The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision

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THE SUPREME COURT'S ATTACK ON ATTORNEYS' FREEDOM OF EXPRESSION: THE GENTILE v. STATE BAR OF NEVADA DECISION

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I. INTRODUCTION

A. The Dilemma of the Defense Attorney

Imagine you are a criminal defense attorney leaving the courthouse after a pretrial conference. Your high-profile client has recently been indicted for multiple murders. The press has reported on the police investigation, revealing some of the more sensational details of the prosecution's alleged evidence. You are approached by a microphone-toting "action-cam" reporter for a local television station. She asks you: "How strong is the State's case against Mr. X? Are the reports that the police have fingerprint and hair sample evidence linking him to the killings true? What were the results of the polygraph test?"

Taken aback, you quickly consider what you may say. Your state has professional disciplinary rules which restrict what you, as a participating attorney, can say to this reporter. The rule enacted by your state mirrors Rule 3.6 of the Model Rules of Professional Conduct, which states in part:

Trial Publicity
(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding . . . .

(c) Notwithstanding paragraph (a) . . . , a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;
(2) the information contained in a public record . . . .

You remember that the United States Supreme Court recently issued a confusing opinion holding that Model Rule ("MR") 3.6's "substantial likelihood of material prejudice" standard was a constitutionally permissible restriction of attorney speech. You also recall that the attorney in that case managed to escape being sanctioned by his state bar because the Court found a portion of the rule was unconstitutionally vague.

1. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.6 (1983) [hereinafter MODEL RULE OR MR]. MODEL RULE 3.6 is reprinted in Appendix A.
What should you say? Unsure of import of the ruling and precisely how the Court’s ruling affects your state's disciplinary rules, you respond “no comment” and hurry away, angry for losing a prime opportunity to counter the negative media attention your client has received.

B. State Court Rules Restricting Attorney Communication with the Media

Attorneys are often prohibited, by rules adopted by state or local bars, from making statements to the media that will adversely affect the fairness of a trial. While these rules may differ in their language, they are all are designed to balance the free speech rights of the attorneys against the Sixth Amendment guarantee of an impartial jury trial for defendants. Whether these rules actually achieve a constitutionally permissible balance between these two fundamental interests has been the subject of much debate, beginning in 1969 with the adoption by the American Bar Association (“ABA”) of Disciplinary Rule (“DR”) 7-107. Responding to the controversy created by DR 7-107, the ABA’s Kutak Commission modified the rule into its current form, MR 3.6.

In the summer of 1991, the constitutionality of MR 3.6 was considered by the United States Supreme Court in *Gentile v. State Bar of Nevada*. Unfortunately, the resulting opinion did little to clear the muddied waters of controversy surrounding the restraint of attorney speech. Essentially, a divided Court held that a state may constitutionally restrict attorney speech upon a showing of “substantial likelihood of material prejudice” to a fair trial. However, the Court also found that the rule, as written, was void for vagueness. The *Gentile* decision is a confusing melange of state-

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2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1969) [hereinafter MODEL CODE]. DR 7-107 is reprinted in Appendix B; see infra notes 64-71 and accompanying text for a detailed analysis of DR 7-107.

3. "In 1977, only eight years after adopting the Model Code of Professional Responsibility, the ABA appointed a Commission on the Evaluation of Professional Standards to recommend revisions to the Code. The Commission was chaired by attorney Robert Kutak and is commonly referred to as the Kutak Commission." STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (1993 ed.)

4. See supra note 1 and accompanying text. See infra Appendix A.

5. 111 S. Ct. 2720 (1991). In *Gentile*, a criminal defense attorney claimed that a disciplinary rule under which he was sanctioned for making statements at a press conference regarding his client's case violated his First Amendment right to free speech.

6. Id. at 2745.

7. Id. at 2731.
ments from two disagreeing opinions. As a result, attorneys are left with little or no practical guidance concerning the permissible range of their speech outside of the courtroom. Even after *Gentile*, attorneys, like the one described above, still have difficulty determining when they may speak to the media and what they may say without running afoul of local rules prohibiting attorney statements that affect the impartiality of trials.8

This note will first discuss the inherent conflict between the rights guaranteed by the First and Sixth Amendments, and the standard that the Supreme Court has traditionally used when examining restraints on First Amendment freedoms. Second, this note will outline the events that led up to, and the considerations that affected, the final drafting of MR 3.6, highlighting the issues raised by previous challenges to the Rule’s constitutionality. Third, the recent *Gentile* ruling on the vagueness of the Model Rule will be explored, as well as its holding on the permissible standard for restriction of attorney speech. The decision will also be critiqued as permitting an unwarranted restraint on the freedom of expression of attorneys. Notwithstanding this critique, this note will make suggestions for redrafting the Rule to comport with the *Gentile* decision and to provide attorneys with clearer guidelines for distinguishing between permissible and impermissible speech.

II. CONSTITUTIONAL CONCERNS RAISED BY RESTRICTING PRETRIAL PUBLICITY THROUGH CURBING THE SCOPE OF ATTORNEY SPEECH: THE FAIR TRIAL - FREE PRESS DEBATE

Any discussion of MR 3.6 should begin with the dilemma that the rule was explicitly designed to address: *the fair trial - free press debate.*9 Succinctly stated, this controversy centers around the issue of whether, in some cases, the public interest and resulting media coverage of a trial may be so great as to make the trial impartial and unfair. In response to this concern, courts have long employed devices such as jury voir dire, jury sequestration, trial

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8. Some courts restrict attorney speech with restraining orders, using the contempt power of the court rather than the disciplinary sanctions of the bar association. Although some of the First and Sixth Amendment issues that arise in this context are similar to those addressed regarding disciplinary rules, this note will be confined to a discussion of current attorney disciplinary rules and their limitation on lawyers’ right to speak.

continuance, or change in venue to counter the perceived effects of publicity and preserve the defendant's right to a fair trial.\textsuperscript{10} The comment to MR 3.6 explicitly recognizes the tension between the First Amendment rights of the media and the Sixth Amendment guarantee to defendants:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial . . . . On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves . . . . No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression.\textsuperscript{11}

Unfortunately, the drafters of MR 3.6, in their attempt to reach a compromise to solve this fair trial - free press debate, sanctioned a restriction on the First Amendment rights of another group — attorneys. This restriction added a new layer to the free press - fair trial debate: when can an attorney's right to speak be legitimately restricted to preserve a defendant's right to a fair trial?

A. The \textit{Sheppard v. Maxwell} Decision: The United States Supreme Court's Directive to Trial Court Judges

The landmark case in the fair trial - free press debate is \textit{Sheppard v. Maxwell}.\textsuperscript{12} In this case, the Supreme Court established what has been interpreted as a "mandate" to trial court judges to:

\begin{quote}
take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its
\end{quote}

\textsuperscript{10} Id. at 343-45.

\textsuperscript{11} MODEL RULE 3.6 cmt (1983).

\textsuperscript{12} 384 U.S. 333 (1966) (overturning a murder conviction because the massive pretrial publicity surrounding defendant's case amounted to a denial of the Sixth Amendment right to a fair trial). For a discussion of the importance of the \textit{Sheppard} decision and how it affects trial judges, see generally, Eric E. Younger, \textit{The Sheppard Mandate Today: A Trial Judge's Perspective}, 56 NEB. L. REV. 1, 5-11 (1977).
function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.\textsuperscript{13}

The grisly and intriguing details of this Cleveland, Ohio, murder captured the attention of the public. The defendant in the case was a well-respected physician accused and later convicted of bludgeoning his pregnant wife to death. Dr. Sheppard denied the murder charge, blaming it on an intruder. The lack of evidence of a break-in and the questionable nature of Sheppard’s version of the event heightened public fascination, causing rampant speculation by the local media about the doctor’s guilt or innocence.\textsuperscript{14}

Dr. Lester Adelson, the forensic pathologist who performed the autopsy on Marilyn Sheppard, the murder victim, characterized the coverage of Dr. Sheppard’s trial as “a good example of media hype.”\textsuperscript{15} Evidently, the United States Supreme Court agreed with this sentiment, overturning the defendant’s conviction 12 years later. The United States Supreme Court reversed the Ohio Supreme Court’s decision that Sheppard’s trial had been fair:

Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre . . . . In this atmosphere of a “Roman holiday” for the news media, Sam Sheppard stood trial for his life.\textsuperscript{16}

\begin{footnotes}
\item \textsuperscript{13} Sheppard, 384 U.S. at 362. See Hirschkop v. Snead, 594 F.2d 356, 366 n.8 (4th Cir. 1979) (Sheppard’s dictum is “more nearly directive than suggestive.”); Sheryl A. Bjork, Comment, Indirect Gag Orders and the Doctrine of Prior Restraint, 44 UNIV. OF MIAMI L. REV. 165, 175 n.85 (1989).
\item \textsuperscript{14} Some examples of headlines in the Cleveland area were: Why No Inquest?; Do it Now Dr. Gerber; Why Don’t police Quiz Top Suspect?; Why Isn’t Sam Sheppard in Jail?: Quit Stalling. Bring Him In; New Murder Evidence Is Found, Police Claim; Blood is Found in Garage; Kerr [Captain of the Cleveland Police] Urges Sheppard’s Arrest. Sheppard, 384 U.S. at 339-42.
\item \textsuperscript{15} Lecture by Dr. Lester Adelson at Case Western Reserve School of Medicine (Oct. 29, 1991).
\item \textsuperscript{16} Sheppard, 384 U.S. at 356 (quoting State v. Sheppard, 135 N.E.2d 340, 342 (1956)). After Dr. Sheppard was convicted in an Ohio state trial court, he first appealed his case through the Ohio court system. State v. Sheppard, 128 N.E.2d 471 (Ohio Ct. App. 1955), 135 N.E.2d 340 (Ohio 1956). His appeal eventually led to the United States
\end{footnotes}
The United States Supreme Court chastised the trial judge for permitting a "carnival atmosphere" to pervade the proceedings and urged courts to use their authority to restrict trial participants and the media from affecting the outcome of trials.\(^\text{17}\)

The *Sheppard* case threw the fair trial-free press debate into the public arena and sparked a wave of reform. Judges began issuing restraining orders banning attorneys and other trial participants from talking to the media.\(^\text{18}\) Additionally, bar associations and courts began to create standing rules to control attorneys.\(^\text{19}\) These rules attempted to define the boundaries of the First Amendment rights of attorneys when the Sixth Amendment guarantees of a defendant are implicated.

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17. *Id.* at 358. Compare the details of the publicity in the *Sheppard* case to cases such as *Mu'Min* v. Virginia, 111 S. Ct. 1899, (holding that massive pre-trial publicity surrounding case does not warrant searching voir dire about its possible impact on potential jurors views) *reh'g denied*, 115 L.Ed. 1097 (1991); and *Stroble* v. California, 343 U.S. 181, 191-95, (finding that the jury had not been prejudiced by inflammatory news items even though the defendant in a trial for murder and molestation of a six year old girl was characterized by the press as a "sex-mad killer," a "werewolf," and a "fiend") *reh'g denied*, 343 U.S. 952 (1952).

18. *Sheppard*, 384 U.S. at 360 ("It is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers.").

19. See Bjork, *supra* note 13, at 174 (noting that *Sheppard* "is sometimes attributed with giving 'birth' to the gag order").

B. The Conflicting First Amendment Rights of Attorneys, Sixth Amendment Rights of the Defendant, and the State and Public Interest in the Impartial Administration of Justice

1. What the Amendments Guarantee

The heart of the fair trial - free press controversy involves the Bill of Rights, specifically the First and Sixth Amendments. Although these amendments do not seem, on their face, to embrace the same subject matter, in the context of publicity about a pending trial they often are directly implicated. The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Sixth Amendment assures that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Where the right to an impartial trial impinges on the right of free expression (or vice versa), a heated debate develops. The fact that both of these rights have been characterized as fundamental and irreplaceable in the American system of government has added further fuel to the fire.

The First Amendment protects the speaker's personal interest in
his or her ability to express him or herself without unreasonable restriction.\textsuperscript{25} This interest is particularly weighty in the case of an attorney speaking openly about the justice system because a "core purpose" of the First Amendment is to assure freedom of communication on matters relating to government functions.\textsuperscript{26} Not only does the First Amendment protect the attorney's interest in critiquing a government operation, but it also secures the citizenry's reciprocal right to receive such information.\textsuperscript{27}

The right to receive and distribute information about the government is linked to the power of citizens in a democratic society to monitor public officials in order to "check" their abuses of power.\textsuperscript{28} Therefore, when an attorney speaks to the public through the media about the facts of a case or perceived injustices in the trial, the First Amendment is strongly implicated both by the

\begin{itemize}
\item \textsuperscript{25} See \textsc{Thomas I. Emerson}, \textit{The System of Freedom of Expression} 15 (1970) (arguing that the fundamental role of the First Amendment is "to guarantee an effective system of freedom of expression"); \textsc{John Stuart Mill}, \textit{On Liberty} 105 (1859) (Atlantic Monthly Press 1921) (positing that although free speech is one of the essential rights of a free society, "[a]s soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it"). Various commentators have characterized this as a "self-fulfillment" or "autonomy of the speaker" rationale for the guarantee of free expression. \textit{See}, e.g., \textsc{David A. Richards}, \textit{Free Speech and Obscenity Law: Towards A Moral Theory of the First Amendment}, 123 \textsc{U. Pa. L. Rev.} 45, 62 (1974); \textsc{Thomas Scanlon}, \textit{A Theory of Freedom of Expression}, \textit{1 Phil. \\& Pub. Aff.} 204, 213-15 (1972). Others have articulated the idea that allowing all ideas to be expressed provides a "marketplace" through which the truth can be effectively identified. \textit{See}, e.g., \textsc{Abrams v. United States}, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

\item \textsuperscript{26} \textsc{Richmond Newspapers, Inc. v. Virginia}, 448 U.S. 555, 575 (1980); \textsc{See Nebraska Press Ass'n v. Stuart}, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government.").

\item \textsuperscript{27} \textsc{See In re Express-News Corp.}, 695 F.2d 807, 809 (5th Cir. 1982) (stating that the individual's right to receive information has been demonstrated by a wide variety of cases); \textsc{(Lawrence H. Tribe}, \textit{American Constitutional Law} 859 (2d ed. 1988) (interpreting \textit{Richmond Newspapers} as establishing the public's right to information as one of constitutional proportions). The right to receive information contributes to the self-actualization or fulfillment of the hearer. \textit{See Scanlon, supra} note 25, at 215-18.

