

## The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice

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Rights clashes are a common occurrence in modern American society, especially in the sphere of constitutional law.<sup>1</sup> Tensions between citizens, both of whom are asserting a purported right, can arise in almost any context. Lawyers are not free from such conflicts. Regulations of trial publicity, which can take many forms, are often justified on the grounds of protecting a defendant's right to a fair trial under the Sixth Amendment.<sup>2</sup> However, these restrictions directly implicate, and arguably violate, the First Amendment free speech rights of the attorney.<sup>3</sup> While the Supreme Court has had occasion to consider this quandary, in *Gentile v. State Bar of Nevada*,<sup>4</sup> this rights clash, like many others, has yet to be settled with finality.<sup>5</sup>

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1. See, e.g., LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990); see also MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (criticizing overemphasis on rights in contemporary law).

2. See Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 837 (1996). "The Sixth Amendment's right to a fair trial is recognized as one of the 'most fundamental of all freedoms,' essential 'to the preservation and enjoyment of all other rights.'" Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323, 329 (1993) (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965)); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., with Stewart and Marshall, JJ., concurring in judgment)).

3. See Erwin Chemerinsky, *Silence is not Golden: Protecting Lawyer Speech under the First Amendment*, 47 EMORY L.J. 859 (1998).

4. 501 U.S. 1030 (1991).

5. See Christopher A. Brown, Note, *The Worsening Problem of Trial Publicity: Is "New" Model Rule 3.6 Solution or Surrender?*, 29 IND. L. REV. 379, 379 (1995) ("The values of the fair administration of justice to both parties to a dispute and the right of free speech will always compete in some form.").

This article will begin with a review of trial publicity rules from the earliest efforts to curb harmful statements of lawyers during trials to the promulgation of Model Rule 3.6 in 1983 by the American Bar Association.<sup>6</sup> It will then examine *Gentile*, the main Supreme Court case in this area. The article will next consider the 1994 and 2002 amendments to Model Rule 3.6, which were inspired in part by the Court's ruling in *Gentile*. It will also look specifically at the trial publicity situation in North Carolina, where Durham District Attorney Michael B. Nifong has been charged with violating the relevant state trial publicity rule, as an example of a state rule virtually identical to Model Rule 3.6 in action. Finally, the article will offer critical comments on the *Gentile* decision and the current version of Model Rule 3.6.<sup>7</sup>

#### LIMITS ON TRIAL PUBLICITY: A HISTORICAL OVERVIEW

The post-trial claim that pretrial publicity impermissibly prejudiced a jury is not a new one in American history.<sup>8</sup> In 1807, Aaron Burr, who was charged with treason, unsuccessfully contended that his chances at a fair trial had most likely been precluded by pre-trial publicity.<sup>9</sup> Such publicity can be generated by a number of sources, including lawyers.<sup>10</sup> In 1887, Alabama issued the first code of legal ethics in the country.<sup>11</sup> The Alabama Code attempted to restrict statements made by attorneys outside of court, out of the fear that such utterances might create unacceptable prejudice.<sup>12</sup> Section

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6. See Shon Kaelberer Hastings, Case Comment, *Constitutional Law—Attorney & Client First Amendment Rights for Lawyers: Where Should North Dakota Draw the Line?*, 68 N.D. L. REV. 937, 947 (1992); *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991).

7. See Esther Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 524-31 (1993).

8. See Theisen, *supra* note 2, at 839.

9. See *id.*

10. See Lonnie T. Brown, Jr., "May It Please the Camera. . . I Mean the Court"—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83 (2004); Ryan Brett Bell & Paula Odysseos, *Sex, Drugs, and Court TV? How America's Increasing Interest in Trial Publicity Impacts Our Lawyers and the Legal System*, 15 GEO. J. LEGAL ETHICS 653 (2002); Theisen, *supra* note 2, at 840 ("Documented incidents of attorney speech outside the courtroom date back to the late 1700s when John Adams's arguments regarding his representation of John Hancock in a forfeiture proceeding were extensively publicized.").

11. See William Scott Croft, Note, *Free Speech & Fair Trials—Striking the Balance: A Case Comment and Analysis of the Maryland Trial Publicity Rule as Applied in Attorney Grievance Commission of Maryland v. Douglas F. Gansler*, 19 GEO. J. LEGAL ETHICS 345, 346 (2006).

12. See Bernabe-Riefkohl, *supra* note 2, at 331.

17 of the Alabama Code, entitled “Avoid Newspaper Discussion of Legal Matters.,” asserted:

Newspaper publications by an attorney as to the merits of pending or anticipated litigation, call forth discussion and reply from the opposite party, tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously.<sup>13</sup>

Nationwide limits on attorneys in the pretrial publicity context first appeared in 1908 in the American Bar Association’s (ABA) Canons of Professional Ethics.<sup>14</sup> Canon 20, which concerned “Newspaper Discussion of Pending Litigation,” read as follows:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.<sup>15</sup>

A version of the canons was adopted in many jurisdictions.<sup>16</sup> Despite its strong and clear language, an attorney who violated Canon 20 was not likely to face a severe punishment.<sup>17</sup> The purpose of Canon 20 was to inspire lawyers to better conduct, not to censure attorney mistakes.<sup>18</sup> Moreover, the standard on extrajudicial speech contained

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13. Croft, *supra* note 11, at 346-47. The language in Section 17 suggests that the authors of the Alabama Code were not overly concerned with the First Amendment Free Speech rights of attorneys. *See id.* at 347.

14. *See* Hastings, *supra* note 6, at 942.

15. Croft, *supra* note 11, at 347.

16. *See* Bernabe-Riefkohl, *supra* note 2, at 331.

17. *See* Brown, *supra* note 10, at 95.

18. *See id.*; Bernabe-Riefkohl, *supra* note 2, at 331 (relating that Canon 20 was “purely an aspiration and not enforced through the disciplinary process”). There were other reasons why the ABA Canons of Professional Ethics were not applied:

Interestingly, the ABA wrote this early rule not to protect fair trial rights, but instead to instruct non-ABA litigators how to practice law like gentlemen.

When the ABA adopted the Canons, only three percent of America’s attorneys belonged to the ABA and most members were corporate attorneys, not litigators. Therefore, the ABA’s rules were largely inapplicable to its members.

Although Canon 20 controlled extrajudicial speech for sixty years, its language was vague, and it was rarely enforced.

Theisen, *supra* note 2, at 840.

within the Canons of Professional Ethics “was seldom enforced. . . because courts considered it too vague.”<sup>19</sup>

In the 1960s, two events occurred that were to have a profound influence upon attorney speech and trial publicity.<sup>20</sup> On November 22, 1963, President John F. Kennedy was assassinated in Dallas, Texas.<sup>21</sup> In the wake of this infamous murder, an investigation was carried out by the President’s Commission on the Assassination of President John F. Kennedy, known to history as the “Warren Commission” as it was headed by then-Chief Justice Earl Warren.<sup>22</sup> According to the Warren Commission’s findings, Jack Ruby’s killing of Lee Harvey Oswald may have been partially caused by the widespread media coverage surrounding the shooting of President Kennedy.<sup>23</sup>

The Warren Commission condemned the unlimited stream of information about the alleged assassin and also suggested that, even if he had not been murdered, Oswald would not have been able to get a fair trial.<sup>24</sup> In the end, the Warren Commission urged 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.”<sup>25</sup>

In 1966, the Supreme Court handed down its decision in *Sheppard v. Maxwell*.<sup>26</sup> The case involved a highly dramatic factual situation. On July 4, 1954, the pregnant wife of the petitioner, Samuel H.

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19. Hastings, *supra* note 6, at 942; see Brown, *supra* note 10, at 95-96 (“The absence of mandatory rules [pertaining to Canon 20], however, may have also reflected concerns about the limits imposed under the First Amendment.”).

20. See Theisen, *supra* note 2, at 841-42; Hastings, *supra* note 6, at 942-43. “Between 1959 and 1966, the Supreme Court, for the first time, reversed several criminal convictions because they had been reached under circumstances heavily influenced by media coverage.” Bernabe-Riefkohl, *supra* note 2, at 331.

21. See “On This Day; 22 November; 1963: Kennedy shot dead in Dallas,” *BBC News*, at [http://news.bbc.co.uk/onthisday/hi/dates/stories/november/22/newsid\\_2451000/2451143.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/november/22/newsid_2451000/2451143.stm) (last visited April 8, 2006).

22. See Brown, *supra* note 10, at 96 n.55.

23. See *id.* at 96; Theisen, *supra* note 2, at 841.

24. See Theisen, *supra* note 2, at 841; Hastings, *supra* note 6, at 944 n.35 (“Because of this publicity, the President’s Commission felt, ‘it would have been a most difficult task to select an unprejudiced jury, either in Dallas or elsewhere.’”) (quoting Judicial Conference of the United States Committee on the Operation of the Jury System, Report of the Committee on the Operation of the Jury System on the “Free Press—Fair Trial” Issue, 45 F.R.D. 391, 395 (1968)); Brown, *supra* note 5, at 382.

