perhaps the United States Supreme Court's statement of the pertinent principle has not been surpassed:

> the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. [Bradley v Fisher, 80 US 335, 355; 20 L Ed 646; 13 Wall 335 (1871).]

Even for acts "outside the pale of the court," there exists a duty to respect a court and "there can be no doubt of the existence of a power to strike the offending attorney from the roll" for a breach:

> "In matters collateral to official duty," said Chief Justice Gibson in the case of *Austin and others*, "the judge is on a level with the members of the bar as he is with his fellow-citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the consequences of beating or insulting a judge in the street for a judgment in court. No one would pretend that an attempt to control the deliberation of the bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. [Bradley, supra, pp 355-356.]

Thus, it is not surprising that the courts have disciplined lawyers for intemperate remarks in cases such as Grimes, supra, and Golub, supra, and have rejected First Amendment arguments that insults against judges are beyond the reach of attorney discipline. See, e.g., In re Shearin, 765 A2d 930, 938 n 7 (2000) (Delaware Supreme Court considered the respondent's First Amendment arguments and concluded, nonetheless, that: "[M]embers of the Delaware Bar are subject to disciplinary sanctions for speech consisting of intemperate and reckless personal attacks on the integrity of judicial officers.").

B. Overbreadth and Vagueness

Respondent argues that the terms of the rules are vague and thus do not give him notice of the conduct prohibited. He also argues that the rules are overbroad and prohibit protected speech.

Lawyers are subject to various general standards governing their conduct. See, e.g., MCR 9.104(2) (misconduct to engage in "conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach"); MCR 9.104(3) (misconduct to engage in "conduct that is contrary to justice, ethics, honesty, or good morals"); Federal Rule of Appellate Procedure 46 (providing for suspension or disbarment for "conduct unbecoming a member of the bar of the court"); MRPC 8.4(c) (misconduct to engage in conduct "prejudicial to the administration of justice"); MRPC 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client"). This is, in part, because lawyers are part of a learned profession and are charged with knowing the "lore" of that profession. Howell v State Bar of Texas, 843 F 2d 205 (CA 5, 1988).

The Washington Supreme Court considered a challenge to a disciplinary rule forbidding lawyers to commit an "act . . . which reflects disregard for the rule of law." After narrowly construing the rule such that it could "only be used to discipline a lawyer for violations of the criminal law," the Court continued:

> This law is not so vague as to be unconstitutional, given this limiting construction. See Law Students Civ Rights Research Coun, Inc v Wadmond, 401 US 154, 156; 27 L Ed 2d 749; 91 S Ct 720 (1971) (upholding requirement that applicants for the New York bar possess "the character and general fitness requisite for an attorney and counsellor-at-law"); State ex rel Nebraska State Bar Ass'n v Kirshen, 232 Neb 445; 441 NW2d 161 (1989) (upholding prohibition on conduct adversely reflecting on fitness to practice law); Jordan v DeGeorge, 341 US 223, 231-32; 95 L Ed 2d 886, 71 S Ct 703 (1951) (upholding the constitutionality of deporting aliens committing offenses involving "moral turpitude"). In Jordan, the Supreme Court found that judicial construction had rendered the term "moral turpitude" sufficiently definite to survive constitutional scrutiny. Importantly, the Court stated that a statute will not be considered unconstitutionally vague just because it is difficult to determine whether certain marginal offenses are within the meaning of the language under attack. Jordan, 341 US at 231.
>
> Standards may be used in lawyer disciplinary cases which would be impermissibly vague in other contexts. Zauderer v Office of Disciplinary Counsel, 471 US 626, 666; 85 L Ed 2d 652; 105 S Ct 2265 (1985) (Brennan, J., dissenting). Where the state has otherwise forbidden certain conduct in reasonably clear terms, the due process clause does not stand in the way of attorney discipline. See Zauderer, 471 US at 666 (Brennan, J., dissenting). Therefore, we hold that an attorney may be disciplined for violations of the criminal law reflecting disregard for the rule of law and pass to the merits. [In Re Curran, 115 Wn 2d 747, 758-759; 801 P2d 962; 1ALR 5th 1183 (1990).]

See also, In re Keiler, 380 A2d 119, 126 (DC App, 1977) ("The rule was written by and for lawyers. The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen"), and Committee on Legal Ethics v Douglas, 370 SE2d 325 (W Va 1988) (Rule against conduct prejudicial to the administration of justice is not unconstitutionally vague "because the standard is considered in light of the traditions of the legal profession and its established practices")

Here, respondent has plenty of guidance from venerable sources. See Bradley v Fisher, supra. See also, Sharswood, as quoted in a recent paper by Judge Kaye, Chief Judge of the New York Court of Appeals:

> Fidelity to the court requires outward respect in words and actions....There are occasions, no doubt, when duty to the interests confided to the charge of the advocate demands firm and decided opposition to the views expressed or the course pursued by the court, nay, even manly and open remonstrance; but this duty may be faithfully performed, and yet that outward respect be preserved, which is here inculcated. Counsel should ever remember how necessary it is for the dignified and honorable administration of justice, upon which the dignity and honor of their profession entirely depend, that the courts and the members of the courts, should be regarded with respect... [Hon. Judith S. Kaye, *Symposium on Judicial Independence: Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 Hofstra L Rev 703, 716 (Spring 1997), quoting George Sharswood, *Professional Ethics*, 61-62 (1854) (Fred B. Rothman & Co. 5th ed. 1993).]

Further, in In Re Snyder, 472 US 634; 105 S Ct 2874; 86 L Ed 2d 504 (1985), the United States Supreme Court discussed Federal Rule of Appellate Procedure 46, stating:

> Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.

In reversing a suspension meted out by the Tenth Circuit Court of Appeals for a "harsh" and "ill-mannered" letter by respondent related to his fees for a completed indigent criminal defense case, the Supreme Court noted that although discipline was not called for in that instance,

> All persons involved in the judicial process -- judges, litigants, witnesses, and court officers -- owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. [Snyder, 472 US at 647.]

V. Conclusion

The State of Michigan, acting through its judicial branch, has promulgated rules of professional conduct which advance a substantial and compelling interest in preserving public confidence in the judiciary by requiring civil and respectful treatment of tribunals and other participants in the legal process. We do not find these rules to be violative of the First Amendment or to be overbroad or unconstitutionally vague. Accordingly, we would affirm the consent order of reprimand.

Board Members Marie E. Martell, Ronald L. Steffens, and Rev. Ira Combs, Jr.