\item \textsuperscript{28} The so-called "checking value" is fully described in \textsc{Vincent Blasi}, \textit{The Checking Value in First Amendment Theory}, 1977 Am. B. Found. Res. J. 521 (1977). \textit{See also In re Oliver}, 333 U.S. 257, 270-71 (1948) (quoting, in part, \textsc{Jeremy Bentham}, \textit{Rationale of Judicial Evidence}, 524 (1827)) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power . . . . "'Without publicity, all other checks are insufficient . . . .'"); \textsc{Alexander Meiklohn}, \textit{Free Speech and Its Relation to Self-Government}, 15-16, 24-27 (1948) (arguing that our system of self-governance requires thorough public knowledge of government activities).
attorney’s right to speak and the citizens’ right to learn about their government. As the Gentile Court recognized, “[t]here is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”

Juxtaposed against these First Amendment concerns is the accused’s constitutionally guaranteed right to a fair and impartial trial. Central to this right is the assurance that a jury’s verdict will be based only on admissible evidence, not on the whims of the media or upon the inappropriate statements of counsel or others. The release of information by an attorney may affect the fairness of proceedings either by persuading a juror to favor one side or by inducing a juror to vote based on fear of community reaction. In addition, potential witnesses may alter their testimony or refuse to testify in the face of publicity. In these ways, an attorney’s communication with the public may impinge on a fair trial conducted with the air of “judicial serenity and calm to which [the accused is] entitled.”

29. Scott M. Matheson, Jr., in his article, The Prosecutor, the Press, and Free Speech, 58 FORDHAM L. REV. 865, 880 (1990) summarizes: “Whether one examines prosecutor speech from the perspective of the self-governance ideal, the checking or safety valve functions, the marketplace of ideas, the ‘self-fulfillment’ of the speaker or the ‘autonomy of the listener,’ there is no reason . . . to conclude the first amendment interest in protecting . . . expression is diminished.” (citations omitted). The ABA recognized that there was no reason to accord diminished protection to attorney speech concerning pending trials. ABA Standards For Criminal Justice Fair Trial and Free Press, Standard 8-1.1 cmt. (3d ed. 1991).

30. Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2724 (1991); Justice Kennedy’s majority opinion also noted that Nevada sought “to punish the dissemination of information relating to alleged governmental misconduct, which only last Term we described as ‘speech which has traditionally been recognized as lying at the core of the First Amendment.’” Id. (citing Butterworth v. Smith, 494 U.S. 624, 632 (1990).

31. This right has been characterized as “a right essential to the preservation and enjoyment of all other rights . . . safeguarding personal libert[y] against government oppression,” and as “unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights.” Nebraska Press, 427 U.S. at 586, 572 (Brennan, J., concurring).

32. As early as 1807, American lawyers argued that prejudicial publicity affected the fairness of trials. When this argument was made by Aaron Burr’s attorney in his trial for treason, the judge agreed, stating that the “jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions.” United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g). In accord, the Supreme Court stated in Patterson v. Colorado, 205 U.S. 454, 462 (1907), “the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.” See also Bridges v. California, 314 U.S. 252, 271 (1941) (“[T]rials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.”).

Aside from the constitutionally significant First and Sixth Amendment concerns, this debate implicates other interests as well. The Supreme Court has recognized that the fair and efficient administration of justice involves the citizenry and the judicial system; in addition to the accused, the state also has an interest in a fair trial. The Supreme Court has held that a state has an interest in maintaining public confidence in the integrity of the court system. The Court's rulings imply that it is openness and the myth-dispelling function of information—not secrecy—that best preserves fairness and efficiency and protects the judicial processes from being misjudged by the public.

34. See, e.g., Illinois v. Allen, 397 U.S. 337, 343-48. reh'g denied, 398 U.S. 915 (1970) (even though the defendant in a criminal trial has the right to a fair trial, he may be expelled from the courtroom for unruly behavior, effectively, he may waive his right to be present); Wade v. Hunter, 336 U.S. 684, 689 (1949) (stating that the public has an interest in and a right to expect "fair trials designed to end in just judgments."); Hayes v. Missouri, 120 U.S. 68, 70 (1887) (holding that the state's use of preemptory challenges to potential jurors during a criminal trial may protect its interest in seeing that the defendant obtains a fair trial). See also Levine v. United States District Court for the Central District of California, 746 F.2d 590, 596 (9th Cir.) ("We must consider the fundamental interest of the government and the public in insuring the integrity of the judicial process."). reh'g denied, en banc, 775 F.2d 1054 (1985), cert. denied, 476 U.S. 1158 (1988); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975) ("We must not forget that public justice is no less important than an accused's right to a fair trial."). cert. denied, 427 U.S. 912 (1976). However, even if such a right exists, it is doubtful that it rivals the constitutional magnitude of the First Amendment right to free expression. The rights of the state and public to justice and efficiency are not constitutionally guaranteed; the Sixth Amendment protects only of the rights of the accused, not of the state. See Susan Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial, 60 S. CAL. L. REV. 1019, 1024-30 (1987).

35. See Cox v. Louisiana, 379 U.S. 559, 565 (1965), reh'g denied, 380 U.S. 926 (1969), where the Court held that:

A state may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process.

36. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 597 (1980) (Brennan, J., concurring in judgment) (positing that access and information are what preserves public confidence and fairness, not suppression of unfavorable comments); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978); Bridges, 314 U.S. at 270-71 ("[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."). The Supreme Court stated:

Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust
2. Balancing Competing Rights: Is One Interest More Weighty than the Other?

Even though the rights protected by the First and Sixth Amendments are cherished parts of the American tradition, the Supreme Court has never said that either is an absolute right. Both are subject to reasonable restrictions when other weighty concerns are present. Therefore, courts have often been forced to balance the two guarantees to determine which aspects of either may legitimately be restricted to give full expression to the competing right.

Some judges have held that where the First and Sixth Amendments conflict, the right to a fair trial should invariably take precedence. For example, the Second Circuit has articulated a blanket rule: "When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter." Statements of this type are usually based on the perception that it is the right to a fair trial that is being hampered by the right to free expression, rather than vice versa.

It may be argued, however, that an overbroad invocation of Sixth Amendment guarantees unduly impinges on freedom of ex-

reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

_Nebraska Press_, 427 U.S. at 587 (Brennan, J., concurring)

37. See, e.g., _Clark v. Community for Creative Non-Violence_, 468 U.S. 288, 293 (1984) (freedom of expression "is subject to reasonable time, place, or manner restrictions"); _Elrod v. Burns_, 427 U.S. 347, 360 (1976) (restraints on free expression are "permitted for appropriate reasons"); _American Communication Ass'n v. Douds_, 339 U.S. 382, 394 ("Freedom of speech . . . does not comprehend the right to speak on any subject at anytime."); _reh'g denied_, 339 U.S. 990 (1950); _Schenk v. United States_, 249 U.S. 47, 52 (1919) (whether speech is protected "depends upon the circumstances in which it is done."). Similarly, the Sixth Amendment, though guaranteeing a fundamental liberty, has never been held to be absolute. Court proceedings may be open to the public, covered by the print media, and even televised if the intrusion upon the trial does not significantly impair the defendant's rights.

38. _In re Dow Jones & Co._, 842 F.2d 603, 609 (2d Cir.), _cert. denied sub nom._, _Dow Jones & Co. v. Simon_, 488 U.S. 946 (1988). _See also_ _Stabile_, _supra_ note 9, at 341 ("An accommodation of these rights should favor the fair trial rights of the individual over the media's right to freedom of expression.").

39. See, e.g., _Pennekamp v. Florida_, 328 U.S. 331, 366 (1946) (Frankfurter, J., concurring) ("[T]he Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote."); _Bridges_, 314 U.S. at 284 (Frankfurter, J., dissenting) ("[T]he Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials.").
pression. If First Amendment rights are restricted when it is unclear whether Sixth Amendment rights are actually being infringed, the concept of "freedom of the press" will be reduced to a nullity. Therefore, since First Amendment rights are no less precious than an accused's right to a fair trial, any restraints on comment or media broadcast must be highly justified and carefully drafted.

The United States Supreme Court has inconsistently construed the interplay between First and Sixth Amendment rights. In Estes v. Texas, the Court, overturned the petitioner's conviction, reasoning that "[w]e have always held that the atmosphere essential to the preservation of a fair trial - the most fundamental of all freedoms - must be maintained at all costs." In contrast, the Nebraska Press Assn. v. Stuart Court stated:

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other . . . . [I]f the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority

40. See Stabile, supra note 9, at 357 (cautioning that although Sixth Amendment rights are entitled to deference in the fair trial - free press conflict, "the first amendment may be restricted only to the extent necessary to provide an adequate balance between . . . [both constitutional] rights.").

41. The "quartet" of Wood v. Georgia, 370 U.S. 375 (1962), Craig v. Harney, 331 U.S. 367 (1947), Pennekamp, 328 U.S. 331 (1946), and Bridges, 314 U.S. 252 (1941), is routinely cited for the proposition that freedom of expression may not be curtailed by the court's contempt power absent compelling circumstances that threaten the impartiality of the trial. These circumstances are usually characterized as "a serious and imminent threat" or "a clear and present danger." See infra section IIC1. See Nebraska Press, 427 U.S. at 572 (Brennan, J., concurring) ("The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right. . . . "); Landmark, 435 U.S. at 838 ("the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachment on freedom of speech"); Brandenburg v. Ohio, 395 U.S. 444, 456-57 (1969) (per curium) (Douglas, J., concurring) (posing that except for the "rare instances" where speech and actions are inseparable, "speech is . . . immune from prosecution."); see also Stabile, supra note 9, at 341 ("However, the argument that the Sixth [A]mendment . . . may override the First [A]mendment . . . is only a foundation for a solution to the fair trial - free press conflict, not a solution. Because the press performs and important function in safeguarding the integrity of our system of government, any limits placed on the press must be carefully crafted.").

42. 381 U.S. 532, 540, reh'g denied, 382 U.S. 875 (1965).
over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. 43

Notwithstanding this statement, it has generally been more common for courts to restrict First Amendment guarantees than to assert that a defendant must forfeit the guarantee of an impartial trial. 44 Therefore, the debate has shifted to concern over when (not if) the state may legally restrict speech to preserve the fairness of a trial.

C. United States Supreme Court Rulings Regarding the Requisite Standard for Permissible State Restriction of Speech

The rights guaranteed by the First Amendment, while fundamental, are not absolute. 45 It follows that these rights may be legitimately restricted by the states upon a showing of necessity. The standard most often used by the Supreme Court to establish necessity is the "clear and present danger" test. 46 This standard evolved from 1919 to the present amidst both criticism and praise for its efficacy in protecting the interests of free speech and those of the state. 47 The precise characterization of the threat is very important to the fair trial - free press controversy because the disciplinary rules in question prohibit a lawyer from speaking only when this requisite danger exists. 48

43. Nebraska Press, 427 U.S. at 561.
44. See Stabile, supra note 9, at 357 (concluding that "courts [in the past] have attempted to resolve . . . [the First v. Sixth Amendment] dilemma by restricting both the information that the media releases to the public and the information that becomes available to the media").
45. See supra note 37 and accompanying text.
46. This means, of course, that a state may constitutionally restrict speech if, by doing so, it prevents a danger than is both "clear" and "present." The words "clear and present" have been susceptible to changing definitions, accounting for the change and evolution of the standard. See infra note 192 and accompanying text.
47. See Michael E. Schwartz, Trial Participant Speech Restrictions: Gagging First Amendment Rights, 90 COLUM. L. REV. 1411 (1990) (outlining some of the difficulties in applying the clear and present danger test).
48. DR 7-107 prevents an attorney from making statements that are "reasonably likely to interfere with a fair trial." MODEL CODE DR 7-107 (1980). The Kutak Commission, in modifying the rule which became MR 3.6, changed this standard to prohibit statements by an attorney that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." MODEL RULE 3.6(2) (1983). Attorneys and courts have long debated which, if either, standard is appropriate. See infra section III. The MR 3.6 standard is more permissive for speakers than the DR 7-107 standard. However, the MR 3.6 standard is less deferential to free speech rights than use of the clear and present danger standard would be. The Gentile court directly addressed the issue of the legitimacy of the MR 3.6
1. Evolution of a Standard and the Reasons for Its Use

Justice Holmes is traditionally credited with the conceptualization of the clear and present danger standard as articulated in his dissent in Abrams v. United States:

The United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.

... It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion . . . .

Later that year, Holmes coined the phrase “clear and present danger” in Schenck v. United States: “The question in every case is whether the words used are used in such circumstances . . . as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”

Justice Brandeis, agreeing with Holmes, reiterated the clear and present danger test in his dissent in Schaefer v. United States and later in his concurrence in Whitney v. California. Brandeis, however, added the element of “seriousness” to intensify the clear and present danger standard.

In adopting the “clear and present danger” standard, the Court developed a test that is somewhat flexible, as its inquiries are fact-specific. For the next twenty-five years, the Court used various

standard. See infra section IVB.

49. Abrams v. United States 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting). This standard similarly applies to actions taken by state and local governments (and bar associations), because the First Amendment has been incorporated by the Due Process Clause of the Fourteenth Amendment to apply to the states. See supra note 17.

50. 249 U.S. 47, 52 (1919).

51. 251 U.S. 466, 483 (1920) (Brandeis, J., dissenting) (“The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is . . . one of degree.”).


53. Id. at 376 (Brandeis, J., concurring). Brandeis argued: Fear of serious injury cannot alone justify suppression of free speech . . . . [T]here must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

54. In Bridges v. California, the Supreme Court recognized the fact-specific nature of
formulations of the test to address infringement of First Amendment concerns. The concept, though not without criticism, was nevertheless well entrenched by 1951, the Court having developed an almost "mathematical formula" of determining whether regulations unconstitutionally restricted free speech. In 1969, the Court

the inquiry, explaining: "We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment." 314 U.S. 252, 271 (1941).

55. See, e.g., Terminiello v. Chicago, 337 U.S. 1, 4, reh'g denied, 337 U.S. 934 (1949) (holding that the clear and present danger "must rise above public inconvenience, annoyance, or unrest"); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (stating that while a state may regulate speech which leads to "danger of riot, disorder, . . . or other immediate danger to public safety, place, or order" it "may not unduly suppress free communication of views"); Frank R. Strong, Fifty Years of "Clear and Present Danger": From Schenk to Brandenburg - and Beyond, 1969 SUP. Ct. REV. 41 (1969) (discussing different formulations of the clear and present danger test).

56. Learned Hand was one of the major critics of the "clear and present danger" test as it was applied. Hand, in Masses Publication Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917), crafted "a distinctive, carefully considered alternative to the prevalent analyses of free speech issues." Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719, 720 (1975). Hand thought that a per se rule of invalidity that depended on the actual content of the speaker's message was more appropriate than a test which considered the speaker's intent or the possible consequences of his speech. Id. 749. Hand argued:

If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.

Masses Publication, 244 F. at 540.