25. Brown, *supra* note 10, at 96.

26. 384 U.S. 333 (1966).

Sheppard, was bludgeoned to death in the couple's suburban home.<sup>27</sup> Sheppard claimed that on the night of the murder he fought with and was injured by a "form" who he discovered "standing next to his wife's bed."<sup>28</sup> The "form" ultimately escaped and left the petitioner unconscious on the beach.<sup>29</sup> Eventually officials and others arrived at the petitioner's house.<sup>30</sup> Sheppard was taken by his brother to a health clinic run by his family.<sup>31</sup>

What followed thereafter can only be described as a frenzy, both on the part of the media as well as the public at large, which culminated in a jury conviction of the petitioner on December 21, 1954.<sup>32</sup> From the beginning, neither the government nor the press treated Sheppard with a presumption of innocence. According to the Court, "[a]fter a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported—and it is undenied—to have told his men, 'Well, it is evident the doctor did this, so let's go get the confession out of him.'"<sup>33</sup> On July 20, on its front page, a newspaper averred that someone was "getting away with murder" in the Sheppard matter: "The editorial attributed the ineptness of the investigation to 'friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected. . . .'"<sup>34</sup>

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27. See *id.* at 335-36.

28. See *id.* at 336-37.

29. See *id.* at 336.

30. See *id.* at 336-37.

31. See *id.* at 337.

32. See *Sheppard v. Maxwell*, 231 F. Supp. 37, 40 (S.D. Ohio 1964). The following incident is illustrative:

The Coroner called an inquest the same day [July 21] and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. *When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience.*

*Id.* at 339-40 (emphasis added).

33. *Id.* at 337.

34. *Id.* at 339.

Around a month before the case was set, 75 prospective jurors were called.<sup>35</sup> The names and addresses of these people were published by the three Cleveland newspapers.<sup>36</sup> As a result, every single venireman was contacted about the upcoming case, by both friends and anonymous people.<sup>37</sup> The trial against the petitioner was saturated by media coverage.<sup>38</sup> The Court related one of “the more flagrant episodes” as follows:

On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard’s allegations which appeared under the headline: “‘Bare-faced Liar,’ Kerr Says of Sam.” Captain Kerr never appeared as a witness at the trial.<sup>39</sup>

In an opinion written by Justice Clark, the Court held that Sheppard’s habeas corpus petition must be granted because he was not sufficiently safeguarded from the “inherently prejudicial publicity” that surrounded Sheppard’s prosecution and certain “disruptive influences” that existed at his trial.<sup>40</sup> According to Clark, extensive freedom of discussion is to be provided for, but it cannot interfere with the equitable and stable administration of justice.<sup>41</sup> The Court summarized its decision as follows:

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. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will

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35. *See id.* at 342.

36. *See id.*

37. *See id.*

38. *See id.* at 343-45.

39. *Id.* at 345, 349.

40. *Id.* at 363.

41. *See id.* at 350 (citing *Pennekamp v. State of Florida*, 328 U.S. 331, 347 (1946)). The majority opinion further stated, “But it must not be allowed to divert the trial from the ‘very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.’” *Id.* at 350-51 (quoting *Cox v. State of Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting)).

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. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must 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 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.<sup>42</sup>

Following the Warren Commission's report, the American Bar Association appointed a committee to investigate the problems identified by that body.<sup>43</sup> It was led by Paul Reardon, an associate justice of the Supreme Judicial Court of Massachusetts.<sup>44</sup> The "Reardon Committee" labored for four years and considered, among other things, the Supreme Court's directive in *Sheppard*.<sup>45</sup> In 1968, the ABA House of Delegates approved the Reardon Committee's draft, which was entitled "Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press."<sup>46</sup>

The Reardon Committee doubted that prejudicial jurors could be effectively screened by the voir dire process, because it believed that a substantial amount of the bias produced by pretrial publicity affects humans subconsciously.<sup>47</sup> As a solution to the problem of guaranteeing just trials, it advocated regulating the speech of lawyers.<sup>48</sup> To that

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42. *Id.* at 362-63.

43. See Brown, *supra* note 10, at 97; Theisen, *supra* note 2, at 841; Lynn Weisberg, Comment, *On a Constitutional Collision Course: Attorney No-Comment Rules and the Right of Access to Information*, 83 J. CRIM. L. & CRIMINOLOGY 644, 647 n.19 (1992).

44. See Theisen, *supra* note 2, at 842-43.

45. See Brown, *supra* note 10, at 97; Bernabe-Riefkohl, *supra* note 2, at 336.

46. See Bernabe-Riefkohl, *supra* note 2, at 336; Weisberg, *supra* note 43, at 647 n.19.

47. See Theisen, *supra* note 2, at 843.

48. See *id.*; Hastings, *supra* note 6, at 943 n.38. Some of the Reardon Committee's recommendations were as follows:

The report [issued by the Reardon Committee] suggested that from the time of arrest or filing of an indictment, information or complaint until the start of trial, prosecutors and defense lawyers should not make any extrajudicial

end, the Reardon Committee “incorporated the *Sheppard* Court’s reasonable likelihood of prejudice standard into Standard 1-1, which addressed the conduct of lawyers, even though the Court had used this language only to describe the situation in which judges should take steps to protect a trial’s fairness.”<sup>49</sup>

Standard 1-1 provided the following:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.<sup>50</sup>

The Reardon Committee asserted that though the constitutionally protected rights of freedom of speech and freedom of the press should be “zealously preserved,” their potential adverse effects upon other essential rights, including the right to an equitable and unbiased trial, must be considered.<sup>51</sup>

At the same time, the “Committee on the Operation of the Jury System on the ‘Free Press-Fair Trial’ Issue,” commonly referred to as the “Kaufman Committee,” counseled that “each United States District Court has the power and the duty to control the release of prejudicial information by attorneys who are members of the bar of that court.”<sup>52</sup> The Kaufman Committee maintained that, in criminal matters, attor-

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statements concerning the following subjects: the defendant’s prior criminal record, character, or reputation, except for factual data; the contents of any confession, admission, or statement by the defendant or the refusal thereof; the performance of or refusal to perform any tests or examinations; the identity, testimony, or credibility of any prospective witnesses; the possibility of a guilty plea or plea bargain; and the suspect’s guilt or innocence based on the evidence. Information regarding the circumstances of the arrest, seized evidence, judicial scheduling, or assistance needed for the investigation could be announced. During the trial, lawyers could only refer to or quote from information in public records. While the case was still pending in any court following trial or disposition, attorneys were prohibited from making extrajudicial comments that could reasonably prejudice sentencing.

Weisberg, *supra* note 43, at 647.

49. Theisen, *supra* note 2, at 843; see Brown, *supra* note 10, at 97-98; Hastings, *supra* note 6, at 943-44.

50. Bernabe-Riefkohl, *supra* note 2, at 337.

51. See Weisberg, *supra* note 43, at 647.

52. *Id.* at 648, 648 n.27.

neys disseminate a large part of the publicity.<sup>53</sup> It stressed the need of judges to respond to violations with local disciplinary rules.<sup>54</sup>

In 1969, the ABA issued the Model Code of Professional Responsibility.<sup>55</sup> “[I]n contrast with the old Canons, and as suggested by the Court in *Sheppard*, the rule on trial publicity was included as one of the ‘disciplinary rules,’ the violation of which could be enforced through the disciplinary process.”<sup>56</sup> The ABA relied heavily on Standard 1-1 in creating DR 7-107.<sup>57</sup> The disciplinary rule may be summarized as follows:

DR 7-107 set out examples of permissible and impermissible speech. Allowable speech included information from the public record, news that an investigation was in progress, general descriptions of the investigation and the offense, requests for information regarding related matters, descriptions of recently seized physical evidence, and warnings about any dangers facing the public. Speech prohibited per se encompassed remarks pertaining to the accused’s character, reputation, or prior criminal record; the possibility of a plea arrangement; the accused’s comments or lack thereof; whether any tests had been performed and their results; information regarding prospective witnesses and their testimony and opinions regarding the suspect’s guilt or innocence, evidence, or the merits of the case. The rule was eventually adopted in every state.<sup>58</sup>

DR 7-107’s “reasonable likelihood of prejudice” standard was challenged on federal constitutional grounds almost as soon as the disciplinary rule was passed.<sup>59</sup> In *United States v. Tijerina*, a trial judge in a pending criminal action had issued a restraining order, based on the standard found in DR 7-107, that applied to lawyers, witnesses, and defendants.<sup>60</sup> The Tenth Circuit panel found that the test did not run afoul of the Constitution: “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.”<sup>61</sup>

However, in 1970, in *Chase v. Robson*, the Seventh Circuit ruled that, before a judge could restrict the free speech rights of a defendant

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53. *See id.* at 648.