57. JOHN HART ELY, DEMOCRACY AND DISTRUST 108 (1980). The plurality opinion in Dennis v. United States, 341 U.S. 494, 510, reh'g denied, 342 U.S. 842 (1951), reh'g denied, 355 U.S. 936 (1958), adopted Judge Learned Hand's interpretation of the clear and present danger test: "In each case courts must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." This formulation has been characterized as "using 'gravity' to dilute the standard," because it implies that some legitimately preventable dangers are more important than others. This, in turn, implies that speech may be restricted on a lesser showing if the danger to be prevented is grave. GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 978 (1st ed. 1986). The authors, citing ELY, supra note 57, at 108, and Kent Greenwald, Speech and Crime, 1980 AM. B.F. RES. J. 645, 717, pose an illustrative question:

If government may restrict speech that creates an immediate 70 percent chance of a relatively modest evil (such as persuading a few persons to refuse induction), shouldn't it also be permitted to restrict speech that creates a less immediate 30 percent chance of a very serious evil (such as attempted overthrow of government)?
decided Brandenburg v. Ohio,58 using a standard that permitted restriction of "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."59

Ostensibly, the clear and present danger standard was designed to protect the societal interests that cause a high value to be placed on freedom of speech.60 For example, in Whitney Justice Brandeis based his acceptance of the serious and imminent threat standard on his perception of the intent of the Framers of the Bill of Rights that dissemination of more, not fewer, ideas leads to a better society because each citizen understands and participates in government.61 The clear and present danger standard recognizes that speech is precious, permitting suppression only when an emergency (defined as a "clear and present danger") exists.62 It also upholds one of the Framers' chief concerns by creating a wide berth for protected expression to prevent an oppressive government from rendering all political opponents mute.63 Based on these underlying rationales, courts using this standard should carefully scrutinize restrictions on speech and be properly deferential to the rights of free expression.

59. Id. at 447 (footnote omitted). The Brandenburg articulation of the test has been called "the most speech-protective standard yet evolved by the Supreme Court." Gunther, supra note 56, at 755.
60. Free speech is important, therefore the state must satisfy a weighty burden of showing great danger that is likely to occur before it can infringe upon such an important constitutional guarantee.
   Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence . . . . Such, in my opinion, is the command of the Constitution.
62. Stone, supra note 57, at 953-54.
63. Id.
2. Application of the Standard to the Fair Trial - Free Press Debate

The "clear and present danger" test has been applied to cases involving fair trial - free press concerns in several instances. First in *Bridges v. California*, and subsequently in three other cases, the Supreme Court indicated that judges may not use their contempt powers to restrain speech unless the speech created a clear and present danger of actually or apparently improperly influencing judicial behavior.

In contrast, in *Landmark Communications, Inc., v. Virginia*, the Court questioned the "mechanical application" of Justice Holmes' test. The Court examined a statute prohibiting dissemination of information about state judicial review commission proceedings using a standard that balanced the "character of the evil" and its likelihood against "the need for unfettered expression" in that context. The Court also inquired into the availability of alternative measures that could serve the state's interest without restricting speech.

The *Landmark* test differs from the clear and present danger standard because it considers the specific interest in a particular issue. In contrast, the clear and present danger test considers the speech itself to be important and does not consider whether viable alternatives to the restriction are available. Therefore, when the *Gentile* court considered the constitutionality of MR 3.6, the proper test to be employed was an open question.

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64. 314 U.S. 252 (1941).
65. *See supra* note 41 discussing *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harrey*, 331 U.S. 367 (1947); and *Pennekamp v. Florida*, 328 U.S. 331 (1946); *see also* *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 562-70 (holding that there is a heavy burden imposed as a condition to securing a prior restraint on the press because other methods short of the restraint on free speech may have protected the defendant's right to a fair trial).
67. *Id.* at 842 (stating that Holmes' test was not intended to be a formulaic solution for deciding cases).
68. *Id.* at 843.
69. *Id.* (warning that "other measures [which] will serve the state's interests" must not be ignored when balancing the competing interests).
70. The Court mentioned the issue of attorney speech about pending cases only once prior to *Gentile*. In that earlier case, the Court failed to decide the issue, stating that the fact that these remarks were made by counsel of record in a pending case was pertinent only in that "they might tend to obstruct the administration of justice," a charge not levied in the case. *In re Sawyer*, 360 U.S. 622, 636 (1959). Therefore, the *Gentile* Court had no directly controlling precedent about whether the requisite state showing should be
III. THE RESPONSE TO THE CONSTITUTIONAL CONCERNS: THE CREATION OF MODEL RULE 3.6

When the Supreme Court assessed the validity of MR 3.6 in *Gentile*, it entered a debate that has continued for nearly one hundred years. At least since the adoption of the 1908 Canons of Professional Ethics, professional legal organizations have been concerned about a lawyer's interaction with the media during the pendency of a trial.⑦1 Canon 20 states: “Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial . . . and otherwise prejudice the due administration of justice. Generally they are to be condemned.”⑦2 This Canon was rarely enforced since it arguably lacks a clear standard for guidance.⑦3

Little attention was directed toward attorney-media relations until the 1960's. The 1963 assassination of President Kennedy and subsequent press frenzy led the Warren Commission to comment that had Lee Harvey Oswald not been killed, it would have been “extremely difficult to impanel an unprejudicial jury and afford [him] a fair trial.”⑦4 Specifically, the Commission criticized the “premature disclosure and weighing of the evidence” in the media which “seriously jeopardized” the impaneling of twelve impartial jurors.⑦5 The Commission's suggestion that the media and the courts work together to resolve these problems led to the creation of a “clear and present danger” to a fair trial, or whether they should use a *Landmark* type rationale. Compare Justice Rehnquist's statement that historically the Court “engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue,” 111 S. Ct. at 2744, with Justice Kennedy's direct response that “[w]ide-open balancing of interests is not appropriate in this context.” *Id.* 2733. The *Gentile* Court's resolution of the issue is discussed in section IVB, *infra.*

⑦1. *See* Scott M. Matheson, Jr., *The Prosecutor, the Press and Free Speech,* 58 FORDHAM L. REV. 865 (1990) (providing a detailed discussion of the evolution of each ABA ethical rule governing extrajudicial attorney commentary).

⑦2. CANONS OF PROFESSIONAL ETHICS, Canon 20 (1908).

⑦3. *See* Hirschkop v. Snead, 594 F.2d 356, 365 (4th Cir. 1979) (“The trouble [with Canon 20] was that the standards were so general and vague that they were exceedingly difficult to apply and did little to forewarn speakers for publication about what was proscribed and what was permitted.”); State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964), *cert. denied,* 380 U.S. 987 (1965) (“[W]e interpret . . . . Canon 20[,] to ban statements to news media . . . . Such statements have the capacity to interfere with a fair trial and cannot be countenanced.”).

⑦4. REPORT OF THE WARREN COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 221 (1964) [hereinafter WARREN COMMISSION REPORT].

⑦5. *Id.*
of the ABA Advisory Committee in 1964 on Fair Trial and Free Press.\textsuperscript{76}

In 1966 in \textit{Sheppard v. Maxwell},\textsuperscript{77} the Supreme Court also suggested that courts protect the Sixth Amendment rights of the defendant from infringement from media use of extrajudicial statements of attorneys and others.\textsuperscript{78} The Court advocated that judges act "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."\textsuperscript{79} These words were ultimately used in the disciplinary rule, which was subsequently created.\textsuperscript{80}

\textsuperscript{76} \textit{Id.} The \textit{Gentile} Court quotes the Warren Commission's recommendation that "representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial." 111 S. Ct. at 2741 (quoting the \textit{WARREN COMMISSION REPORT}, \textit{supra} note 74, at 47, as quoted in Robert A. Ainsworth, Jr., \textit{Fair Trial-Free Press}, 45 F.R.D. 417 (1968)). This recommendation led to the creation of the Advisory Committee on Fair Trial and Free Press in 1964. Ainsworth, 45 F.R.D. at 417. The same year, the ABA created the Special Committee on the Evaluation of Ethical Standards [hereinafter Wright Committee] to revise the 1908 Canons of Professional Ethics. \textit{See MODEL RULES OF PROFESSIONAL CONDUCT Preface} (1992). In 1966, the Judicial Conference of the U.S. authorized a Special Subcommittee to Implement \textit{Sheppard} v. \textit{Maxwell}, 384 U.S. 333 (1966). \textit{See Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue}, 45 F.R.D. 391, 391-92 (1968).

\textsuperscript{77} 384 U.S. 333 (1966).

\textsuperscript{78} \textit{Id.} at 363 ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.") \textit{See supra} notes 12-20 and accompanying text discussing the facts and resolution of \textit{Sheppard}.

\textsuperscript{79} \textit{Sheppard}, 384 U.S. at 363. One commentator writes:

Restricting attorney speech with blanket rules — known as attorney "no comment" rules — came into vogue as a reaction to controversial cases such as \textit{Estes} and \textit{Sheppard}. In these cases, the trial judges had to handle fairness-threatening trial publicity on a case-by-case basis without any guiding standards. Rule-making bodies sought to lay down standards to help similarly-situated judges. The few egregious cases in which the trial judge failed to control the publicity prompted the development of rules restricting attorney comments.


\textsuperscript{80} DR 7-107, adopted in 1969, reads in part:

(D) . . . a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication . . . that [is] reasonably likely to interfere with a fair trial . . .

. . .

(G) A lawyer or law firm associated with a civil action shall not . . . make or participate in making an extrajudicial statement . . . that relates to . . .

(5) any . . . matter reasonably likely to interfere with a fair trial of the action.
The late Sixties saw the creation of numerous committees and commissions whose mission was to study the fair trial - free press debate and propose solutions. Based on the findings of these commissions, the Wright Committee of the ABA drafted what became DR 7-107 of the Model Code of Professional Responsibility, adopted in 1969. DR 7-107, mirroring the language of Sheppard, prohibits attorney speech that is “reasonably likely to interfere with a fair trial.”

In the next decade, challengers attacked the validity of these rules and, specifically, the “reasonable likelihood” standard in the courts. These suits resulted in disagreement among the lower courts about whether the “reasonable likelihood” standard was a constitutionally permissible restriction of speech, either in disciplinary rules or in judge-made restraining orders. For example, the Courts of Appeals for the Seventh and Tenth Circuits were squarely in opposition about the permissible standard for restraining orders. The Seventh Circuit required a showing of “serious and imminent threat to the administration of justice prior to restraining attorney speech.” The Tenth Circuit, on the other hand, merely

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81. See, e.g., Committees cited supra note 76.
82. See supra note 64. DR 7-107 quotes Sheppard, 384 U.S. at 362-63, in a footnote:
   From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused . . . . Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.
83. The first of such challenges was United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969), cert. denied, 369 U.S. 990 (1969) which attacked the constitutionality of a trial judge's restraining order that was issued on a showing of “reasonable likelihood” of prejudice. Tijerina argued that a showing of clear and present danger was necessary. The appellate court disagreed, stating, “We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial.” Id. at 666. The court distinguished Bridges, Pennekamp, Craig, and Wood, see supra note 41, on the basis that these cases did not deal directly with the issuance of a contempt citation because the litigant violated a trial judge's restraining order. Tijerina, 412 F. 2d at 666.
84. Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (per curiam). The Chase court, citing Wood and Craig, held that “before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings . . . establishing that [their] conduct is a ‘serious and
required the lesser showing of "reasonable likelihood" of prejudice. Similarly, in the context of the disciplinary rules, the Seventh Circuit struck down a rule using the DR 7-107 standard of "reasonable likelihood." The Fourth Circuit disagreed, stating that such a standard was permissible, even preferable, because it "divide[d] the innocuous from the culpable, add[ed] clarity to the rule and [made] it more definite in application."
In the face of continuing disagreement in the courts and debate among commentators, the ABA in 1977 appointed the Kutak Commission to reexamine the Model Code of Professional Responsibility and draft a replacement. Additionally, in 1978 the ABA amended its Standards for Criminal Justice, particularly Standard 8-3.1, to replace the reasonable likelihood standard with the clear and present danger test. While the Standards for Criminal Justice do not affect the Code of Professional Responsibility, this change nonetheless added to the debate concerning the standard to be included in the Kutak Commission's revision of DR 7-107.

The Kutak Commission circulated four drafts of its proposed rules between 1977 and 1983, receiving comment and criticism about their form and substance. The final form of the Model Rules of Professional Conduct was approved in 1983, with Model Rule 3.6 replacing DR 7-107. Rule 3.6 prohibited: "extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

unique role and responsibility in the administration of criminal justice and, therefore, have an extraordinary power to undermine or destroy the efficacy of the criminal justice system...[S]uch attorneys are appropriately subject to carefully tailored restraints upon their free speech."); In re Lastwell, 673 P.2d 855, 858 n.3 (Or. 1983) (finding Bauer and Hirschkop consistent and purporting to follow both in holding that the correct test was whether the attorney knew or should have known that his statement was highly likely to interfere with the trial's fairness); Widoff v. Disciplinary Bd. 420 A.2d 41, 43-44, aff'd, 430 A.2d 1151 (1980) (Pa. Commw. Ct. 1980) (deciding that the reasonable likelihood standard was not unconstitutionally vague as applied to attorney communications).


89. ABA Standard for Criminal Justice 8-3.1 (as amended 1978) (2d ed. 1980 and Supp. 1986). Chapter 8 of the Standards was amended in 1991 and now states that "[a] lawyer should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding." Standard 8-3.1 (as amended 1991), reprinted in, STEPHEN GILLERS & ROY D. SIMON, JR., REPUTATION OF LAWYERS: STATUTES AND STANDARDS 1993 (1992).

90. During this period, the Revised Report of the Judicial Conference Commission on the Operation of the Jury System on the Free Press - Fair Trial Issue [hereinafter Seitz Report] also evaluated DR 7-107 in consideration of the Bauer and Hirschkop decisions. 87 F.R.D. 519 (1980). The final draft of MR 3.6 followed the Bauer court's suggestions, adopting a higher standard than "reasonable likelihood" and including illustrative lists of comments that would violate the standard.

91. MODEL RULE 3.6 (1983) (emphasis added). One commentator criticized the drafting process of Rule 3.6:
The new rule did little to quell the free trial - free press debate. Since the rule used neither "reasonable likelihood" nor "clear and present danger" language, debate focused on whether restriction was permissible at all under the new standard as well as on what that standard actually meant. Therefore, the United States Supreme Court, by accepting certiorari in the Gentile case, seemed poised to shine a beam of light into this murky waters of the debate.

IV. THE GENTILE V. STATE BAR OF NEVADA DECISION

While the free press - fair trial controversy was most actively debated during the 1970's, the 1983 adoption of Model Rule 3.6 by the ABA and the adoption of similar rules by state and local bar associations continued to fuel the fire. When Dominic Gentile, a practicing defense attorney in Las Vegas, Nevada, gave a press conference after his client was indicted, his remarks and subsequent

The Kutak Commission [made] no attempt to support the constitutional validity of Model Rule 3.6, referring rather in its Commentary to the Model Code of Professional Responsibility and the A.B.A. Standards Relating to Fair Trial and Free Press. The trial publicity provision of the Model Code of Professional Responsibility contains no independent Commentary but simply incorporates the provisions of the aforementioned Fair Trial/Free Press Standards. These standards were adopted by the [A.B.A.] upon the recommendation of the Advisory Committee on Fair Trial and Free Press chaired by Justice Paul C. Reardon. The profession's justification for both current and proposed regulatory provisions therefore is a report and recommendation by the Reardon Committee which purports to provide constitutional authority for its conclusions, although it acknowledges in its introduction that it cannot empirically verify them.


92. This debate is exemplified in the statements made by Justices Kennedy and Rehnquist in their Gentile opinions. Rehnquist opined, "When the Model Rules . . . were drafted . . ., the drafters did not go as far as the revised Fair Trial-Free Press Standards in giving precedence to the lawyer's right to make extrajudicial statements when fair trial rights are implicated, and instead adopted the 'substantial likelihood of material prejudice test.'" 111 S. Ct. at 2741. In contrast, Kennedy stated: "The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test." 111 S. Ct. at 2725. In support of his conclusion, Kennedy cited the Annotated Model Rules of Professional Conduct 243 (1st ed. 1984) ("formulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focussing on the likelihood of injury and its substantiality", GEOFFREY C. HAZARD AND WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 397 (1st ed. 1985) ("To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely")), and In re Hinds, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982) ("substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger"). Id.
discipline by the State Bar of Nevada ultimately led to the first United States Supreme Court ruling directly on the issue of disciplinary rules as restraints on speech.93

Mr. Gentile's involvement in the free speech - fair trial debate began with the indictment of his client, Mr. Grady Sanders. Gentile had represented Sanders for several weeks and learned in advance of the impending indictment.94 Aware of the publicity that the case had received,95 Gentile decided that the most effective way to counter the negative press would be to stage a press conference immediately following Sanders' indictment.96 Gentile, convinced of the importance of the conference, spent several hours researching Nevada Rule 177, attempting (he claimed) to keep his statements within the confines of the rule.97 The essence of Gentile's message to the press conference was that his client was innocent; however, he also suggested another possible perpetrator of the

94. Id. at 2728.
95. Sanders owned a safety deposit vault company; large amounts of cocaine and travelers checks disappeared from one of his vaults while police were using them in connection with an undercover investigation. The Las Vegas sheriff initially reported the theft at a press conference on February 2, 1987. Media attention on the case continued over the next several months — in various stories, the media reported: that police detectives and Sanders' employees were primary suspects, that the police had been cleared of all wrongdoing, that others had come forward to report valuable items missing from Sanders' vault, that suspicion was being focused on Sanders through the process of elimination, that Sanders had refused to take a polygraph, along with other insinuations that Sanders had been doing business with drug dealers. Id. at 2727-28. The Kennedy opinion reported that Gentile "was personally aware of at least 17 articles in the major local newspapers . . . and numerous local television news stories which reported on the . . . theft and ensuing investigation." Id. at 2728. Thus, negative attention had been focused on Sanders for over a year before Gentile held his press conference.
96. Id. Gentile's remarks are reprinted at Appendix C. Justice Kennedy's opinion reprinted the Disciplinary Board's findings of Gentile's purposes in calling the conference: (i) to counter public opinion which be perceived as adverse to [his client], (ii) . . . to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecutor to poison the prospective jury pool, and, (iv) to publicly present [his clients side of the case].

Id.
97. Kennedy said that "[Gentile] did not blunder into a press conference, but acted with considerable deliberation." Id. Kennedy also highlighted the fact that "[a]t the evening before the press conference, [Gentile] and two colleagues spent several hours researching the extent of an attorney's obligations under Rule 177." Id. at 2729. Conversely, Rehnquist, citing the Nevada Supreme Court's opinion, Gentile v. State Bar of Nevada, 787 P.2d 386, 387 (Nev. 1990), relied on Gentile's deliberation to evidence that "the statements were timed to have maximum impact, when public interest in the case was at its height . . . ." 111 S. Ct. at 2747.
crime. 98

When the voir dire was conducted months later, an acceptably impartial jury was found and Mr. Sanders was acquitted. 99 This verdict was attained without a motion from either the prosecution or defense requesting a change of venue on account of prejudicial local publicity. 100 Nonetheless, the State Bar of Nevada filed a complaint against Gentile, alleging that he violated the Nevada Supreme Court rule prohibiting extrajudicial attorney statements, which cause adverse pretrial publicity. 101

The Southern Nevada Disciplinary Board of the State Bar found Gentile in violation of the rule and recommended a private reprimand. 102 Gentile appealed to the Nevada Supreme Court, which affirmed the findings and recommendations of the Board. 103 Gentile then appealed to the United States Supreme Court 104 which seemed ready to issue a final opinion that would resolve the decades-long debate.

At first blush, the Gentile decision appeared to be a victory for those who urged that the disciplinary rules at issue constituted unconstitutional restraints on speech. The victory, however, was pyrrhic, for the Court actually allowed the state broad powers to regulate attorney speech more readily than that of the press or any

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98. [Gentile] was disciplined for stating that (1) the evidence demonstrated his client's innocence, (2) the likely thief was a police detective . . . and (3) the other victims were not credible, as most were drug dealers or convicted money launderers . . . ." Id at 2729. Kennedy stated that Gentile "refused to comment on polygraph tests . . . ; he mentioned no confessions, and no evidence from searches or test results; [and] he refused to elaborate upon his charge that the other so-called victims were not credible, except to explain his general theory that they were pressured to testify . . . ." Id. at 2730. In rebuttal, Rehnquist pointed out that Gentile, by his own admission . . . called the press conference for the express purpose of influencing the voir. . . ." Id. at 2747.

99. Id. at 2730 ("[T]he record is altogether devoid of facts one would expect to follow upon any statement that created a real likelihood of material prejudice to a criminal jury trial.").

100. Id.

101. The Nevada Supreme Court rule in question, Rule 177, is quoted in full by Justice Kennedy in Appendix B to his opinion. See id. at 2737-38. The Nevada Rule is identical to Model Rule 3.6 in all material respects. See Appendix A to this note for the text of Model Rule 3.6. Kennedy noted that "only a small fraction of [Gentile's] remarks were disseminated to the public, in two newspaper stories and two television news broadcasts. The stories mentioned not only Gentile's press conference but also a prosecution response and police press conference." 111 S.Ct. 2729.


103. Id. at 388.

other class of people. The Court's opinion consists of two voting blocks. One group of four Justices affirmed the findings of the Nevada Supreme Court, holding the disciplinary rule to be a constitutionally permissible burden on speech. Another group of four Justices found the rule void for vagueness and an unconstitutional First Amendment restraint as applied. Justice O'Connor wrote a separate concurrence, joining Justice Rehnquist to make a majority for the proposition that the restriction embodied in the rule is a permissible restraint on speech. O'Connor then defected to the Kennedy camp, making a five person majority for the proposition that the rule as written is void for vagueness.

A. The Void for Vagueness Doctrine Applied to Nevada's Rule

The Kennedy opinion (with O'Connor providing the fifth vote) found Nevada Supreme Court rule 177 void for vagueness as interpreted by the Nevada Supreme Court. Consequently, Petitioner Gentile escaped sanction by the Nevada Bar because the imprecision of the rule violated his right to due process. The concept of voiding rules that are "so vague that [persons] of common intelligence must necessarily guess at [their] meaning and differ as to [their] application" is well embedded in First Amendment doc-

105. Chief Justice Rehnquist wrote the opinion and was joined by Justices Scalia, Souter, and White. 111 S. Ct. at 2738.
106. Id. at 2745-48.
107. Justice Kennedy wrote the opinion and was joined by Justices Blackmun, Marshall, and Stevens. Id. at 2723.
108. Id. at 2731-32, 2736.
109. Id. at 2748.
110. Id. at 2749.
111. Id. at 2731.
112. Id. at 2736. "Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide 'fair notice to those to whom [i]t is directed.'" Id. 2731 (quoting Grayned v. City of Rockford, 408 U.S. 104, 112 (1972)). At a minimum, procedural due process, guaranteed by the Fourteenth Amendment, requires notice before a person may be deprived of "life liberty, or property." U.S. CONST. amend. XIV, § 1. See, e.g., Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("That the terms of a . . . statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.").
113. Id. See generally David S. Bogen, First Amendment Ancillary Doctrines, 37 MD. L. REV. 679, 714-26 (1978) (vagueness problems may be overcome when the count is convinced the statute in question addresses legitimate government interests); Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67 (1960) (arguing that the vagueness doctrine must not be used for "unambiguous ends"); NIMMER, NIMMER ON FREEDOM OF SPEECH, 4-147 to 4-162 (1984).
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The "void for vagueness" doctrine focuses on the defendant and examines whether the right to due process of law has been subverted because the defendant cannot determine what the law prohibits or requires.\textsuperscript{114}

The doctrine is unconcerned with the nature of the speech or with the standard of protection; rather, it concerns only the means used by the state to restrict speech. Therefore, even if a state is permitted to restrict the speech upon the requisite showing of danger or malice, a court may still strike down a statute because its method of restriction is constitutionally infirm.\textsuperscript{115} For example, in \textit{Smith v. Goguen}\textsuperscript{116} the Supreme Court overturned a conviction under a law prohibiting anyone from publicly treating the United States flag "contemptuously." Justice Powell emphasized that the


\textsuperscript{115} The void for vagueness doctrine is related to the overbreadth doctrine, which invalidates laws that include both protected and unprotected conduct within their sweep. \textit{See, e.g.}, \textit{New York v. Ferber}, 458 U.S. 747, 766-74 (1982) (holding that a statute which defines "sexual performance" is not unconstitutionally overbroad because its permissible reach does not substantially overshadow arguably impermissible application); \textit{Broadrick v. Oklahoma}, 413 U.S. 601, 615 (1973) (holding that a statute is not unconstitutional even though it may deter protected speech to "some unknown extent"); \textit{Coates v. Cincinnati}, 402 U.S. 611, 614 (1971) (opining that a statute is unconstitutionally overbroad when it is not "directed with reasonable specificity toward the conduct to be prohibited"); \textit{United States v. Raines}, 362 U.S. 17, 21 (1960) (rationalizing that even though a statute's breadth may be unconstitutional, the party in interest may not argue such if the application in the case before the court is valid); \textit{Barrows v. Jackson}, 346 U.S. 249, 254 (1953) (reasoning that a statute is not unconstitutionally overbroad if the class of individuals it applies to is identifiable); \textit{Martin H. Redish, The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine}, 78 NW. U. L. REV. 1031, 1039-52 (1983) (exploring alternative means of applying the overbreadth doctrine); \textit{Henry P. Monaghan, Overbreadth, 1981 Sup. Ct. REV. 1, 23-33} (discussing the "contours" of the historical application of the overbreadth principle); \textit{Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844}, 846 (1970) (arguing that "the overbreadth doctrine is a principled response to the systematic failure of other methods of adjudication to protect First Amendment Rights adequately." (citation omitted). Stone recognized the potential link between the two doctrines, stating that "by declaring overbroad laws unconstitutional on their face, the overbreadth doctrine avoids the vagueness that ordinarily would result from permitting such laws to be enforced up to the limits of their constitutionality." \textit{Stone, supra note 57, at 1045. See also Paul A. Freund, The Supreme Court of the United States 68} (1961) ("The clarity of its language is delusive, since it will have to be recast in order to separate the constitutional from the unconstitutional applications. If it is read as applicable only where constitutionally so, the reading uncovers the vagueness that is latent in its terms.").

\textsuperscript{116} 415 U.S. 566 (1974).
statute's words were "inherently vague" and that it "failed to draw reasonably clear lines." As Justice White's concurrence makes clear, the state could legitimately proscribe certain acts in order to protect the flag. This statute, however, was flawed because its imprecise warning failed to alert those who crossed over into prohibited conduct.

Courts have addressed vagueness issues in areas other than First Amendment freedoms. It has been recognized that vague laws are particularly odious in the realm of freedom of expression. This is due to the "sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.'" Since vague laws engender the possibility of selective and discriminatory enforcement, courts have sought to end their potential chilling effect on protected speech. The Kennedy opinion, mindful

117. Id. at 574 ("The statutory language under which [appellee] was charged, however, fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not.").

118. "I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity ..." Id. at 587 (White, J., concurring).

119. Id. Similarly, the Court in Stromberg v. California, 283 U.S. 359, 370-71 (1931) (McReynolds, J., dissenting) struck down, as unconstitutionally vague, a law that prohibited displaying anything "as a sign, symbol or emblem of opposition to organized government." The statute was not intended to be a total ban on all expressions of opinion, but because of imprecise drafting, the line over which people could not cross was fuzzy and unclear. Id. at 369-70.

120. See id. at 88 ("the standard for definiteness for statutes curtailing free expression is stricter than it is for other types of statutes").


122. The Grayned court recognized that a vague restriction may in effect impermissibly delegate away from the legislature "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." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (footnote omitted). The Kennedy plurality opinion in Gentile points out that, aside from being a member of the criminal defense bar, with the "professional mission to challenge actions of the State, [Gentile] ... succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government." 111 S. Ct. at 2732. Kennedy implies that attorneys in Gentile's position are more likely to be in the bad graces...
of these concerns, found that Nevada's rule "[a]s interpreted by the Nevada Supreme Court...is void for vagueness." 123

The defect in the Nevada rule was the safe harbor provision that was lifted verbatim from MR 3.6. 124 This section comes after a list of statements that the drafters felt was likely to cause impermissible prejudice, and ostensibly provides attorneys with a list of statements that can permissibly be made. As noted by Chief Justice Rehnquist's dissent in Gentile, 125 the safe harbor section was included in the Model Rule to cure problems with DR 7-107. DR 7-107 was difficult to interpret because its various prohibitions were dependent on the stage of the proceeding as well as whether the proceeding was criminal or civil. 126 In an attempt to clarify the Rule, the drafters of the Model Rule abandoned these distinctions.

The "Model Code Comparison" to MR 3.6 states: "Rule 3.6 transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable

123. Id. at 2731. Justice Kennedy was careful to note, however, that the decision was based, at least in part, on the absence of "clarifying interpretation by the state court." Id. These comments are responsive to precedent, which suggests that "attacks on statutes for vagueness will fail if the restriction is 'readily subject to a narrowing construction by the state courts.'" Young v. American Mini Theaters, Inc., 427 U.S. 50, 60 (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 216 (1975)), reh'g denied, 429 U.S. 873 (1976). See also Wainright v. Stone, 414 U.S. 21, 22-23 (1973) (per curium) ("For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation [the Supreme Court] must take the statute as though it read precisely as the highest court of the State has interpreted it.") (quoting Minnesota ex rel. Parson v. Probate Court, 309 U.S. 270, 273 (1940)); Grayned, 408 U.S. at 111-12 (examining state cases construing similar ordinances to determine vagueness in the application of law in question); Cox v. New Hampshire, 312 U.S. 569, 575 (1941) (finding that a defendant may be prosecuted under a statute that is vague on its face but interpreted by the state court to be narrower or clearer than its mere language). But see Marks v. United States, 430 U.S. 188, 191-92 (1977) (declaring that "unexpected" or "unforeseeable" state court interpretations violate the defendant's right to due process because persons must be given notice that a particular activity is criminal); Bouie v. Columbia, 378 U.S. 347, 349 (1964) (holding that defendant's right to due process violated when given no notice by reason of unforeseeable judicial enlargement of a statute).