54. *See id.*

55. *See* Brown, *supra* note 5, at 382; Bernabe-Riefkohl, *supra* note 2, at 338.

56. Bernabe-Riefkohl, *supra* note 2, at 338.

57. *See* Theisen, *supra* note 2, at 843; Brown, *supra* note 10, at 97-98; Weisberg, *supra* note 43, at 649.

58. Theisen, *supra* note 2, at 843; *see* Brown, *supra* note 10, at 98-100.

59. *See* Theisen, *supra* note 2, at 844; Hastings, *supra* note 6, at 946.

60. 412 F.2d 661 (10th Cir. 1969).

61. *Id.* at 666.

and his lawyer, she must show that the free expression constitutes “a serious and imminent threat to the administration of justice.”<sup>62</sup> The court went on to state, “Applying either the standard that the speech must create a ‘clear and present danger,’ . . . of a serious and imminent threat to the administration of justice, or the lesser standard that there must be a ‘reasonable likelihood,’ . . . of [such a threat], we hold that the trial court’s order is constitutionally impermissible.”<sup>63</sup>

In *Chicago Council of Lawyers v. Bauer*, DR 7-107 was challenged directly by a local group of lawyers.<sup>64</sup> The federal panel held that the “reasonable likelihood” standard is overbroad and consequently unconstitutional.<sup>65</sup> The court reaffirmed the standard it had articulated in *Chase*: “Only those comments that pose a ‘serious and imminent threat’ of interference with the fair administration of justice can be constitutionally proscribed.”<sup>66</sup>

However, the court also stressed the general need to limit any collaboration between attorneys and the media that might adversely prejudice a criminal trial.<sup>67</sup> Moreover, in theory, the panel approved a rule that would state upfront that comments relating to specific matters would presumptively be considered a serious and imminent threat, as long as anyone accused with violating such a rule would have the opportunity to vindicate himself.<sup>68</sup> The Seventh Circuit summarized its decision as follows:

These rules as they now read are, in our opinion, constitutionally infirm. This general infirmity results from a failure to specifically incorporate within each provision the serious and imminent threat

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62. 435 F.2d 1059, 1061 (7th Cir. 1970) (quoting *Craig v. Harney*, 331 U.S. 367, 373 (1947)).

63. *Id.* at 1061 (citations omitted); see Theisen, *supra* note 2, at 845 (“A year later, however, the Seventh Circuit came to an opposite conclusion in *Chase v. Robson*, in which the court promoted a standard for judicial restraining orders that is nearly synonymous with *clear and present danger*—‘serious and imminent threat to the administration of justice.’”) (emphasis added).

64. 522 F.2d 242 (7th Cir. 1975).

65. See *id.* at 249.

66. *Id.* However, the court cautioned:

We should emphasize at this point, however, that this standard is not constitutionally sufficient by itself. While the application of the standard to these rules can eliminate overbreadth, the specific rules are also necessary in order to avoid vagueness. The rules furnish the context necessary to determine what may constitute a “serious and imminent threat” of interference with the fair administration of justice.

*Id.* at 249-50.

67. See *id.* at 251.

68. See *id.*

standard. We do not believe that there can be a blanket prohibition on certain areas of comment—a per se proscription—without any consideration of whether the particular statement posed a serious and imminent threat of interference with a fair trial. Yet these rules establish such a blanket prohibition whereby even a trivial, totally innocuous statement could be a violation. The First Amendment does not allow this broad a sweep.<sup>69</sup>

In *Markfield v. Association of the Bar of New York*, a state court considered DR 7-107.<sup>70</sup> The court acknowledged that the purpose behind the disciplinary rule was to equitably balance the public's interest in an honorable judicial system and just trials with the First Amendment free speech rights of lawyers.<sup>71</sup> As to the constitutionality of DR 7-107, the court held the following:

And, while it might appear that DR 7-107(D) if interpreted only to prevent extra-judicial statements which 'are reasonably likely to interfere with a fair trial', would pass constitutional muster. . . we are of the belief that application of the rule should be restricted only to those situations where it is found that the extra-judicial statements were such as to present a " 'clear and present danger' to the administration of justice."<sup>72</sup>

In *Hirschkop v. Snead*, the Fourth Circuit considered various challenges to Rule 7-107 of the Virginia Code of Professional Responsibility.<sup>73</sup> This state rule was essentially DR 7-107.<sup>74</sup> The court asserted that the disciplinary rule furthers a "substantial governmental interest unrelated to the suppression of expression."<sup>75</sup> Unlike the Seventh Circuit in *Bauer*, the Fourth Circuit found the "reasonable likelihood" standard constitutionally permissible.<sup>76</sup>

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69. *Id.*

70. 370 N.Y.S.2d 82 (N.Y. App. Div. 1975).

71. *See id.* at 517.

72. *Id.* (citations omitted).

73. 594 F.2d 356 (4th Cir. 1979).

74. *See id.* at 362.

75. *Id.* at 364.

76. *See id.* at 370. *Hirschkop* articulated its differences with *Bauer* as follows:

As noted at the end of the introductory section, a majority of a panel of the Seventh Circuit came to a different conclusion. *Chicago Council of Lawyers v. Bauer*, 522 F.2d. 242. There, under consideration was a district court rule which was construed by the panel to foreclose such things as a statement by the defense lawyer questioning the constitutionality of the statute under which his client was charged. We find no such restraint in Virginia's rule. To the extent that it was held in *Bauer*, however, that the reasonable likelihood test is constitutionally impermissible in a rule such as Virginia's we simply disagree. For the reasons we have given, the reasonable likelihood test

The court did conclude that several provisions of the Virginia rule were unconstitutional because of vagueness or overbreadth concerns.<sup>77</sup> Specifically, the Fourth Circuit found that the section “prohibit[ing] a lawyer associated with a civil action from making a broad range of comments during the investigation or litigation of the case” was overbroad.<sup>78</sup>

Largely as a result of the Seventh Circuit’s ruling in *Bauer*,<sup>79</sup> the ABA Task Force on Fair Trial and Free Press (the “Goodwin Committee”) rewrote Standard 8-1.1 of the ABA Standards Relating to the Administration of Criminal Justice, assimilating the “clear and present danger test.”<sup>80</sup> The Goodwin Committee’s report recommended the following:

“For a restriction on extrajudicial attorney speech to be lawful . . . the restriction [must] promote a legitimate governmental interest . . . the speech in question [must] seriously jeopardize this interest . . . the threat presented [must] be imminent, and . . . the restriction [must] be no broader than necessary to protect the governmental interest.”<sup>81</sup>

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divides the innocuous from the culpable, adds clarity to the rule and makes it more definite in application. We find no requirement in the Constitution of anything else.

*Id.*

77. *See id.* at 371-74.

78. *Id.* at 373.

79. It has been suggested that the Supreme Court’s ruling in *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976), also contributed to the ABA’s decision to look again at the “fair trial/free press’ conundrum.” Brown, *supra* note 10, at 100. In *Stuart*, the Court held the following:

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore Reversed.

427 U.S. at 570.

80. *See* Theisen, *supra* note 2, at 845; Brown, *supra* note 10, at 100; Bernabe-Riefkohl, *supra* note 2, at 341.

81. Theisen, *supra* note 2, at 845-46.

The Goodwin Committee also did away with the absolute prescription of extrajudicial statements, perceiving that though such statements may undermine the impartiality of a trial, such a result need not necessarily occur.<sup>82</sup> In August 1978, the Goodwin Committee's report was adopted by the ABA's House of Delegates.<sup>83</sup> Nevertheless, the ABA did not alter DR 7-107, although its constitutionality was directly challenged by *Bauer*.<sup>84</sup>

Seven years after the promulgation of the Model Code, the ABA appointed a commission to consider possible revisions.<sup>85</sup> In 1983, the ABA issued its Model Rules of Professional Conduct.<sup>86</sup> Model Rule 3.6 dealt with trial publicity.<sup>87</sup> By 1990, thirty-one states employed verbatim or substantially identical types of Model Rule 3.6.<sup>88</sup> Textually, the rule may be summarized as follows:

Originally, this rule had three parts. Paragraph (a) adopted a standard prohibiting statements that the attorney "knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Paragraph (b) listed six categories of statements that were considered likely to violate paragraph (a). Finally, paragraph (c) incorporated a safe-harbor provision permitting attorneys to make certain statements "without elaboration."<sup>89</sup>

In the debate between the "reasonable likelihood" and "serious and imminent threat" standards, Model Rule 3.6's standard occupies the compromise position: "substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>90</sup> Model Rule 3.6 provides a list of utterances "ordinarily" likely to run afoul of the test when issued during criminal cases, civil matters to be tried by jury, and other proceedings that might end with jail time.<sup>91</sup> "Though more streamlined, the new rule included much of DR 7-107's specifics but appeared broader

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82. See Weisberg, *supra* note 43, at 651.

83. See *id.*

84. See Bernabe-Riefkohl, *supra* note 2, at 341-42.

85. See *id.* at 342; Theisen, *supra* note 2, at 846 ("In light of continuing disagreement over the proper standard, the ABA created the Kutak Commission in 1977, giving it the responsibility to review the Model Code of Professional Responsibility and to draft revisions.").

86. See Brown, *supra* note 5, at 383.

87. See Hastings, *supra* note 6, at 947.

88. See Croft, *supra* note 11, at 348.

89. Brown, *supra* note 5, at 383.

90. See Weisberg, *supra* note 43, at 653.

91. See Theisen, *supra* note 2, at 846.

on its face because it seemingly applied to all lawyers, irrespective of their connection with a given litigation matter."<sup>92</sup>

*GENTILE V. STATE BAR OF NEVADA*

In *Gentile*, the Supreme Court considered the constitutionality of Nevada Supreme Court Rule 177, a rule controlling pretrial publicity virtually identical to Model Rule 3.6.<sup>93</sup> Dominic P. Gentile was an attorney and a member of the Bar of the State of Nevada.<sup>94</sup> Soon after his client was criminally charged, Gentile, the petitioner in the case, conducted a press conference where he read a prepared statement and answered questions.<sup>95</sup>

Six months after the press conference, Gentile tried the case in front of a jury and obtained an acquittal for his client on all counts.<sup>96</sup> Subsequently, the State Bar of Nevada filed a complaint against Gentile, asserting that he had violated Nevada Supreme Court Rule 177.<sup>97</sup> The Supreme Court provided the full text of Rule 177, as it was before January 5, 1991:

Trial Publicity

1. 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.

2. A statement referred to in subsection 1 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:

(a) 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;

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92. Brown, *supra* note 10, at 101-02.

93. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033 (1991).

94. See *id.*

95. See *id.* In Section I of his opinion, which was not supported by a majority of the justices, Justice Kennedy noted that Gentile was reprimanded for pure political speech. See *id.* at 1034. At the press conference in question, the petitioner contended "that the State sought the indictment and conviction of an innocent man as a 'scapegoat' and had not 'been honest enough to indict the people who did it; the police department, crooked cops.'" *Id.* Consequently, according to Kennedy, the issue in the case was the constitutional status of a ban on political speech that criticized the government and its agents. See *id.*

96. See *id.* at 1033.

97. See *id.*

- (b) 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;
- (c) 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;
- (d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (e) 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; or
- (f) 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.

3. Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

- (a) the general nature of the claim or defense;
- (b) the information contained in a public record;
- (c) 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 when prohibited by law, the identity of the persons involved;
- (d) the scheduling or result of any step in litigation;
- (e) a request for assistance in obtaining evidence and information necessary thereto;
- (f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (g) 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 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.<sup>98</sup>

The Southern Nevada Disciplinary Board of the State Bar held a hearing, determined that the petitioner violated Rule 177, and urged that he be reprimanded privately.<sup>99</sup> Gentile appealed to the Nevada

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98. *Id.* at 1060-62.

99. *See id.* at 1033. "The state bar, and the Supreme Court of Nevada on review, found that petitioner knew or should have known that there was a substantial

Supreme Court, thereby waiving his right to keep the disciplinary proceedings confidential.<sup>100</sup> Ultimately, the Nevada Supreme Court decided to affirm the Board's conclusion.<sup>101</sup> The United States Supreme Court heard the case and early in its opinion summarized its response to the issues raised on appeal:

Nevada's application of Rule 177 in this case violates the First Amendment. Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws. Furthermore, the Rule's safe harbor provision, Rule 177(3), appears to permit the speech in question, and Nevada's decision to discipline petitioner in spite of that provision raises concerns of vagueness and selective enforcement.<sup>102</sup>

The Court's voting in *Gentile* was divided and complex. Justice Kennedy announced the Court's judgment and provided part of the opinion of the Court. For Parts III and VI of his opinion, Justices Marshall, Blackmun, Stevens, and O'Connor joined Kennedy. As for the rest of Kennedy's opinion, Parts I, II, IV, and V, he was only able to get Marshall, Blackmun, and Stevens to back him. Chief Justice Rehnquist wrote the other part of the Court's opinion. In Parts I and II of his opinion, Rehnquist was supported by Justices White, O'Connor, Scalia, and Souter. Rehnquist provided a dissent with Part III of his opinion, which was supported by White, Scalia, and Souter. O'Connor filed an additional concurrence.

In his brief, *Gentile* argued that the constitutional guarantee of free speech necessitated the "actual prejudice or . . . substantial and imminent threat to fair trial" standard.<sup>103</sup> Writing for the Court, Chief Justice Rehnquist refused to adopt such an interpretation: "We conclude that the 'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amend-

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likelihood that his statements would materially prejudice the trial of his client." *Id.* at 1062.

100. *See id.* at 1033.

101. *See id.*

102. *Id.* at 1033-34.

103. *Id.* at 1062-63 (quoting Brief for the Petitioner at 15, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (No. 89-1836)). Elsewhere, Rehnquist characterized *Gentile's* position as follows: "Petitioner maintains, however, that the First Amendment to the United States Constitution requires a State, such as Nevada in this case, to demonstrate a 'clear and present danger' of 'actual prejudice or an imminent threat' before any discipline may be imposed on a lawyer who initiates a press conference such as occurred here." *Id.* at 1069 (emphasis added).

ment.”<sup>104</sup> In contrast to Justice Kennedy’s view, Rehnquist stressed that “[t]he 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.”<sup>105</sup>

The Court recognized the conflict, inherent in rules aiming to limit prejudicial lawyer speech in the adjudicatory context, between the important constitutional values of free speech and a fair trial:

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 material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet. 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 about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system. The way most of them acquire information is from the media. The First Amendment protections of speech and press have been held, in the cases cited above, to require a showing of “clear and present danger” that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial.<sup>106</sup>

In *Gentile*, the Court sought to answer the question of whether an attorney, defending someone involved with America’s system of criminal justice, may demand the “clear and present danger” standard before he is penalized for public statements about the proceeding, or

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104. *Id.* at 1063.

105. *Id.* at 1070. Rehnquist justified this conclusion as follows:

We disagree with Justice KENNEDY’s statement that this case “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 to Nevada’s interpretation of that standard.” . . . Petitioner challenged Rule 177 as being unconstitutional on its face in addition to as applied, contending that the “substantial likelihood of material prejudice” test was unconstitutional, and that lawyer speech should be punished only if it violates the standard for clear and present danger set forth in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

*Id.* (citation omitted).

106. *Id.* at 1070-71.

whether the government instead may punish that type of pronouncement upon a lesser showing.<sup>107</sup>

The Court began its analysis by strongly reaffirming the proposition that whatever constitutional right to free speech a lawyer possesses is highly circumscribed in the courtroom during an official judicial proceeding.<sup>108</sup> For example, "An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."<sup>109</sup> Furthermore, *In re Sawyer* seems to stand for the proposition that attorneys in pending cases can be subject to ethical regulations concerning speech to which the common citizen would not be, even outside the courtroom.<sup>110</sup>

In setting forth the relevant First Amendment freedom of speech principles to decide the crucial issue in *Gentile*, Chief Justice Rehnquist quoted *Sheppard v. Maxwell*:

we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must 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 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.*<sup>111</sup>

Moreover, the Court stressed that it had expressly contemplated that the speech of those people participating before a judge could be regulated.<sup>112</sup> To support this proposition, Chief Justice Rehnquist pointed towards *Seattle Times Co. v. Rhinehart*, where the Court unanimously ruled that a newspaper, which was in court as a defendant in a defamation suit, could be prevented from publishing information about the plaintiffs that it had obtained via court-ordered discovery.<sup>113</sup> In *Seattle Times*, the Court stated: "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting . . . on

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107. *See id.* at 1071.

108. *See id.*

109. *Id.* (citing *Sacher v. United States*, 343 U.S. 1, 8 (1952) (criminal trial); *Fisher v. Pace*, 336 U.S. 155 (1949) (civil trial)).

110. *See id.* (citing 360 U.S. 622 (1959)).

111. *Id.* at 1072 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 363 (emphasis added)).

112. *See id.* at 1072.