124. Nevada Rule 177(3) corresponds to Model Rule 3.6(c) which provides: "Notwithstanding paragraph (a) and (b) (1-5), a lawyer . . . may state without elaboration: (1) the general nature of the claim or defense . . . ." MODEL RULE 3.6 (1983). MODEL RULE 3.6 is reprinted in Appendix A.

125. "Model Rule 3.6, from which Rule 177 was derived, was specifically designed to avoid the categorical prohibitions of attorney speech contained in . . . [DR] 7-107 . . . ." Gentile, 111 S. Ct. at 2745 (Rehnquist, C.J., dissenting).

126. See MODEL CODE DR 7-107, reprinted in Appendix B infra.
dangers to the fair administration of justice."\(^{127}\) Ironically the attempt to give attorneys fair notice actually causes the rule to be vague. The Kennedy plurality opinion implied that the drafters of MR 3.6 failed in their efforts to cure DR 7-107 of its vagueness defects.

In pertinent part, MR 3.6 states: "Notwithstanding paragraph (a) and (b)(1-5), a lawyer . . . may state without elaboration", and provides a list of permissible subjects.\(^{128}\) The Gentile Court held that these words created an unacceptably imprecise restriction that could only confuse an attorney attempting to conform to the rule.\(^{129}\) Kennedy stated that the wording of the rule essentially advises that regardless of the clear prohibitions in the first paragraphs of the rule an attorney can state "the 'general' nature of . . . the defense," but only "without 'elaboration.'"\(^{130}\)

The words "general" and "elaboration" are "classic terms of degree . . . [with] no settled usage or tradition of interpretation in law."\(^{131}\) The Court, therefore, admonished: "The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated."\(^{132}\) Justice Kennedy's opinion placed much emphasis on the fact that Gentile made a studied effort to comply with the rule and still failed to do so.\(^{133}\) Essentially, the Court used Gentile as the "[person] of common intelligence"\(^{134}\) and found that because Gentile was uncertain as to the application or interpretation of the rule, the rule was void for vagueness.\(^{135}\)

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\(^{127}\) MODEL RULE 3.6 Model Code Comparison.

\(^{128}\) MODEL RULE 3.6, reprinted in Appendix A infra.

\(^{129}\) "A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours." 111 S. Ct. at 2731.

\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) Kennedy noted that, "On the evening before the press conference, [Gentile] and two colleagues spent several hours researching the extent of an attorney's obligations under Rule 177." Id. at 2729. The opinion reprinted a portion of the exchange between Gentile and a reporter that was recorded by the media. In response to a demand for comment on witness' backgrounds, Gentile says: "I can't because ethics prohibit me from doing so. Last night before I decided I was going to make a statement, I took a close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?" Id. at 2731 (emphasis in original).


\(^{135}\) Gentile, 111 S. Ct. at 2732. "The fact Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary." Id.
The Justices joining Chief Justice Rehnquist's opinion disagreed with the plurality on two main points: they contended that the rule was not vague in its terms and, more specifically, asserted that it was not unclear as applied to Gentile's particular statements. The Rehnquist group first argued, in dissent, that Rule 177(3) must not be considered to negate or confound the ban on prejudicial comment, but only to explain and outline an illustrative list of statements not ordinarily likely to prejudice the fairness of the trial. Rehnquist found that "[Gentile] was clearly given notice that such conduct was forbidden, and the list of conduct likely to cause prejudice, while only advisory, certainly gave notice that the statements made would violate the rule if they had the intended effect." Curiously, both Rehnquist and Kennedy seized upon the fact that Gentile made a concerted effort to discern the contours of the rule. Rehnquist, however, used this fact as evidence not of the rule's vagueness, but of Gentile's bad intent, stating: "[w]e find it persuasive that, by his own admission, [Gentile] called the press conference for the express purpose of influencing the venire. It is difficult to believe that he went to such trouble, and took such a risk, if there was no substantial likelihood that he would
Rehnquist disagreed with Kennedy's implication that Gentile's study of the rule highlighted its vagueness and the impossibility of compliance. Rather he thought that Gentile's study of the rule showed just the opposite — that Gentile intended to violate the rule and succeeded.

Secondly, Rehnquist attacked Gentile's standing to challenge the rule on vagueness grounds, finding that the rule was clear as to the conduct for which Gentile was disciplined. Specifically, Rehnquist argued that Gentile's attempt to sway public opinion in favor of his client was enough to place him in violation of section (1) of the rule, thus making vagueness in its later provisions irrelevant.

Rehnquist could not muster a majority to sup-

139. Id. Rehnquist would thus apparently view Gentile in a more favorable light had he not gone to such lengths to familiarize himself with the rule.

140. Id. at 2746. "[H]e has admitted that his primary objective in holding the press conference was the violation of Rule 177's core prohibition — to prejudice the upcoming trial by influencing potential jurors." Id.

141. Id. at 2747. "These provisions were not vague as to the conduct for which petitioner was disciplined; '[i]n determining the sufficiency of the notice a statute must of necessity be examined in light of the conduct with which a defendant is charged.'" Id. (citing United States v. National Dairy Products Corp., 372 U.S. 29, 33 (1963)). Rehnquist's argument was that since Rule 177 was not vague as to Gentile's conduct, he should not have standing to challenge vagueness in other provisions of the rule. This issue of whether those challenging vagueness have standing to challenge alleged vagueness in parts of the rule not applicable to them remains unresolved.

The Court in Brockett v. Spokane Arcades allowed a defendant to challenge a law's overbreadth even though his own conduct was not protected. The Court reasoned that "an individual whose own speech . . . may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." 472 U.S. 491, 503 (1985). See also Redish, supra note 115, at 1056-69 (discussing the Burger court's use of the overbreadth doctrine).

Justices and commentators have disagreed over whether the same privilege should be afforded to defendants challenging a law's vagueness. Justice White, in particular has been opposed to such an extension. His majority opinion in Broadrick v. Oklahoma, as well as his dissent in Kolender v. Lawson, suggest that his position is that vagueness challenges should be limited to "as applied" attacks unless the statute is vague as to all its applications. Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) (relying on the personal nature of constitutional rights and the Article III restriction on jurisdiction to actual cases or controversies); Kolender v. Lawson, 461 U.S. 352, 369-74 (1983). See also New York v. Ferber, 458 U.S. 747, 767 (1982) (citing Broadrick, and describing the general rule that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court"); Young v. American Mini-Theatres, 427 U.S. 50, 60 (1976) (stating that if the "deterrent effect on legitimate expression is not 'both real and substantial' and if the statute is 'readily subject to a narrowing construction by the state courts' . . . the litigant is not permitted to assert the rights of third parties") (citing
port his position that the rule was not vague and should be left intact, he managed, with O'Connor's defection, at least to preserve the current standard included in MR 3.6.

B. Standard for Permissible Regulation of Attorney Speech

Fortunately for Mr. Gentile, the rule that the Rehnquist majority designed had no effect on his particular case since his sanctions were reversed as a result of vagueness. However, the Court's holding was not so innocuous; deciding that states may regulate attorney speech upon a lesser showing than is required to restrict the speech of the press or other citizens has a far-reaching impact on state regulation of political speech.

1. The Rehnquist Opinion

In essence, Gentile urged that his speech should be regulated under the same standards that the Court set forth in Nebraska Press v. Stuart, Pennekamp v. Florida, Craig v. Harney, and Wood v. Georgia. Casting his case as an extension of these precedents, Gentile insisted that the "clear and present danger" or "serious and imminent threat" standard applied

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142. See supra notes 111-41 and accompanying text (discussing the vagueness doctrine and its application to the Gentile case).
143. 427 U.S. 539 (1976) (striking down a judicially imposed restriction on pre-trial publicity as an invalid prior restraint).
144. 328 U.S. 331, 334 (1946) (requiring a clear and present danger to the administration of justice before members of the press could be held in contempt).
145. 331 U.S. 367, 375 (1947) (holding that a finding of contempt was not supported by a finding of a clear and present danger to the administration of justice).
146. 370 U.S. 375, 384 (1962) (requiring a serious and imminent threat to the judiciary before a contempt citation will be permissible).
not only to the press and to disinterested third parties, but also to
defense attorneys speaking about a pending case.\textsuperscript{147}

The Rehnquist majority discounted this reasoning, relying on
three main arguments. First, recounting the drafting of the current
Rule 3.6, the opinion emphasized that the drafters wished to create
a standard less deferential to attorney speech.\textsuperscript{148} Second, it asserted that prior case law dictated a distinction between participants in
the trial and nonparticipant observers.\textsuperscript{149} Third, it relied on previ-
ous advertising cases that suggested that attorney speech should not
receive protection from a serious and imminent threat standard, but
only under a less strict balancing test.\textsuperscript{150} The opinion concluded
by asserting that since the Nevada rule was narrowly tailored to
promote a substantial state interest,\textsuperscript{151} it passed constitutional
muster. The underlying theme of these arguments was that the
special role of an attorney, as a licensed "officer of the court,"
permitted the state to regulate this speech under a less rigorous
First Amendment standard.\textsuperscript{152}

The majority first analyzed the recommendations of two com-
missions that urged that the rule adopt a "reasonably likely" stan-
dard, mirroring the \textit{Sheppard} Court's language.\textsuperscript{153} The Court then
observed that: "Ten years later, the ABA amended its guidelines,
and the 'reasonable likelihood' test was changed to a 'clear and
present danger' test."\textsuperscript{154} Relying on the drafters' reversion to a
compromise "substantial likelihood" test, the Court argued that
since the drafters intended to be less deferential to attorneys' free
expression rights, their preferences should be followed.\textsuperscript{155} The
Court then listed thirty-one states using the "substantial likelihood"
test, perhaps arguing that majority rule should prevail. 156

Second, the majority pointed out that none of the cases cited by Gentile dealt specifically with attorneys speaking about their pending cases. 157 The Court relied on Patterson v. Colorado, 158 In re Sawyer, 159 Seattle Times Co. v. Rhinehart, 160 and Sheppard 161 to illustrate the important and relevant distinctions between attorneys and nonparticipants in the legal process. 162 To emphasize its point, the court referred to the special ethical rules governing attorney conduct, 163 and the Sheppard mandate expressly restraining attorneys participating in a trial. 164 The Court concluded by quoting from Seattle Times:

"[a]lthough litigants do not ‘surrender their First Amend-
ment rights at the courthouse door,’ those rights may be
subordinated to other interests that arise in this set-
ing . . . . [O]n several occasions [we have] approved
restriction on the communications of trial participants where
necessary to ensure a fair trial for a criminal defen-
dant."

Finally, the Court posited that instead of using the “clear and present danger” test, the standard should be a “balancing process, weighing the State’s interest in the regulation of a specialized

156. Id. at 2741 n.1. The Court also pointed out that while eleven states adopted DR 7-107’s even less deferential “reasonable likelihood” standard, only one, Virginia, explicitly adopted a “clear and present danger” test. The Court conceded that four more states and the District of Columbia adopted standards that “arguably approximate[d]” the clear and present danger test. Id. at 2741. In total the Court tallied up 41 states that “advocated” restraints on attorney speech on less than a “clear and present danger” showing, while only six used the test. Id.

157. Id. at 2742.

158. 205 U.S. 454, 463 (1907) (“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.”).

159. 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) (“Obedience to ethical pre-
cepts may require abstention from what in other circumstances might be constitutionally protected speech.”).

160. 467 U.S. 20, 32-33 n.18 (1984) (holding that First Amendment rights may be
subordinated to other rights in a courtroom setting).

161. 384 U.S. 333, 363 (1966) (stating that attorneys may be subject to disciplinary
action for making improper disclosures to the press). See also supra notes 12-20 and ac-
companying text (discussing the facts and issues involved in the Sheppard case).

162. Gentile, 111 S. Ct. at 2743-44.

163. Id.

164. Id.

165. Id. at 2744 (quoting Seattle Times, 467 U.S. at 32-33 n.18).
profession against a lawyer's First Amendment interest in the kind of speech that was at issue.\textsuperscript{166} This test is gleaned from cases involving attorney advertising in violation of the ethical rules, which never suggested that lawyers are entitled to full First Amendment protection.\textsuperscript{167} Here, the Court clearly referred to lawyers in their capacity as lawyers or officers of the court, since all citizens are guaranteed First Amendment freedoms.\textsuperscript{168}

Applying this balancing test, the Court found a substantial state interest in "preventing officers of the court, such as lawyers, from imposing such costs [referring to the administrative costs associated with sequestration, change of venue, or extensive pretrial voir dire] on the judicial system and on the litigants."\textsuperscript{169} Furthermore, the Court asserted that the restraint was narrowly tailored to achieve these objectives since it only applied to speech "substantially likely to have a materially prejudicial effect on" a proceeding, applied to all attorneys participating in the proceeding, and merely postponed comments until after the trial.\textsuperscript{170}

2. The Kennedy Rebuttal

The Kennedy group preferred that the Court focus on the manner in which the restriction was applied by the state, rather than on the words of the rule. Kennedy stated that "[t]he difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics."\textsuperscript{171} Recognizing that the words "clear and present dan-

\textsuperscript{166} Id. The Kennedy dissenter took issue with the balancing test because neither attorney advertising nor release of confidential information obtained by discovery was present in \textit{Gentile}. As such, they observed "[w]ide-open balancing of interests is not appropriate in this context." Id. at 2733 (Kennedy, J.).

\textsuperscript{167} Id. at 2743-44.

\textsuperscript{168} See supra notes 22-30 and accompanying text (stating that lawyers are entitled to protection from unreasonable restrictions on their First Amendment freedoms).

\textsuperscript{169} \textit{Gentile}, 111 S. Ct. at 2745.

\textsuperscript{170} Id. See infra notes 226-30 and accompanying text. \textit{Cf.} Nebraska Press v. Stuart, 427 U.S. 539, 560-61 (1976) ("Of course, the order at issue . . . does not prohibit but only postpones publication." The burden, however, is not reduced by the temporary nature of the restraint.). \textit{But see} Bridges v. California, 314 U.S. 252, 268 (1941) ("It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgements below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the more important topics of discussion.").

\textsuperscript{171} \textit{Gentile}, 111 S. Ct. at 2725. Indeed, the opinion states at the first, "Nevada's appli-
were not a talisman, Justice Kennedy would have required that whatever the words, any interpretation of a rule restricting speech must take into account both the proximity and degree of possible harm. The opinion clearly acknowledged that state infringement of First Amendment rights must be considered under the same "clear and present danger" standard that is warranted by other restrictions on speech.

The Kennedy opinion, using this framework, then criticized the finding of the majority that a "clear or present" threat to the impartiality of Mr. Sanders' trial existed. The opinion focused on the facts of this particular case, rather than engaging in an abstract discussion about speech restrictions. Detailing the extensive pre-trial publicity, Kennedy relied heavily on the fact that both the prosecution and the police had already inundated the public with information about the case. Since Gentile "sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client," Kennedy believed that Gentile's statements had little or no effect, particularly when made six months prior to trial to such a large jury pool.

The Court also mentioned the lack of actual prejudice arising out of Gentile's statements, pointing out that the trial took place as scheduled before a panel of impartial jurors, and without either a request for continuance or change of venue.

Kennedy's analysis emphasized how the Nevada court applied the rule to the facts before it, not on the actual semantics of the

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172. Id. at 2725-26. The opinion intimates that if the Nevada court were to interpret "substantial likelihood of material prejudice" as the equivalent of a "clear and present danger" standard, it would be acceptable. "The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test." Id. at 2725 (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 243 (1984)). Hazard & Hodes agree: "To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)." GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 397 (1985).


174. Id. at 2726-31. (following precedent that requires appellate courts, in First Amendment cases, to make an independent examination of the record in order to make sure that "the judgement does not constitute a forbidden intrusion on the field of free expression.").

175. Id. at 2727-28.

176. Id. at 2728.

177. Id. at 2729 ("In 1988, Clark County, Nevada had population in excess of 600,000 persons.").

178. Id. at 2730.
rule. In sum, Kennedy found that the glaring lack of evidence of potential or actual prejudice made the case a poor one for defining with precision the outer limits under the Constitution of a court's ability to regulate. . . . At the very least, however, we can say that the Rule which punished petitioner's statement represents a limitation of First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood. 179

V. CRITIQUE OF THE GENTILE DECISION: UNWARRANTED NARROWING OF FIRST AMENDMENT RIGHTS

A. The Supreme Court Turns Its Back on Precedent

In analyzing the Gentile decision, it is instructive to compare its holding with that of an earlier case where the Supreme Court was confronted with First Amendment rights butting up against the guarantees of the Sixth Amendment. In Bridges v. California, 80 the Court explicitly recognized that "the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization . . . ." 181 Confronting similar concerns and balancing the same two amendments, the Gentile and Bridges Courts came to opposite conclusions. Five justices in Bridges favored the First Amendment right to free

179. Id. at 2736.
180. 314 U.S. 252 (1941) together with its companion case, Times-Mirror Co. v. Superior Court of California, also on writ of certiorari, 310 U.S. 623 (1940), to the Supreme Court of California.
181. Bridges, 314 U.S. at 260. The Gentile Court also recognized the nature of the debate before them: These opposing positions illustrate one of the many dilemmas which arise in the course of constitutional adjudication. The above quotes from Patterson and Bridges epitomize the theory upon which our criminal justice system is founded: the outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on the material admitted into evidence before them in a court proceeding . . . . At the same time, however, the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed . . . and, if sufficiently informed . . . might wish to make changes in the system.
Gentile, 111 S. Ct. at 2742.
182. Justice Black, the author, along with Justices Reed, Douglas, Murphy, and Jackson. Bridges, 314 U.S. at 258-78.
expression, adopting the speech-deferential "clear and present danger" test, while five in Gentile found that the interest in fair and impartial trials was more weighty, and allowed restraint of speech upon a lesser showing. The salient difference between the two cases is the status of the speaker — in Bridges the speaker was a union officer, in Gentile, a criminal defense attorney. Arguably, the differing results of these two cases was a function of a conservative Court's vision of attorneys as subject to comprehensive restrictions that accompany the practice of law.

The Bridges majority pointed to the historical underpinnings of a very broad First Amendment doctrine, highly deferential to political speech. Conversely, the Gentile majority focused on the history of court regulation of attorney speech. Ironically, Rehnquist quoted Bridges: "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." However, Rehnquist failed to complete the thought of the Bridges majority which continued: "But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials . . . ."

The Bridges Court then applied the "clear and present danger"

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183. Chief Justice Rehnquist, joined by Justices Scalia, Souter, White, and O'Connor, who concurred in the part of the judgement allowing restriction of speech upon a lesser showing than "clear and present danger." Gentile, 111 S. Ct. at 2738-49.

184. Bridges, an officer of a C.I.O. union involved in litigation against its rival A.F.L. union, sent a telegram to the Secretary of Labor, calling the judge's decision "outrageous" and threatening a large scale strike if the judgment was enforced. The telegram was published in "newspapers of general circulation in San Francisco and Los Angeles." Bridges, 314 U.S. at 276 n.20. In the companion Times-Mirror case, the speaker was the author of several editorials advocating a harsh sentence for already convicted defendants. Id. at 274-75.

185. See supra notes 93-98 and accompanying text.

186. Bridges, 314 U.S. at 263 ("For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.")

187. "In the United States, the courts have historically regulated admission to the practice of law before them, and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards." Gentile, 111 S. Ct. at 2740. "Even outside of the courtroom, a majority of the court . . . observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be." Id. at 2743.

188. Id. at 2742 (quoting Bridges, 314 U.S. at 271).

189. Bridges, 314 U.S. at 271.
test to the facts in question, concluding that the speech involved did not present a danger of the requisite seriousness or imminence.\textsuperscript{190} When the \textit{Gentile} Court balanced First and Sixth Amendment rights, the role of the attorney as an "officer of the court"\textsuperscript{191} weighed in on the side of the Sixth Amendment, tipping the balance against unfettered freedom of expression. Essentially, Rehnquist allowed the systemic interest of preventing attorneys from imposing costs on the judicial process to outweigh the attorney’s personal interest in speech.\textsuperscript{192}

B. The Supreme Court’s Decision Unduly Restricted Attorney Speech: Membership in the Bar Is Not a Waiver of First Amendment Rights

It is not contended that attorneys have a greater claim to freedom of expression than any other citizen. Concededly, an attorney’s speech can legitimately be restricted if it amounts to obstruction of justice, constitutes contempt of court, violates a rule of evidence or, outside the courtroom, poses a danger to others.\textsuperscript{193} Obviously, an attorney can no more falsely shout fire in a crowded theater than may any other prankster.\textsuperscript{194} Arguably, the disciplinary

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\item \textsuperscript{190} Id. ("We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.").
\item \textsuperscript{191} See infra notes 195-98 and accompanying text (discussing the role of the attorney as an officer of the court).
\item \textsuperscript{192} Shortly after the decision was published, a commentator noted, "It is difficult to avoid the conclusion that the Rehnquist majority in \textit{Gentile} is advancing a judicial philosophy that has less to do with the actual issues in the case than with the larger issue of the role of a lawyer in the judicial system." Bernard James, Justices Still Seeking a Consistent Voice on First Amendment, \textit{Nat’l Law J.}, August 19, 1991 at 54-55. The Kennedy opinion highlighted this aspect of the majority opinion, stating, "We have not in recent years accepted our colleagues’ apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms." \textit{Gentile}, 111 S. Ct. at 2734.
\item \textsuperscript{193} See, e.g., Whitney v. California, 274 U.S. 357, 371 (1927) ("That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose . . . and that a state . . . may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.") (citing Gitlow v. New York, 268 U.S. 652, 666-68 (1925)); NORMAN DORSEN & LEON FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASS’N OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON COURTROOM CONDUCT 131-188 (1973) (describing the rights and responsibilities of defense counsel and prosecutors in the criminal setting).
\item \textsuperscript{194} See Schenck v. United States, 249 U.S. 47, 52 (1919) ("The character of every
rules restricting attorney speech unfairly differentiate attorneys from ordinary citizens, making what they say subject to sanction, whereas the same speech would be protected if uttered by a non-lawyer.

It is true that attorneys, aside from functioning as client representatives, have an additional role as "officers of the court." This second rule has been characterized as a "fiduciary relationship" designed to preserve the integrity of the judicial process. It has been contended that an attorney's duty to the court derives from the privilege to practice before the bar and that, consequently, attorneys may be subject to special rules. This is, essentially, the theory supporting the rules of ethics or professional responsibility. Attorneys, as contributors to the search for justice, must comport their behavior to certain guidelines that facilitate this search.

act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.

195. The preamble to the Model Rules of Professional Conduct states "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES PREAMBLE (1992). Various courts have also discussed this theme. See, e.g., Cohen v. Hurley, 366 U.S. 117, 124 (1961) ("It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes."); Hirschkop v. Snead, 594 F.2d 356, 366 (4th Cir. 1979) (per curiam) ("Lawyers are officers of the court, subject to reprimand and the imposition of other disciplinary sanctions for the violations of rules to which non-lawyers are not subject.").

196. Traditionally, protecting the defendant's right to a fair trial has been included among an attorney's duties. See, e.g., Hirschkop, 594 F.2d at 366 ("The lawyer is under a high fiduciary duty to fairly represent his client, but he owes substantial duties to the court and to the public as well."); In re Halkin, 598 F.2d 176, 186 (D.C. Cir. 1979) ("[L]awyers have a legal and ethical responsibility to safeguard the right to a fair trial.").

197. In Gentile, Rehnquist quotes: "Membership in the bar is a privilege burdened with conditions." 111 S. Ct. at 2740 (quoting Cardozo J., in In re Rouss, 116 N.E. 782, 783 (N.Y. 1917)). This has been characterized as a duty owed "in return for . . . what amounts to a monopoly of power." Michael E. Swartz, Note, Trial Participant Speech Restrictions: Gagging First Amendment Rights, 90 COLUM. L. REV. 1411, 1427 (1990) (citing In re Snyder, 472 U.S. 634, 644 (1985)); Nebraska Press v. Stuart, 427 U.S. 539, 601, n.27 (1976) (Brennan, J., concurring)). Swartz notes however, that "[t]he constraints that can be imposed upon attorneys are not limitless." Swartz, supra at 1427 (citing In re Primus, 436 U.S. 412, 431-32 (1978); Spevack v. Klein, 385 U.S. 511, 516, 520 (1967)).

198. Scott M. Matheson Jr. states: "Lawyers are 'officers of the court' because their duty to clients must be fused with their duty as participants in the governmental function of protecting the judicial process from extraneous influences that impair its fairness." Scott M. Matheson, Jr., The Prosecution, The Press, and Free Speech, 58 FORDHAM L. REV. 865, 886 (1990). See also Nebraska Press v. Stuart, 427 U.S. 539, 601 n.27 (1976) (Brennan, J. concurring) ("[A]ttorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the
Attorneys, however, are not only officers of the court. Included in the duty to preserve the fairness of trials is the duty to zealously represent the client's interest, thereby ensuring the integrity of an advocacy-based system.\(^{199}\) In order to advance the client's interest, an attorney "may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."\(^{200}\) Although an attorney may be part of the court system, he or she is not an employee of the court, similar to court personnel. Rather, as an advocate, the attorney necessarily maintains some distance from the court's essential functions.\(^{201}\) Critics of the current Model Rules of Professional Conduct charge that the rules were drafted by those who have forgotten the crucial and primary role of the attorney as the "citizens' champions against official tyranny."\(^{202}\)

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\(^{199}\) See Gannett Co. v. DePasquale, 443 U.S. 368, 384 (1979) ("[O]ur adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation.").

\(^{200}\) MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983). The Court has noted in Gentile that an attorney's obligation to his client includes defending his reputation and taking permissible steps to lessen the force of an indictment or have it dismissed. 111 S. Ct. at 2728-29. See also United States v. Wade, 388 U.S. 218, 257-58 (1967) (White J., concurring in part, dissenting in part) (stating that defense counsel should "defend his client whether he is innocent or guilty" and in these cases "we countenance or require conduct which in many instances has little, if any, relation to the search for truth.").

\(^{201}\) See Spevack v. Klein, 385 U.S. 511, 520 (1967) (Fortas J., concurring) ("[A] lawyer is not an employee of the State. He does not have the responsibility of an employee to account to the State for his actions because he does not perform them as agent of the State."); Cammer v. United States, 350 U.S. 399, 405 (1956) (stating that "officer" of the court does not mean the same thing as "employee" of the state); Swift, supra note 91, at 1027 ("[A]lthough an attorney is an officer of the court, his role differs considerably from that of other court officers such as marshals, bailiffs and court clerks . . . . [H] has significant professional obligations upon which he must make independent judgments.").

\(^{202}\) Theodore I. Koskoff, Preface to THE ROSCOE POUND — AMERICAN TRIAL LAWYER'S FOUNDATION, THE AMERICAN LAWYERS CODE OF CONDUCT, reprinted in TRIAL, July 1982 at 55, 56. The American Lawyers Code of Conduct (ALCC) is an example of the libertarian vision of lawyers as part of the adversary system, rather than the traditional officer of the court conception. An excerpt from the Preface to the ALCC reads: "The Kutak Commission [drafters of the current Model Rules of Professional Conduct,] sees lawyers as ombudsmen, who serve the system as much as they serve clients. This is a collectivist, bureaucratic concept. It is the sort of thinking you get from a commission made up of lawyers . . . who have lost sight of the lawyer's basic function . . . . [The Kutak Rules] embody a core conviction about the lawyer's role that is fundamentally at odds with the American constitutional system." Id. The preface continues: "It is said . . . that the lawyer is an 'officer of the court' . . . . Out of context, such phrases are at best meaningless, and at worst misleading. In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of a court only in the sense of serving a court as a zealous, partisan advocate of one side . . . ." Id. at 55, 59.
In examining regulations which restrict speech, the Supreme Court has traditionally emphasized that the degree of constitutional protection does not depend on the identity of the speaker, but depends on the circumstances of the speech itself. Whether or not the speech of a certain class of persons may be restricted depends not upon that person's status but upon the special circumstances of the particular environment in which the person speaks. The constitutional defect with restricting speech based upon mere status is that it comes dangerously close to censorship based on content or upon the point of view of the speaker.

Recently, in *Rust v. Sullivan*, the Court held that practitioners in health care facilities funded by Title X may not counsel their patients about abortion as an alternative to carrying a pregnancy to term. The Court explicitly reasoned that the government has a right to limit the speech of medical personnel in pub-

Arguably, the role of advocate for one side does not apply to all attorneys with equal force. Attorneys representing the government and prosecutors may be subject to speech restrictions by reason of their employment with the State. See Connick v. Myers, 461 U.S. 138, 142 (1983) (balancing the lawyer's First Amendment rights against the state's rights as an employer). The Justice Department, for example, restricts the content of extrajudicial statements to the press made by its lawyers in the "Katzenbach restrictions," 28 C.F.R. § 50.2 (1989). Similarly, a prosecutor has a duty as a representative of the State to discharge his or her duties without violating the due process rights of the accused. See *Model Rules of Professional Conduct* Rule 3.8 cmt. (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").