113. *See id.* at 1072-73 (citing 467 U.S. 20 (1984)).

several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant.”<sup>114</sup>

It was important to the Court that the Nevada Supreme Court had read all sections of Rule 177 as applying solely to attorneys in pending cases, never to other attorneys or non-attorneys.<sup>115</sup> Chief Justice Rehnquist explicitly declined to rule on the constitutional status of an ethics rule limiting the speech of a lawyer who is not involved in the pending case about which the utterances in question are made.<sup>116</sup> The Court took notice of the fact that “of all the cases petitioner cites as supporting the use of the clear and present danger standard,” there was only one “that even arguably involved a nonthird party.”<sup>117</sup> Chief Justice Rehnquist found this precedent distinguishable from Gentile’s situation.<sup>118</sup>

In mentioning the Court’s precedents involving a lawyer’s free speech right to solicit business and advertise, the Court pointed out another context, further removed from the courthouse and the pendency of a case, where attorneys are not granted First Amendment protection to the same degree as ordinary citizens.<sup>119</sup> According to Chief Justice Rehnquist, “In each of these cases, we 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.”<sup>120</sup>

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114. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984).

115. *See Gentile*, 501 U.S. at 1073.

116. *See id.*

117. *Id.* (citing *Wood v. Georgia*, 370 U.S. 375 (1962)).

118. *See id.* at 1073. The Court argued as follows:

[In *Wood*,] a county sheriff was held in contempt for publicly criticizing instructions given by a judge to a grand jury. Although the sheriff was technically an “officer of the court” by virtue of his position, the Court determined that his statements were made in his capacity as a private citizen, with no connection to his official duties. . . . The same cannot be said about petitioner [*Gentile*], whose statements were made in the course of, and in furtherance of, his role as defense counsel.

*Id.* (citing 370 U.S. at 393).

119. *See id.* (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U.S. 91 (1990); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978)).

120. *See id.* at 1073. The Court asserted that these precedents recognize the venerable principle that:

“Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was ‘an officer of the court, and, like the court itself, an instrument . . . of justice . . . .’”

Relying primarily on *In re Sawyer* and *Sheppard v. Maxwell*, the Court asserted that the speech of attorneys representing clients in cases that are pending may be limited under a less stringent standard than that laid out for the regulation of the press in *Nebraska Press Assn.*<sup>121</sup> Chief Justice Rehnquist then officially endorsed the “substantial likelihood of material prejudice” standard as one that balances the free speech rights of lawyers in pending cases and the government’s legitimate interest in fair and impartial trials in a constitutionally licit way.<sup>122</sup> The Court justified its conclusion in the following manner:

Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in *Nebraska Press*, which was joined by Justices Stewart and MARSHALL, “[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.” . . . Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative.<sup>123</sup>

Chief Justice Rehnquist acknowledged that when a government regulation involved rights under the First Amendment, the Court has to balance the free speech interests against the government’s legitimate interest in imposing limits upon the conduct in question.<sup>124</sup> The Court maintained, “The ‘substantial likelihood’ test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State’s judicial system, and it imposes only narrow and necessary limitations on lawyers’ speech.”<sup>125</sup>

Chief Justice Rehnquist readily admitted that the right to a fair trial by an unbiased jury is fundamental under the Constitution.<sup>126</sup> He noted that a verdict shaped by extrajudicial utterances would violate this fundamental interest.<sup>127</sup> Importantly for the Court, the Rule

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*Id.* at 1074 (quoting *In re Cohen*, 7 N.Y.2d 488, 495, 199 N.Y.S.2d 658, 661, 166 N.E.2d 672, 675 (N.Y. 1960)) (emphasis added).

121. *See id.* at 1074.

122. *See id.* at 1075.

123. *Id.* at 1074 (citations omitted).

124. *See id.* at 1075.

125. *Id.*

126. *See id.*

127. *See id.* (citing *Sheppard*, 384 U.S. at 350-351; *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)).

177 was designed to prevent: “(1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.”<sup>128</sup> Chief Justice Rehnquist approved of the way that Nevada legislated to obtain those ends:

The restraint on speech is narrowly tailored to achieve those objectives. The regulation of attorneys’ speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys’ comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.<sup>129</sup>

In that part of his opinion in which a majority of the Court joined, Justice Kennedy held that Rule 177, as construed by the Nevada Supreme Court, was unconstitutionally vague for its safe harbor provision.<sup>130</sup> The Court contended that the safe harbor provision misled Gentile into believing that he could hold his press conference without fear of punishment.<sup>131</sup> According to Justice Kennedy:

Rule 177(3)(a) provides that a lawyer “may state without elaboration . . . the general nature of the . . . defense.” Statements under this provision are protected “[n]otwithstanding subsection 1 and 2(a-f).” By necessary operation of the word “notwithstanding,” the Rule contemplates that a lawyer describing the “general nature of the . . . defense” “without elaboration” need fear no discipline, even if he comments on “[t]he character, credibility, reputation or criminal record of a . . . witness,” and even if he “knows or reasonably should know that [the statement]

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128. *Id.*

129. *Id.* at 1076. The Court rejected the suggestion that other means could satisfactorily obtain these goals:

Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

*Id.* at 1075.

130. *See id.* at 1048.

131. *See id.*

will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”<sup>132</sup>

The Court asserted that, considering the grammatical structure of Rule 177 and the fact that no clarifying interpretation had been given by the Nevada Supreme Court, the rule did not afford “‘fair notice to those to whom [it] is directed.’”<sup>133</sup> Justice Kennedy maintained that an attorney wishing to take advantage of the safe harbor provision would have to guess at its outline or precise meaning.<sup>134</sup>

The Court noted that “The right to explain the ‘general’ nature of the defense without ‘elaboration’ provides insufficient guidance because ‘general’ and ‘elaboration’ are both classic terms of degree.”<sup>135</sup> In *Gentile*, in Justice Kennedy’s view, such terms had no established usage or tradition of legal construction.<sup>136</sup> In short, according to the Court, under Rule 177 the attorney has no principle for verifying when his speech passes “from the safe harbor of the general to the forbidden sea of the elaborated.”<sup>137</sup> To illustrate his point, Justice Kennedy observed that, despite the view taken by the Nevada Supreme Court, *Gentile* testified he believed his utterances were safeguarded by Rule 177(3) and the Court agreed with the petitioner.<sup>138</sup>

The Court recognized that the “prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement . . . for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law.”<sup>139</sup> In *Gentile*, the relevant inquiry was whether Rule 177 suffered from so much lack of precision that discriminatory enforcement was a credible possibility.<sup>140</sup> Justice Kennedy determined that “[a]s interpreted by the Nevada Supreme Court, the Rule is void for vagueness, in any event, for its safe harbor provision, Rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline.”<sup>141</sup> Consequently, the

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132. *Id.*

133. *See id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)).

134. *See id.* at 1048.

135. *Id.* at 1048-49.

136. *See id.* at 1049.

137. *Id.*

138. *See id.*; *see also id.* at 1051 (“The fact that *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.”).

139. *Id.* at 1051 (citing *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974)).

140. *See id.* at 1051.

141. *Id.* at 1048.

Court reversed the Supreme Court of Nevada's judgment in the *Gentile* matter.<sup>142</sup>

#### 1994 REVISIONS TO MODEL RULE 3.6

*Gentile* produced dispute and criticism.<sup>143</sup> At first, there was an impression that the Court's decision had not satisfied anyone; one camp believed that *Gentile* had been excessive in limiting attorney speech, while the other felt that the Court had been too accommodating to the free speech rights of lawyers.<sup>144</sup> In the aftermath of *Gentile*, the ABA created a committee to consider changes to Model Rule 3.6.<sup>145</sup> The committee looked at the following issues:

whether the rule should: (1) pertain only to criminal proceedings; (2) apply only when there is a possibility of a jury trial; (3) relate to particular times, i.e., during a trial, before a trial, etc.; (4) move the safe harbor provision to the Comment section; (5) focus on specific evils rather than prejudice; (6) add a clear and present danger standard; (7) provide separate regulations for prosecutors; (8) apply only to lawyers involved in the case; and (9) grant a right to reply to prejudicial publicity.<sup>146</sup>

On August 10, 1994, Model Rule 3.6 was amended by the ABA House of Delegates.<sup>147</sup> The ABA retained the "substantial likelihood" standard.<sup>148</sup> There were several important revisions.<sup>149</sup> "First, the rule now applies only to lawyers participating in or who have participated in the investigation or litigation of the case, whereas the 1983 version applied to comments made by any lawyer."<sup>150</sup> The revisers addressed the sections of the rule that *Gentile* had found unconstitutionally vague.<sup>151</sup> "For example, the words 'notwithstanding' and 'without elaboration' were eliminated from the text of the rule and the phrase 'general nature of the claim or defense' was changed to 'the claim, offense or defense involved.'"<sup>152</sup>

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142. *See id.* at 1058.

143. *See* Theisen, *supra* note 2, at 852.

144. *See* Croft, *supra* note 11, 351-52.

145. *See* Theisen, *supra* note 2, at 852.

146. *Id.* at 852-53.

147. *See* Brown, *supra* note 5, at 385.

148. *See* Brown, *supra* note 10, at 105.

149. *See* Brown, *supra* note 5, at 385.

150. Theisen, *supra* note 2, at 853; *see* Bernabe-Riefkohl, *supra* note 2, at 348.

151. *See* Bernabe-Riefkohl, *supra* note 2, at 348.

152. *Id.*; *see* Theisen, *supra* note 2, at 853 ("Second, the revisers eliminated the phrases 'without elaboration' and 'general nature,' leaving a provision whereby lawyers may state 'the claim, offense or defense involved' notwithstanding the prohibition in

As of the 1994 changes, Model Rule 3.6 contains a right to reply provision, which allows an attorney to issue a response, if necessary, to protect his or her client from unfair negative publicity, so long as that undue negative publicity was not created by the client or the lawyer.<sup>153</sup> A key revision drew some harsh criticism:

The most important change in Rule 3.6 concerns the paragraph defining presumptively improper statements. The amendments remove the paragraph from the text of the Rule and include the language in the Rule's official comment, creating a void in the Rule's effective language. Thus, the primary black-letter guideline, not to mention the teeth, of the Rule has become simply a suggested method of enforcement. Other commentators have noted that few boundaries have been set pertaining to permissible extrajudicial statements by attorneys, and the Rule is ineffective as a result. Elimination of the guidelines delineating presumptively improper statements only makes the Rule less effective.<sup>154</sup>

In the comment section, the drafters added a section advising lawyers that certain types of procedures are at greater risk of unacceptable bias from extrajudicial speech than others; Comment 6 ranked criminal cases tried in front of a jury as the most liable to prejudice, then civil trials, followed by arbitrations and non-jury hearings.<sup>155</sup> Additionally, paragraph (a) of Model Rule 3.6 now applies to the implicated attorney's associates and partners at his or her law firm (or government agency).<sup>156</sup> Finally, "The ABA also modified Model Rule 3.8(g) to include a specific provision applicable to prosecutors."<sup>157</sup>

#### 2002 REVISIONS TO MODEL RULE 3.6

In 2002, there were two minor alterations made to Model Rule 3.6 by the ABA. First, the "reasonable person" of 3.6(a) was changed to the

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(a) on statements that the 'lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.'").

153. See Croft, *supra* note 11, at 352. The retaliatory exception states:

[A] lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Theisen, *supra* note 2, at 853.

154. Brown, *supra* note 5, at 386; see Barnabe-Riefkohl, *supra* note 2, at 348.

155. See Theisen, *supra* note 2, at 853.

156. See Croft, *supra* note 11, 352.

157. Barnabe-Riefkohl, *supra* note 2, at 348.

“reasonable lawyer.”<sup>158</sup> This meant that in effect “the likelihood that a statement will be publicized, as well as its potential for prejudice, are to be judged against what a lawyer reasonably should know.”<sup>159</sup> Second, 3.6(a) discarded “would expect” in favor of “knows or reasonably should know,” which is the language used to define the scienter standard in Model Rule 1.0(j).<sup>160</sup> This latter change does not appear to be substantial.<sup>161</sup>

Currently, Model Rule 3.6 reads as follows:

Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

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

(5) a request for assistance in obtaining evidence and information necessary thereto;

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

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in 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.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursu-

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158. See AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 377 (15th ed. 2003).

159. *Id.* (citing ABA Report to the House of Delegates, No. 401 (Feb. 2002), Model Rule 3.6, Reporter’s Explanation of Changes).

160. See *id.*

161. See *id.*

ant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

#### Comment

[1] 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, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. 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. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal mat-

ter, or any other proceeding that could result in incarceration. These subjects relate 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 that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (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.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.<sup>162</sup>

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162. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2002).

## TRIAL PUBLICITY IN NORTH CAROLINA

North Carolina is a state that has followed the recommendations of the ABA very closely in drafting its trial publicity rule. North Carolina Revised Rule of Professional Conduct 3.6 (N.C. Rule 3.6) governs trial publicity in North Carolina.<sup>163</sup> It was adopted on July 24, 1997, and then amended in 2003.<sup>164</sup> The text of N.C. Rule 3.6 is virtually identical to the current version of Model Rule 3.6.<sup>165</sup>

There are only two differences between the rules worth noting. First, N.C. Rule 3.6 provides: "Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is *reasonably* necessary to mitigate the recent adverse publicity."<sup>166</sup> "Reasonably" does not appear in Model Rule 3.6.<sup>167</sup> Second, NC Rule 3.6 states, "The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies."<sup>168</sup> No such language appears in Model Rule 3.6.<sup>169</sup>

In April 2006, three members of the Duke University lacrosse team were "indicted for first-degree rape, kidnapping and sexual offense."<sup>170</sup> The controversial case, wherein an African-American woman accused three white men of malfeasance, attracted considerable media attention.<sup>171</sup> Durham County District Attorney Mike Nifong, who brought the charges against the Duke students, was a key

163. See NORTH CAROLINA REVISED RULES OF PROF'L CONDUCT R. 3.6 (2003).

164. See NORTH CAROLINA REVISED RULES OF PROF'L CONDUCT R. 3.6, available at <http://www.ncbar.com/rules/rules.asp?page=1&keywords=3%2E6> (last visited Feb. 17, 2007).

165. See NORTH CAROLINA REVISED RULES OF PROF'L CONDUCT R. 3.6; MODEL RULES OF PROF'L CONDUCT R. 3.6.

166. NORTH CAROLINA REVISED RULES OF PROF'L CONDUCT R. 3.6(c) (emphasis added).

167. See MODEL RULES OF PROF'L CONDUCT R. 3.6.

168. NORTH CAROLINA REVISED RULES OF PROF'L CONDUCT R. 3.6(e).

169. See MODEL RULES OF PROF'L CONDUCT R. 3.6.

170. Susannah Meadows, *In Scandal's Shadow; In a NEWSWEEK exclusive, Reade Seligmann details his family's anguish since that infamous lacrosse party*, NEWSWEEK, January 15, 2007, at 34.

171. See, e.g., Liz Halloran, *Duke's Trial by Media*, U.S. NEWS & WORLD REPORT, August 14, 2006, at 39; Duff Wilson and Jonathan D. Glater, *Prosecutor's Silence on Duke Rape Case Leaves Public With Plenty of Questions*, N.Y. TIMES, June 12, 2006, at 13; Susannah Meadows and Evan Thomas, *What Happened at Duke?; Sex. Race. A*

actor in this drama.<sup>172</sup> Indeed, as of June 2006, “[a]fter the alleged rape, Nifong estimated . . . he [had given] 50 to 70 interviews to local and national media.”<sup>173</sup>

However, the situation changed significantly over the course of a year.<sup>174</sup> By early 2007, the charges of rape had been dropped and Nifong had recused himself from the matter.<sup>175</sup> In April 2007, North Carolina Attorney General Roy A. Cooper exonerated the three defendants of any wrongdoing and formally ended the case, saying, “We have no credible evidence that an attack occurred. . . .”<sup>176</sup> In dropping all charges against the lacrosse team members, “Cooper declared that the three players were innocent, that no rape had taken place, that a ‘rogue prosecutor’ had overreached and that, ‘in the rush to condemn, a community and a state lost the ability to see clearly.’”<sup>177</sup> Shortly thereafter, Nifong issued an apology to the three defendants:

To the extent that I made judgments that ultimately proved to be incorrect, I apologize to the three students that were wrongly accused. . . . I also understand that when someone has been wrongly accused, the harm caused by the accusations might not be immediately undone merely by dismissing them. . . . It is my sincere desire that the actions of Attorney General Cooper will serve to remedy any remaining injury that has resulted from these cases.<sup>178</sup>

However, this apology was apparently not very convincing for the defendants’ attorneys, whose clients’ families wish to oust the Durham district attorney and are contemplating bringing a civil action against

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*raucous party. A rape charge. And a prosecutor up for re-election. Inside the mystery that has roiled a campus and riveted the country,* NEWSWEEK, May 1, 2006, at 40.

172. See Evan Thomas and Susannah Meadows, *Doubts About Duke; The prosecutor insists his rape case is strong. One big problem: the facts thus far*, NEWSWEEK, June 26, 2006, at 22.