204. Swift, *supra* note 91, at 1023-24 (positing that when speech may appear to be restricted based on position, as in *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (restricting teachers' speech), or in *Procurier v. Martinez*, 416 U.S. 396, 409 (1974) (involving prisoners' speech rights), it is actually restrained based on the special needs of the particular environment, not on the mere status of the speaker). *See also* *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 511 (1969) (restricting public school student's right to freedom of expression while at school).


207. *Id.*
licly-funded hospitals and clinics.\textsuperscript{208} Similarly, prosecutors and other attorneys paid by the government may legitimately have their speech restricted as a consequence of accepting public funding.\textsuperscript{209} Since non-government attorneys are not subject to restrictions based on who their employer is, they should, therefore, be free to speak as their clients' interests or their consciences dictate. The \textit{Gentile} Court, however, largely ignored this distinction.

In \textit{Gentile}, the respondent State Bar Association pointed out the need for a rule restricting attorneys "[b]ecause lawyers have special access to information, [including confidential statements from clients and information obtained] through [pretrial] discovery [or plea negotiations and so] lawyers' statements are likely to be received as especially authoritative."\textsuperscript{210} Since this argument justifies the speech restriction based solely on the special qualities of the legal profession, not on the needs of the environment or the receipt of government subsidies, it is constitutionally objectionable.\textsuperscript{211}

Other courts and commentators have, however, rejected the argument that merely because an individual is an attorney, or an officer of the court, his or her speech may be restrained on no other showing.\textsuperscript{212} Whether the speaker is an attorney or a member

\textsuperscript{208} \textit{Id.} at 1775 ("The employees' freedom of expression is limited during the time they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."). Thus, the Court expressly conditioned the restraint of free speech on the voluntary acceptance of government funding. In contrast, attorneys are required to take an examination in order pass the bar to practice law, which is not comparable to voluntarily accepting a privilege.

\textsuperscript{209} See \textit{supra} note 202.

\textsuperscript{210} Gentile, 111 S. Ct. at 2745. Kennedy responded, "If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent." \textit{Id.} at 2735 (Kennedy, J).

\textsuperscript{211} See \textit{supra} notes 203-208 and accompanying text (stating that restrictions on speech depend upon the environment in which it occurs).

\textsuperscript{212} See, e.g., \textit{In re Primus}, 436 U.S. 412, 429 (1978); NAACP v. Button, 371 U.S. 415 (1963) (rejecting the view, in both cases, that the First Amendment activities of attorneys were subject to greater restriction than those of the general public); Wood v. Georgia, 370 U.S. 375 (1962) (holding that a sheriff who criticized a judge is not guilty of contempt because the judge's order violated the sheriff's First Amendment rights); \textit{In re Halkin}, 598 F.2d 176, 186 (D.C. Cir. 1979) (stating that even public officers who have special responsibilities to the court do not necessarily have a more curtailed right to freedom of expression than the average citizen); Markfield v. The Ass'n of the Bar of the City of New York, 370 N.Y.S.2d 162, \textit{appeal dismissed}, 375 N.Y.S.2d 106 (N.Y. App. Div. 1975) (holding that appellant's position as an officer of the court was insufficient to justify the sanctions imposed against him); Younger v. Smith, 106 Cal. Rptr. 225, 233
of another profession, attention is more properly focused not on one’s position but on the circumstances surrounding the speech.\textsuperscript{213}

In fact, being an officer of the court makes it “all the more imperative that they be allowed freely to express themselves on matters of current public importance.”\textsuperscript{214}

The Kennedy opinion in \textit{Gentile} clearly indicated that membership in the bar or acting in pursuit of litigation does not constitute a waiver of First Amendment freedoms.\textsuperscript{215} As the Supreme Court said in \textit{Seattle Times}, “litigants do not surrender their First Amend-
ment rights at the courthouse door.” 216 Therefore, the Rehnquist majority’s heavy reliance on a vision of the attorney’s role in the justice system is unwarranted and can be criticized with both precedent and learned opinion. Since the attorney is often in the unique position of both insider to the judicial process and advocate for a client, criticism of government may be particularly important. In holding that the attorney’s unique status effectively deprives him or her of the power to speak without restraint, the Court dilutes the Bill of Rights as a mechanism to limit governmental power.

C. Abandonment of the Clear and Present Danger Test Is Unjustified

Setting aside the argument that an attorney’s membership in the organized bar should not serve to reduce his constitutional protection, there are other avenues of attack on the Gentile holding. In particular, the Rehnquist Court’s approval, in the majority opinion, of a standard that is unprotective of speech is unwarranted. The “clear and present danger” test has been called, “in effect, the general, all-purpose First Amendment test.” 217 Since admission to the practice of law should not militate against the use of such a fully protective test, 218 the question remains whether there exists any other sufficient rationale warranting departure from the clear and present danger test.

The classic application of the clear and present danger test is to state restriction of subversive advocacy. 219 Justice Kennedy

217. HARRY KALVEN JR., A WORTHY TRADITION 180 (1988). See also Bridges, 314 U.S. at 262 (stating that the clear and present danger test “has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue”); Staughton Lynd, Comment, Brandenburg v. Ohio: A Speech Test For All Seasons?, 43 U. CHI. L. REV. 151, 153-56 (1975) (tracking the development of the “clear and present danger” test).
218. See supra notes 167-89 and accompanying text.
219. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (overturning a conviction for advocating unlawful methods of political terrorism because there was no evidence of preparing to act violently); Dennis v. United States, 341 U.S. 494, 499 (1951) (justifying criminal convictions by a danger of an attempt to overthrow the government); Hernon v. Lowry, 301 U.S. 242, 1260 (1937) (holding that solicitation of members by the communist party did not pose a danger of violence); Fiske v. Kansas, 274 U.S. 380, 386 (1927) (recruiting members into a labor union did not create the requisite danger); Gitlow v. New York, 268 U.S. 652, 668-69 (1925) (holding that words urging others to engage in revolutionary activity are sufficient to uphold a criminal conviction); Pierce v. United States, 252 U.S. 239, 252 (1920) (upholding a conviction under the World War I era espionage laws); Gilbert v. Minnesota, 254 U.S. 325, 327 (1920) (allowing
would argue that Gentile’s comments to the press were comparable to subversive advocacy and there is, thus, no reason to depart from the clear and present danger standard. Arguably, Gentile’s criticism of the prosecutor and police served the same societal function as advocating the overthrow of government. Of course, Gentile’s comments, in the form of a warning to citizens that the prosecutors and police had been slack on the job, were more appropriate than a call to violently overthrow the State. Therefore, characterizing Gentile’s statements as that of a citizen criticizing the political process allows his speech to be as deserving of protection as speech which calls the proletariat of the world to the final struggle.

The Supreme Court has stated that “reasonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests, and are permitted.” These types of state restrictions ostensibly do not ban a particular message or an identified speaker, but only prevent certain forms of expression in certain places or at certain times. Thus, time, place and manner restrictions on speech are examined by the Court with greater deference when they “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” Justice Rehnquist’s opinion in Gentile argued that Nevada’s rule was just such a restriction, en...

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220. Gentile, 111 S. Ct. at 2724 (“At issue here is the constitutionality of a ban on political speech critical of the government and its officials.”).

221. Some examples of Gentile’s remarks include: “[The police] were playing very fast and loose . . . .”; “. . . . Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police Department and at the District Attorney’s office.” Id. at 2737, 2739.

222. Gitlow, 268 U.S. at 659. Professor Tribe commented about the speech at issue in Bridges: “[I]f Bridges’ threat to cripple the economy of the entire West Coast did not present clear and present danger, then the lesson of the case must be that almost nothing said outside the courtroom is punishable as contempt.” Tribe, supra note 27 at 856-57 n.1 (citing ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 15 (1972)).


forceable only during the investigation and pendency of the trial.\(^{225}\)

While the *Gentile* restriction is narrow in the sense that it postpones, rather than eliminates, speech,\(^{226}\) the Supreme Court has in the past rejected this as a grounds to uphold restraints that are otherwise constitutionally impermissible.\(^{227}\) The *Bridges* Court, examining a ban that was only in effect “during the pendency of a case,” stated: “No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.”\(^{228}\) Under the Nevada rule, however, an attorney’s speech may be banned for months, even years, until the proceedings ultimately have been resolved, eliminating any potential for prejudice. By this point, an attorney may have lost all incentive to speak about long past abuses of the judicial process or the potential audience is disinterested because of the untimeliness of the message. When it is not clear whether the temporal ban will actually silence the speaker indefinitely or merely for a short period of time, classifying the ban as a time, place, and manner restriction is unjustified because “alternative channels of expression” may be illusory.\(^{229}\) In those instances where the speech restriction completely muzzles a speaker for years, the protection afforded by the

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\(^{225}\) *Gentile*, 111 S. Ct. at 2745. Rehnquist pointed out in a footnote that “[t]he Nevada Supreme Court has consistently read all parts of Rule 177 as applying only to lawyers in pending cases, and not to other lawyers . . . .” Id. at 2743-44 n.5. Note that the rule itself does not distinguish between participating and nonparticipating attorneys until the last section. The general prohibition may be construed to apply to all attorneys as it merely states “A lawyer shall not . . . .” The last section of the rule is limited, however, to “a lawyer involved in the investigation or litigation of a matter . . . .” See *Model Rules of Professional Conduct* Rule 3.6 (1983). Nor does the rule explicitly limit the duration of the ban, prohibiting speech until it no longer has the proscribed prejudicial effect.

\(^{226}\) *Gentile*, 111 S. Ct. at 2745. Similar to the restriction at issue in *Cox v. Louisiana*, the *Gentile* restriction might be characterized as a place and manner restriction, which does not ban the message, but simply defers it to an appropriate time and place. *Cox v. Louisiana*, 379 U.S. 559, 560 (1965) (prohibiting picketing a courthouse).

\(^{227}\) *See supra* note 170 and accompanying text (rejecting the temporal nature of a ban on speech as a mitigating factor).

\(^{228}\) *Bridges v. California*, 314 U.S. 252, 268-69 (1941).

\(^{229}\) *See Grace*, 461 U.S. at 181-83. The Court in *Rust v. Sullivan* noted that employees remain free to say whatever they wish about abortion outside the Title X project, and that the recipient remains free to use private, non-Title X funds to finance abortion related activities. *Rust v. Sullivan*, 111 S. Ct. 1759, 1774-75 (1991). This is in stark contrast to the *Gentile* case, where the rule prohibited attorneys from speaking “on their own time” about a pending case, forcing them wait until the case was resolved.
courts in examining the restraint should be highly deferential to the speech.\textsuperscript{230}

One commentator has asserted that the clear and present danger test is not always appropriate, even for high value speech,\textsuperscript{231} because the test essentially is designed to promote and protect the self-government rationale underlying free speech.\textsuperscript{232} Under this approach, the test should only be applied to speech that causes a harm that is repairable by the influx of more speech.\textsuperscript{233} For example, when a speaker incites a crowd to riot, the undesirable behavior can be prevented by another speaker, who discourages the acts.\textsuperscript{234} Thus, more speech should be permitted to circumvent the possible harm, and the initial speech should be subject to the clear and present danger test.

Thus, this approach involves a two-step inquiry. First, an ex-

\begin{itemize}
\item \textsuperscript{230} Some content-based restrictions are so detrimental to the free exchange of ideas that they are presumptively invalid. See Alexander Meiklejohn, \textit{Political Freedom: The Constitutional Powers of the People} 27 (1960) (analyzing content-based restrictions on speech). Other speech restrictions, however, leave open alternative channels of communication. See Geoffrey R. Stone, \textit{Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions}, 46 U. CHI. L. REV. 81, 104-05 (1978).
\item \textsuperscript{231} The problem, of course, is to separate one set of cases from the other . . . . [E]ven if one were satisfied in any given case that the particular restriction was genuinely intended to serve the interest asserted, the possibility would nevertheless remain that . . . the restriction was in some degree colored — consciously or unconsciously — by the illegitimate consideration.”. See also Kenneth L. Karst, \textit{Equality as a Central Principle of the First Amendment}, 43 U. CHI. L. REV. 20, 28 (1975) (“The principle [of equality] requires courts to start from the assumption that all speakers and all points of view are entitled to a hearing, and permits deviation from this basic assumption only upon a showing of substantial necessity.”).
\item \textsuperscript{232} Tom Hentoff, \textit{Note, Speech, Harm, and Self-Government: Understanding the Aim of the Clear and Present Danger Test}, 91 COLUM. L. REV. 1453, 1466 (1991) (“[W]hether the test is applied cannot be determined by the type of speech alone . . . . One must also consider the manner in which the speech causes harm . . . . a decision against applying the test is not necessarily tied to the value of speech.”).
\item \textsuperscript{233} See Hentoff supra note 231 at 1454. See supra notes 25-30 and accompanying text (explaining the self-government rationale.).
\item \textsuperscript{234} See Hentoff supra note 231 at 1454-67 (analyzing the link between the imminence requirement of the clear and present danger test and the “more speech” rationale supporting the test’s application).
\item \textsuperscript{234} Id. at 1469. (“[T]he test is thus tailored to address a situation in which A speaks and influences B to commit a bad act. The state wants to prevent B’s act, not A’s speech. Counterspeech can reach B, convincing her not to commit the act, and thus prevent the harm.”).
\end{itemize}
amination is made of the way the speech causes harm to determine if more speech will prevent its occurrence.\textsuperscript{235} The second inquiry is whether suppression of the speech would frustrate the self-government rationale.\textsuperscript{236} If the answer to both queries is affirmative, then the “clear and present danger” test should be applied to any restraints on that speech.\textsuperscript{237}

Employing this model, Rehnquist would argue that the ultimate harm caused by Gentile’s speech was the initial tainting of the jury venire.\textsuperscript{238} Rehnquist would note that the “theory upon which our criminal justice system is founded [is that] the outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case.”\textsuperscript{239} Thus, any prejudicial information received by potential jurors would be considered a harm, even if the jury bases its verdict only on the facts entered into evidence. This characterization of harm effectively precludes the use of clear and present danger test because the first inquiry is not satisfied — the harm is not preventable by counterspeech.

This characterization of harm, however, is not only out of line with the express words of MR 3.6,\textsuperscript{240} but would also allow the state to suppress statements made by anyone concerning a pending trial. If the harm is merely the receipt of information that clouds the prospective juror’s blank slate, it is irrelevant whether that information comes from an attorney, the press, or a disinterested third party. Since prior cases clearly mandate a clear and present danger standard for release of information by the press, this characterization of harm must be rejected and possible characterizations examined.

Justice Kennedy would define the harm as prejudice in the final jury decision, mirroring the “material prejudice to an adjudicative proceeding” language of the rule. This kind of harm does answer “yes” to step one of the test since it can be prevented by more speech. This counterspeech is provided to the jury by opposing counsel’s arguments or the judge’s instruction to disre-

\textsuperscript{235} Id. at 1472.
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 1465-66.
\textsuperscript{238} See Gentile, 111 S. Ct. at 2747 (Rehnquist J.) (“[P]etitioner called the press conference for the express purpose of influencing the venire.”).
\textsuperscript{239} Id. at 2742.
\textsuperscript{240} The language of Rule 3.6 explicitly addresses the prevention of “prejudicing an adjudicative proceeding,” and does not forbid any statement about the case that will be heard by potential jurors. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).
garden information received outside the courtroom. Since the ultimate evil to be avoided is an unfair verdict, which can be prevented with more speech, the second step of the test must be addressed: whether suppression of this speech is consistent with the self-government rationale.