173. *Id.*

174. See Susannah Meadows, *The Duke Case: Standing Down*, NEWSWEEK, January 22, 2007, at 8.

175. See *id.*; Duff Wilson and David Barstow, *Prosecutor Asks to Exit Duke Case*, N.Y. TIMES, January 13, 2007, at 1; Duff Wilson, *More Ethics Charges Brought Against Official in Duke Case*, N.Y. TIMES, January 25, 2007, at 18.

176. Duff Wilson and David Barstow, *Duke Prosecutor Throws Out Case Against Players*, N.Y. TIMES, April 12, 2007, at A1; see Duff Wilson, *‘Credibility Issues’ Undid Duke Case, Report says*, N.Y. TIMES, April 28, 2007, at A14 (“Mr. Cooper repeated the words he used two weeks ago when he dismissed the charges against three former students. They were ‘innocent,’ and there was ‘no credible evidence’ of any attack.”).

177. Susannah Meadows and Evan Thomas, *That Night At Duke*, NEWSWEEK, April 23, 2007, at 40.

178. Duff Wilson, *Prosecutor Apologizes to Ex-Players*, N.Y. TIMES, April 13, 2007, at A14.

Nifong for damages.<sup>179</sup> “I still haven’t heard him admit he did anything wrong,’ said James P. Cooney III, a lawyer for Reade W. Seligmann, one of the three. ‘I think the most concrete way he could apologize to everybody is to resign his office.’”<sup>180</sup>

In the wake of the Duke rape case, the North Carolina attorney general subjected Nifong to searching criticism: “with the weight of the state behind him, the Durham district attorney pushed forward unchecked. . . . There were many points. . . where caution would have served justice better than bravado. . . in the rush to condemn, a community and a state lost the ability to see clearly.”<sup>181</sup> Cooper plans to pursue the implementation of new legislation that would provide the state supreme court with an increased ability to remove prosecutors.<sup>182</sup>

In December 2006 and January 2007, the North Carolina State Bar Association filed a series of legal ethics charges against Nifong.<sup>183</sup> The plaintiff’s complaint alleges that Nifong violated a number of North Carolina ethics rules, including NC Rule 3.6(a) and a section of North Carolina Revised Rule of Professional Conduct 3.8 (NC Rule 3.8).<sup>184</sup> According to NC Rule 3.6(a),

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.<sup>185</sup>

The pertinent section of NC Rule 3.8 reads as follows:

The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement

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179. *See id.*

180. *Id.*

181. Wilson and Barstow, *supra* note 176, at 1.

182. *See id.*

183. *See* Wilson, *supra* note 175, at 18; David Barstow and Duff Wilson, *Prosecutor in Duke Sexual Assault Case Faces Ethics Complaint From State Bar*, N.Y. TIMES, December 29, 2006, at 22.

184. *See* The North Carolina State Bar v. Michael B. Nifong, Attorney, Disciplinary Order 06 DHC 35, available at <http://www.ncbar.com/discipline/orders.asp?page=1&fname=&lname=Nifong> (last visited Feb. 22, 2007).

185. NORTH CAROLINA REVISED RULES OF PROF’L CONDUCT R. 3.6(a).

that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.<sup>186</sup>

In its amended complaint before the Disciplinary Hearing Commission of the North Carolina State Bar, the plaintiff State Bar Association contended that Nifong's wrongful actions include the following: "Improper Pretrial Public Statements and Misrepresentations," "Withholding or Failing to Provide Potentially Exculpatory DNA Evidence," "Misrepresentations and False Statements to Court and Opposing Counsel," and "Misrepresentations and False Statements to State Bar's Grievance Committee."<sup>187</sup>

As to the subject of trial publicity, the State Bar Association alleged:

Nifong made statements to the news media . . . that had a substantial likelihood of heightening public condemnation of the accused. . . . Nifong made statements to the news media . . . that constituted an expression of his personal opinion about the guilt of the suspects/accused and/or an expression of his personal opinion that a crime had occurred. . . . Nifong knew or reasonably should have known that his statements to representatives of the news media . . . would be disseminated by means of public communication. . . . Nifong knew or reasonably should have known that his statements to representatives of the news media . . . had a substantial likelihood of prejudicing the criminal adjudicative proceeding.<sup>188</sup>

To substantiate these claims, the plaintiff in the Nifong disciplinary matter points to a number of pieces of evidence. The following is an illustrative sampling:

Nifong stated to a representative of the news media "[i]f it's not the way it's been reported, then why are they so unwilling to tell us what, in their words, did take place that night?" . . . Nifong stated to a representative of the news media "[a]nd one would wonder why one needs an attorney if one was not charged and had not done anything wrong." . . . Nifong stated to a representative of the news media "[s]o, the fact that they're making statements about what the reports are saying, and not actually showing the reports, should in and of itself raise some red flags." . . . Nifong stated to a representative of the news media "I am convinced there was a rape, yes, sir." . . . Nifong stated to a representative of the news media "the guilty will stand trial." . . . Discussing the result of DNA testing, Nifong stated during a public forum that "[i]t doesn't mean nothing happened. It just means nothing was left

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186. NORTH CAROLINA REVISED RULES OF PROF'L CONDUCT R. 3.8, 3.8(f).

187. The North Carolina State Bar v. Michael B. Nifong, Attorney, Disciplinary Order 06 DHC 35.

188. *Id.*

behind.” . . . Nifong stated to a representative of the news media “[t]hey don’t want to admit to the enormity of what they have done.” . . . Nifong stated to a representative of the news media “I would not be surprised if condoms were used. Probably an exotic dancer would not be your first choice for unprotected sex.” . . . Nifong stated to a representative of the news media “I would like to think that somebody [not involved in the attack] has the human decency to call up and say, “What am I doing covering up for a bunch of hooligans?” . . . Nifong stated to a representative of the news media “[i]n this case, where you have the act of rape—essentially a gang rape—is bad enough in and of itself, but when it’s made with racial epithets against the victim, I mean, it’s just absolutely unconscionable.”<sup>189</sup>

When talking to the press about the Duke drama, Nifong has justified speaking out, especially early on in the matter, with the following arguments: “First, he has said he was trying to encourage and pressure possible witnesses on the team to come forward. Second, he has said he was trying to assure the community that as the county’s top law enforcement official, he was taking the woman’s complaint seriously.”<sup>190</sup> On February 28, 2007, Nifong filed his answer to the plaintiff’s averments as well as a motion to dismiss.<sup>191</sup>

As an initial matter, the defendant contended that the Disciplinary Hearing Commission should dismiss the North Carolina State Bar Association’s complaint under North Carolina Rule of Civil Procedure 12(b)(6) because it has failed “to state a claim upon which relief can be granted.”<sup>192</sup> To substantiate this claim, Nifong argued that the Duke players’ procedural due process rights were not violated, because he gave them a statement of the results of all relevant tests conducted by DSI as of late-October 2006.<sup>193</sup> Furthermore, the Durham district attorney submitted that since “the State provided the underlying data contained in the DSI file including reports of the results of all tests and examinations performed by DSI. . . . [one can conclude] that at a reasonable time prior to trial, the Duke defendants knew of the existence of the ‘potentially exculpatory evidence.’”<sup>194</sup>

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189. *Id.*

190. Barstow and Wilson, *supra* note 183, at 22.

191. See Motion to Dismiss and Answer for Defendant at 1, *The North Carolina State Bar v. Michael B. Nifong*, Disciplinary Order 06 DHC 35 (hereinafter “Defendant’s Answer”).

192. *Id.*

193. See *id.*

194. *Id.* at 2-3.

As to the plaintiff's claim of "Improper Pretrial Public Statements and Misrepresentations" on the part of Nifong, the defendant made the following general statement:

Defendant admits that from March 27, 2006 until approximately April 3, 2006, that he granted interviews to various news organizations, both print and television, about the "Duke lacrosse case". After April 3, 2006, the defendant attempted to limit comments about said case to arguments he made in open court, press releases issued from his office and responses to questions directed to him at public forums which he attended in Durham County. Furthermore, defendant may have made some comments about the case to local print media while discussing other matters. Defendant made the statements outlined in paragraphs 12 through 175 of the Amended Complaint at a time when there was an ongoing investigation relating to the facts contained in the Affidavit attached to the Application for Nontestimonial Identification Order. . . .The statements made between March 27, 2006 and April 3, 2006, were made at a time when no individual suspects had been identified and were an effort by the defendant to reassure the community that the case was being actively investigated by the Durham Police Department in an effort to obtain assistance in receiving evidence and information necessary to further the criminal investigation. Defendant further admits that at the time he made said statements that he did not fully understand the extent of the national media interest in this particular investigation and as such, he did not comprehend the effect said statements may have on any matters related to the case. Defendant denies that any statements he made as further alleged in plaintiff's Amended Complaint were made with the intent of materially prejudicing an adjudicative proceeding which has resulted from said investigation. Defendant further denies that when he made the statements as alleged in the Amended Complaint, that he intended to heighten the public condemnation of an accused or that his actions were intended to heighten the public condemnation of an accused.<sup>195</sup>

Though he vigorously disputes such an allegation, if the Commission finds Nifong in breach of any of the North Carolina Revised Rules of Professional Conduct, he argued that such "violations. . .[were] not the result of his intentional conduct. Rather, any violation of the Rules of Professional Conduct was the result of the defendant's mistaken belief that any actions taken by him as alleged in the Amended Complaint was not prohibited by the North Carolina Rules of Professional Conduct."<sup>196</sup>

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195. *Id.* at 4-5.

196. *Id.* at 47.

The Disciplinary Hearing Commission of the North Carolina State Bar Association has the discretion to decide what punishment will be meted out to Nifong if he is found to have violated the state's legal ethics rules.<sup>197</sup> Possible sanctions vary from censure to disbarment.<sup>198</sup> Relevant bar association regulations require that the Commission take up the matter within 90 to 150 days.<sup>199</sup> "A three-member independent panel is expected to hear the matter against him this summer."<sup>200</sup> On April 13, a panel rejected the attempt by Nifong and his attorneys to dismiss the weightiest ethics charge that has been leveled against the Durham district attorney, namely the assertion that Nifong concealed exculpatory DNA samples.<sup>201</sup> The "hearing panel ruled that all the ethics charges, including one that Mr. Nifong had made inflammatory public comments, would be heard at a four-day trial in June."<sup>202</sup> When the complaint against Nifong is fully adjudicated, attorneys in general, and prosecutors in particular, will have a better idea of what constitutes impermissible trial publicity in North Carolina.

#### ASSESSING MODEL RULE 3.6

Model Rule 3.6 represents a compromise between 1) an attorney's right to free speech and 2) the government's valid interest in fulfilling its duty to safeguard a criminal defendant's right to a fair trial under the Sixth Amendment and to administer justice in an impartial manner.<sup>203</sup> Like most compromises, Model Rule 3.6 contains aspects that are open to criticism.<sup>204</sup> However, in the final analysis, the rule plays an important role in preventing bias from infecting an adjudicatory proceeding.<sup>205</sup>

Opponents have made a variety of arguments against the way that the ABA has handled the question of trial publicity.<sup>206</sup> This paper will review a sampling of those contentions. In the vast majority of cases,

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197. See Barstow and Wilson, *supra* note 183, at 22.

198. See *id.*

199. See *id.*

200. Wilson, *supra* note 175, at 18.

201. See Duff Wilson, *Prosecutor Loses Effort to Dismiss Main Ethics Charge*, N.Y. TIMES, April 14, 2007, at A13.

202. *Id.*

203. See Bernabe-Riefkohl, *supra* note 2, at 377; Brown, *supra* note 5, at 396.

204. See, e.g., Weisberg, *supra* note 43, at 670-79 (arguing for abolition of attorney no-comment rules).

205. See Brown, *supra* note 5, at 396-97.

206. See Berkowitz-Caballero, *supra* note 7, at 524-37.

there is no threat of harmful pretrial publicity.<sup>207</sup> “Robust protection of attorneys’ remarks thus would not substantially harm judicial interests.”<sup>208</sup> Furthermore, it is far from clear that the populace finds attorneys, despite their expertise, more believable than other information sources,<sup>209</sup> though Chief Justice Rehnquist was apparently worried about this danger in *Gentile*.<sup>210</sup>

Moreover, some commentators allege that Model Rule 3.6 fails to achieve its goal of safeguarding trials from prejudicial information, since it does not adequately deal with advances in communications technology and third parties involved in the litigation.<sup>211</sup> Indeed, in *Gentile*, Justice Kennedy made that point that “[m]uch of the information in petitioner’s remarks was included by explicit reference or fair inference in earlier press reports.”<sup>212</sup>

Model Rule 3.6’s detractors maintain that the rule “is not the ‘least restrictive means’ of protecting the fair administration of justice . . . . [and] that the Rule, as it stands with the ‘substantial likelihood’ criterion embedded in it, is too restrictive of First Amendment rights on its face.”<sup>213</sup> Critics of the ABA approach have also argued that properly respecting the free speech rights of lawyers has two additional tangible benefits: 1) it allows an attorney to vigorously defend the interests of her client, and 2) it grants the public-at-large an important font of information as to the government and the judicial system.<sup>214</sup>

Even so, there are important reasons for retaining Model Rule 3.6.<sup>215</sup> In *Gentile*, Chief Justice Rehnquist asserted that “Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative.”<sup>216</sup> Though Chief Justice Rehn-

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207. See Theisen, *supra* note 2, at 860-61; Berkowitz-Caballero, *supra* note 7, at 524. Another variation of this claim avers that there is a paucity of evidence that the types of utterances restricted by Model Rule 3.6 would actually produce prejudice. See Theisen, *supra* note 2, at 861-62.

208. Berkowitz-Caballero, *supra* note 7, at 524.

209. See *id.* at 525.

210. See 501 U.S. at 1074.

211. See Brown, *supra* note 5, at 397.

212. See 501 U.S. at 1052-53.

213. Brown, *supra* note 5, at 397.

214. See Berkowitz-Caballero, *supra* note 7, at 532-37.

215. See Theisen, *supra* note 2, at 858-60.

216. *Gentile*, 501 U.S. at 1074.

quist did not provide exhaustive documentation for this contention, as an initial matter it does not seem false.<sup>217</sup>

In *Bauer*, the Seventh Circuit made an observation similar to Chief Justice Rehnquist's point in *Gentile*: "Attorneys' statements are often the source of prejudicial publicity, especially since their views and comments are usually accepted by the public on the basis that they come from a wellspring of reliable information. Restricting such comment can be a significant aid in controlling publicity which may affect the fairness of a trial."<sup>218</sup> One skeptical scholar offers the following response to that type of argument: "[w]hile lawyers are considered to be more knowledgeable about their cases and clients, there is no proof that the general public finds lawyers more credible than other sources."<sup>219</sup> Nevertheless, she has not produced evidence that contradicts Chief Justice Rehnquist's position.

In *Gentile*, the Court stressed that in joining a state bar, a lawyer takes on certain conditions and obligations, including the duty to obey its rules.<sup>220</sup> As one supporter has concluded, Model Rule 3.6 is justified because "as officers of the court, attorneys speaking outside the courtroom must be held to a higher standard because they share the responsibility to the public for orderly, fair, and economical administration of justice."<sup>221</sup> Additionally, there is arguably a notion that attorneys, considering their professional role as officers of the court, are obliged to not force the government to spend more money than is necessary to facilitate an unbiased trial.<sup>222</sup>

As the Court noted long ago, "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."<sup>223</sup> Model Rule 3.6 helps

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217. He did point to two state court cases for support. *See id.* at 1074-75 ("See, e.g., *In re Hinds*, 90 N.J. 604, 627, 449 A.2d 483, 496 (1982) (statements by attorneys of record relating to the case 'are likely to be considered knowledgeable, reliable and true' because of attorneys' unique access to information); *In re Rachmiel*, 90 N.J. 646, 656, 449 A.2d 505, 511 (N.J.1982) (attorneys' role as advocates gives them 'extraordinary power to undermine or destroy the efficacy of the criminal justice system.')).

218. 522 F.2d at 250.

219. *See Berkowitz-Caballero, supra* note 7, at 525.

220. *See* 501 U.S. at 1066 ("Membership in the bar is a privilege burdened with conditions,' to use the oft-repeated statement of Cardozo, J., in *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917), quoted in *Theard v. United States*, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957).").

221. Brown, *supra* note 5, at 396.

222. *See* Theisen, *supra* note 2, at 859.

223. *Bridges v. State of Cal.*, 314 U.S. 252, 271 (1941).

ensure that cases are decided by the courts, not by the media.<sup>224</sup> Not only does it help filter out prejudicial trial publicity, but Model Rule 3.6 also serves the important function of maintaining the appearance of absolute propriety on the part of the judicial system.<sup>225</sup>

Finally: “In the language of constitutional scholars, fair administration of justice is without question a legitimate and substantial state interest. The Model Rules of Professional Responsibility, like the Code and the Canons before them, foster that interest by requiring the development of professional ability and obedience to ethical norms.”<sup>226</sup> Model Rule 3.6 represents a compromise between competing positions and interests. As such, not surprisingly, it has many discontents. Admittedly, the rule is not perfect. Nevertheless, Model Rule 3.6 has been given an extremely difficult task and, all things considered, it has performed that task admirably.

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224. See Theisen, *supra* note 2, at 860.

225. See Brown, *supra* note 5, at 398.

226. *Id.* at 397-98.