Gentile’s comments, criticizing a governmental entity, clearly deserve protection under this rationale. His speech was precisely that which the nation’s founders intended to permit and encourage — the citizenry policing and speaking about their government. Indeed, our democratic society is based upon permitting citizens to criticize the government. Under this characterization of the ultimate harm, both prongs of the test are satisfied, and use of the “clear and present danger” test is clearly appropriate.

This exercise highlights the major difference between Justices Rehnquist and Kennedy of how to characterize Gentile’s speech. Rehnquist saw Gentile as a disobedient and undignified attorney, violating the ethical rules of his state bar association. Kennedy, on the other hand, viewed Gentile as an interested and involved citizen, alerting others to possible corruption in the government. This difference in perception led to the application of different standards to the restraints on Gentile’s speech. Since it has been demonstrated that Rehnquist’s method of characterizing the harm leads to inconsistent results, Kennedy’s analysis and characterization is superior.

VI. THE RULES CAN BE REDRAFTED TO AVOID VAGUENESS PROBLEMS

Justice Kennedy’s analysis was only concerned the with Nevada rule as applied by the Nevada Supreme Court and not the ABA MR 3.6 or other similar rules. Justice Rehnquist criticized this

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241. See Hentoff, supra note 231, at 1489-90 (realizing that if the jury disregards the speech, the evil of an unfair verdict can be avoided).
242. See supra notes 235-37 and accompanying text (discussing Hentoff’s two-step test for application of the clear and present danger standard).
243. See Hentoff, supra note 231, at 1479 (“denying the right to comment on pending cases would ‘remove from the arena of public discussion’ matters in which ‘public interest would naturally be at its height’ . . . . Not relying on ‘more speech’ in such a situation would undemocratically stifle debate.”) (citing Bridges v. California, 314 U.S. 252, 268 (1941)).
244. See supra notes 19-24 and accompanying text.
245. Gentile, 111 S. Ct. at 2724 (“The matter before us does not call into question the constitutionality of other States’ prohibitions upon an attorney’s speech that will have a ‘substantial likelihood of materially prejudicing an adjudicative proceeding,’ but is limited
distinction, stating in a footnote:

We disagree with Justice Kennedy's statement that this case "does not call into question the constitutionality of other states" prohibitions upon attorney speech that will have a substantial likelihood of materially prejudicing an adjudicative proceeding, but is limited to Nevada's interpretation of that standard. Petitioner challenged Rule 177 as being unconstitutional on its face . . . . The validity of the rules in the many states applying the "substantial likelihood of material prejudice" test has, therefore, been called into question in this case. 246

Apparently, Kennedy restricted his analysis to the Nevada court's interpretation of the rule, believing that the semantics of the rule were unimportant as long as the state interpreted the words to permit restriction only upon the requisite showing of a clear and present danger. 247

Practically, the limited analysis of the Kennedy opinion is of little significance to committees which are redrafting their rules. The Court, despite protestations that its holding affected only the Nevada rule, effectively demanded a rewriting of all rules patterned after MR 3.6 to cure the vagueness problems. Justice Rehnquist's statement that all extrajudicial attorney speech restraints were affected garnered a majority of the Court. 248 By holding that the standard used in the Rule was permissible, Rehnquist approved redrafting the rules, employing the same standard or one even less deferential to the rights of attorneys.

As a result of the disjointed Gentile opinion, drafters attempting to remedy the defects of the current rule are faced with a particularly difficult task. First, because a majority of the Court held that MR 3.6 is unconstitutionally vague, 249 the rule must be redrafted to make it more concrete, forewarning an attorney specifi-

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246. Id. at 2742 n.4 (citation omitted).
247. See supra notes 171-79 and accompanying text (discussing the Kennedy opinion in detail). See also Gentile, 111 S. Ct. at 2725 ("The difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application.").
248. Id. at 2743-45.
249. Id. at 2731.
cally of those statements for which he or she is subject to sanction. Second, a majority of the Court also held that a state may restrict speech absent a showing of any actual prejudice or even absent a showing of an imminent threat of such prejudice. The substantial likelihood of material prejudice is a subjective determination, asking what is substantially likely to prejudice a trial. It will be a difficult task indeed to take into account all statements which potentially may be perceived as substantially likely to affect fairness and simultaneously maintain the constitutionally required degree of specificity.

Drafters must initially decide, therefore, whether to change only those parts of the rule, which the court has highlighted as objectionable, or to start anew with a different approach to the persistent problem of pretrial publicity. Since Rehnquist approved at least the part of the rule containing the standard, drafters will presumably prefer to remedy the specific ailments of MR 3.6 rather than effecting a complete overhaul. In similar circumstances, courts generally follow the principle that when a statute is found impermissibly vague, only the offensive language is invalidated, leaving the remainder of the statute intact.

In developing a constitutionally permissible alternative to the current MR 3.6, it is helpful to reexamine precisely what Justice Kennedy found objectionable about the rule. In Part III of his opinion, Kennedy highlighted the "safe harbor" provision of the rule as causing the impermissible vagueness. The Court seized

250. See id. at 2745 (allowing for suppression of speech even if a fair trial can still be assured through alternative means).

251. See LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 718 (1st ed. 1978) ("[I]n any particular area, the legislature confronts a dilemma: to draft with narrow particularity is to risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others.").

252. In Brockett, the Court recognized the "normal rule that partial, rather than facial, invalidation of statutes is the required course." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985). But see Kolender v. Lawson, 461 U.S. at 352, 359 n.8 (1983) (invalidating the entire statute on a showing of "substantial vagueness"). In Regan v. Time Inc., the Court stated that after declaring part of a statute invalid, it would look to the intent of the legislature to determine if severability from the non-vague part was intended. If it was intended to be reversible, the Court would strike out only the offensive part; if it was nonseverable, the Court would invalidate the entire statute. Regan v. Time Inc., 468 U.S. 641, 653 (1984) (plurality opinion) (stating also that federal legislation is presumptively severable).

253. The "safe harbor" provision is found at section (3) of the Nevada Rule: "Notwithstanding subsection (1) and (2)(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration: . . . ." NEV. S. CT. RULE 177(3). This section is identical to M.R. 3.6's section (c).
upon the words "general" and "elaboration" as being sufficiently imprecise so as to prevent fair warning and to violate the Constitution.\textsuperscript{254}

Initially, therefore, drafters should examine section (c) of MR 3.6 and remove the offending language. They should consider excising the words "Notwithstanding paragraph (a) and (b) (1-5)" and allow dissemination of the following categories of information only "if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Sections (c)(1-7) should be recast as examples of statements that may not prejudice a proceeding rather than as absolutely protected statements. Such redrafting would recognize that while in most cases these types of statements are unlikely to cause harm, in some instances they might.\textsuperscript{255} Recognizing the fact specific nature of the determination of potential prejudice, the drafters should apply the same prohibition to any statement, leaving the listed statements merely as examples of speech that would usually be innocuous.\textsuperscript{256} Similarly, the categories identified in section (b) should also be characterized as examples, not statements ordinarily likely to cause harm. By considering these categories of statements as presumptively likely to cause harm, the current rule places an

\textsuperscript{254} Gentile, 111 S. Ct. at 2731. See supra notes 93-119 and accompanying text (describing the Court's reasoning in greater detail).

\textsuperscript{255} For example, information contained in a public record may be highly prejudicial. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c)(2) (1983) (allowing lawyers to disclose information that is a part of public records). As seen in the trial of William Kennedy Smith, the prosecutor's submission of affidavits including alleged prior sexual assaults of the defendant put the allegations into the public record. See Cathy Booth, The Case That Was Not Heard, TIME, Dec. 23, 1991, at 38, 38 (describing the prosecution's attempt to introduce this evidence). The fact that these charges were later ruled inadmissible highlights the fact that their availability to the press was probably prejudicial to the defendant even though rule 3.6(c)(2) would permit an attorney to speak about them to the media. The release of such information is ostensibly precluded by rule 3.6(b)(5) as "information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(b)(5) (1983). However, section (c)'s "notwithstanding" language appears to permit such disclosure as long as it comes from the public record. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c)(2) (1983) (allowing disclosures that are part of a public record is another example of the vagueness and clumsy drafting of the rule).

\textsuperscript{256} The words "without elaboration" should be deleted completely since they are unnecessary and contribute to the vagueness. Attorneys should be able to "elaborate" as much as they wish as long as their comments are not substantially likely to materially prejudice the proceeding. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1983).
unfair burden on the attorney, who believes that, in a particular case, a statement from one of the categories will not cause harm, to prove that it will not. If the rule were redrafted to make (b)(1-6) a clearly designated list of illustrations (used for comparison only), the attorney would be able to make any statement as long as he or she knows or reasonably should know that it will not cause prejudice. By reducing the force of paragraphs (b) and (c) to mere alternatives for an attorney to consider, drafters can maintain the goal of the rule, prevention of unfair prejudice, while diminishing some of the vagueness caused by the confusing language of sections (b) and (c).

Along these lines, drafters may wish to follow the example of the states of Michigan, Washington, and Minnesota and abandon the examples altogether, relying exclusively on the “substantially likely” language, requiring attorneys to decide whether their statements are prohibited without the guidance of (and without the confusion engendered by) section (b) and (c). The drafter’s opinions concerning which statements usually do or do not cause material prejudice could be relegated to the “Comment” section of the rule to guide the attorney’s fact specific determination of whether or not a particular statement is substantially likely to cause material prejudice in that particular situation.

257. See Swift, supra note 91, at 1031 (explaining the Rule’s heavy burden on lawyers).
258. The redrafted rule would thus contain a core prohibition against statements substantially likely to materially prejudice in section (a), with section (b) containing an illustrative list of statements that may cause such prejudice, and section (c) offering a similar list of examples that may not cause prejudice. An attorney would then have to decide whether the proposed statement fell within or without the core prohibition depending on the particular facts of the litigation, rather than based on statements deemed likely or unlikely to do so in the abstract.
259. Michigan's rule adopts MR 3.6’s sections (b) and (c) as part of its “comment” section. MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1992). The District of Columbia and Virginia have both adopted a “short form” of the rule without the examples. Virginia’s rule prohibits a lawyer “participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury” from making an extrajudicial statement that “constitutes a clear and present danger of interfering with the fairness of the trial by a jury.” VA. R. S. CT., Pt. 6, § II, Canon 7, DR 7-106 (1992). The District of Columbia’s rule similarly provides: “A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of mass public communica-
Alternatively, drafters could imitate the 1980 discussion draft of MR 3.6.261 That draft, instead of linking the permissibility of speech with a subjective determination of the likelihood of prejudice to an impartial trial, proscribed extrajudicial statements “intended to induce the tribunal to determine the matter otherwise than in accordance with the law.”262 The draft went on to unconditionally permit certain statements, regardless of the possibility that they may be considered by some to carry a likelihood of prejudice.263 Thus, an attorney would have clear guidelines of what is permissible speech. Admittedly, this option seems extraordinarily permissive of attorney speech, only proscribing statements intended to prejudice proceedings. However, clarification of when an attorney would be deemed to have intended the likely consequences of his or her actions could be placed in the comment section of the rule.264 Such a formulation would adhere to the guiding principle and goal that attorneys should refrain from speech prejudicial to fair and impartial trials but would avoid the harshness (and attendant vagueness) of a blanket ban on speech.

Whichever approach drafters eventually adopt, care should be taken to make the rule as streamlined as possible. Rejecting the confusing format of DR 7-107, the Kutak Commission attempted to simplify the rule to make it easier to determine what speech subjected an attorney to discipline. Now that their efforts have similarly been invalidated as vague, special efforts are necessary to create
a rule that is as simple and easy to apply as possible.

VII. CONCLUSION

While MR 3.6 may be redrafted to cure its vagueness problems, the Court’s holding that attorney speech can be restricted on a lesser showing than clear and present danger cannot be so easily dispensed with. The Supreme Court’s confusing and disjointed opinion in Gentile v. United States represents an unjustified limitation on attorneys’ First Amendment guarantees. By sanctioning that part of the disciplinary rule, which gives insufficient deference to attorney’s rights to disseminate political speech, the conservative Court showed that it was more concerned with how attorneys may be controlled and silenced as a predicate to membership in the bar than with how attorneys may function as concerned citizens and watchdogs of the judicial system. By limiting the First Amendment’s ability to protect those who champion unpopular litigants or criticize the workings of judicial and law enforcement bodies, the Supreme Court has permitted the gagging of a group of people uniquely suited to present a compelling critique of the judicial system.

SUZANNE F. DAY
Appendix A

ABA Model Rules of Professional Conduct

Rule 3.6 Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

1. The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

2. In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

3. The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

4. Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

5. Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;

6. The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

1. The general nature of the claim or defense;

2. The information contained in a public record;

3. That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except where prohibited by law, the identity
of the persons involved;

(4) the scheduling or result of any step of the litigation;

(5) a request for assistance in obtaining evidence and informa-
tion necessary thereto;

(6) a warning of danger concerning the behavior of a person
involved, when there is reason to believe that there exists the like-
lihood of substantial harm to an individual or to the public interest;

and

(7) in a criminal case:
   (i) the identity, residence, occupation and family status of
   the accused;
   (ii) if the accused has not been apprehended, information
   necessary to aid in the apprehension of that person;
   (iii) the fact, time, and place of arrest, and
   (iv) the identity of investigating and arresting officers or
   agencies and the length of the investigation.

APPENDIX B
ABA Model Code of Professional Responsibility
DR 7-107 Trial Publicity

(A) A lawyer participating in or associated with the investigation
of a criminal matter shall not make or participate in making an
extrajudicial statement that a reasonable person would expect to be
disseminated by means of public communication and that does
more than state without elaboration:

   (1) Information contained in a public record.
   (2) That the investigation is in progress.
   (3) The general scope of the investigation including a descrip-
tion of the offense and, if permitted by law, the identity of the
victim.
   (4) A request for assistance in apprehending a suspect or assis-
tance in other matters and the information necessary thereto.
   (5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or de-
defense of a criminal matter shall not, from the time of the filing of
a complaint, information, or indictment, the issuance of an arrest
warrant, or arrest until the commencement of the trial or disposi-
tion without trial, make or participate in making an extrajudicial
statement that a reasonable person would expect to be disseminated
by means of public communication and that relates to:

   (1) The character, reputation, or prior criminal record (includ-
ing arrests, indictments, or other charges of crime) of the accused.
(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers of agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies that charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or the disposition without trial
of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) Omitted

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.