

Fall 1992

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### Recommended Citation

Lynn Weisberg, On a Constitutional Collision Course: Attorney No-Comment Rules and the Right of Access to Information, 83 J. Crim. L. & Criminology 644 (1992-1993)

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# ON A CONSTITUTIONAL COLLISION COURSE: ATTORNEY NO-COMMENT RULES AND THE RIGHT OF ACCESS TO INFORMATION\*

## I. INTRODUCTION

Attorney Dominic Gentile knew he represented an innocent man.<sup>1</sup> A local grand jury had indicted Grady Sanders, charging him with stealing money and drugs from his clients' safe deposit vaults.<sup>2</sup> To counter the pervasive and prejudicial pretrial publicity surrounding the case, Gentile held a press conference following Sanders' arraignment.<sup>3</sup> At the conference, Gentile announced his client's innocence and discussed his theory of the case, noting publicly that he was bound by disciplinary rules that limited the subject matter on which he could elaborate.<sup>4</sup> Though a jury ultimately acquitted his client, Gentile faced a private reprimand from the Southern Nevada Disciplinary Board and the Nevada Supreme Court, which affirmed that he violated the local attorney no-comment rules.<sup>5</sup>

Attorney no-comment rules are designed to regulate trial publicity in order to protect a defendant's right to a fair trial. They prohibit lawyers from commenting about pending criminal cases if they have reason to believe their statements will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding.<sup>6</sup>

Following the Nevada Supreme Court's decision to reprimand Gentile for violating the local attorney no-comment rules, the United States Supreme Court granted certiorari to decide the standard that should govern attorney speech.<sup>7</sup> In *Gentile v. State Bar of*

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\* I would like to thank Jack C. Doppelt for his knowledge and creativity in helping me develop this piece and reviewing earlier drafts of this article. I also want to thank Dominic Gentile for his help and insight.

<sup>1</sup> "I can't fill a hand with people that I've represented that were truly innocent. Grady was one of them . . ." Joint Appendix at 42, *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991) (No. 89-1836) [hereinafter Joint Appendix].

<sup>2</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2728 (1991).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2731-32.

<sup>5</sup> *Id.* at 2723.

<sup>6</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

<sup>7</sup> *Gentile*, 111 S. Ct. at 2738.

*Nevada*, the Court said that states could regulate lawyers' speech in order to preserve a defendant's right to a fair trial.<sup>8</sup> In *Gentile's* case, however, Nevada's rules proved too vague to provide meaningful guidelines.<sup>9</sup> By approving restrictions on lawyers' speech outside the courtroom, the Court failed to reconcile a series of access-to-information cases<sup>10</sup> that allow the public and press access to courtroom proceedings. In these open court proceedings, the public gains access to the same information prohibited by attorney no-comment rules. As a result, attorney no-comment rules do not accomplish their purpose of shielding prejudicial information from potential jurors; instead, they merely postpone dissemination of the very same information until it is raised in the courtroom setting.<sup>11</sup> Furthermore, these rules infringe upon attorneys' freedom of speech, as guaranteed by the First Amendment to the U.S. Constitution. In light of the rules' ineffectiveness in protecting the overriding interest of a defendant's right to a fair trial, this Comment argues that the First Amendment restraint on free speech is unjustified and therefore unconstitutional.

Part II of this article traces the history of attorney no-comment rules from their inception as recommendations designed for heavily publicized cases to their present form as American Bar Association Model Rule 3.6.<sup>12</sup> Part III reviews the five Supreme Court access-to-information cases<sup>13</sup> that allow the public and media access to trial court proceedings and the subsequent right to publish information resulting from these proceedings. Part IV analyzes the Supreme

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<sup>8</sup> *Id.* at 2723-26.

<sup>9</sup> *Id.* at 2731-32.

<sup>10</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Sup. Ct. of Cal.*, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*]; *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Sup. Ct. of Cal.*, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*].

<sup>11</sup> Michael A. Swartz, Note, *Trial Participant Speech Restrictions: Gaggling First Amendment Rights*, 90 COLUM. L. REV. 1411, 1432 (1990).

While this Comment does not address whether pretrial publicity does, in fact, impact jurors, empirical studies reveal that jury prejudice resulting from such press coverage is exaggerated. For a discussion of this subject, see Ralph Frasca, *Estimating the occurrence of trials prejudiced by press coverage*, 72 JUDICATURE 162 (1988); Robert Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests about the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1 (1989); ALFRED FRIENDLY & RONALD L. GOLDFARB, *CRIME AND PUBLICITY* (1967); Rita J. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact of Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977); Don R. Pember, *Does Pretrial Publicity Really Hurt?*, COLUM. JOURNALISM REV. 16 (Sept.-Oct. 1984); John M. Shipman, Jr. & Dale Spencer, *Courts Recognize Multiple Factors in Free Press/Fair Trial Cases*, 12 COMM. & L. 87 (1990).

<sup>12</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

<sup>13</sup> *Nebraska Press*, 427 U.S. 539; *Richmond Newspapers*, 448 U.S. 555; *Press-Enterprise I*, 464 U.S. 501; *Waller*, 467 U.S. 39; *Press-Enterprise II*, 478 U.S. 1.

Court's decision in *Gentile v. State Bar of Nevada*<sup>14</sup> and the standard of free speech that exists for lawyers. Part V juxtaposes pretrial court proceedings and the information that arises within the course of each of these hearings with restrictions imposed by attorney no-comment rules. This contrast illustrates the ineffectiveness of these rules in preventing public dissemination of information that is considered prejudicial. Part VI explores the effect of abolishing attorney no-comment rules, positing that courts will be forced to re-examine and scrutinize the issuance of gag orders on trial participants. This judicial review will ultimately result in the establishment of a constitutional standard by trial courts that will regulate extrajudicial speech and provide a clear, unambiguous standard by which trial participants can effectively gauge their comments.

## II. THE HISTORY OF RULE 3.6

From 1961 to 1966, the United States Supreme Court reversed four convictions as a result of prejudicial publicity that prevented the defendant from receiving a fair trial.<sup>15</sup> In *Sheppard v. Maxwell*,<sup>16</sup> the Court criticized the trial court judge for failing to use available mechanisms to mute the effect of publicity. It also noted that prejudicial press reports had become "increasingly prevalent," requiring trial courts to take effective steps to ensure a fair and impartial trial through jury sequestration, change of venue, or continuances.<sup>17</sup> The Court warned:

[W]e 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. Collaborating 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

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<sup>14</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991).

<sup>15</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (carnival-like atmosphere and inflammatory publicity denied defendant a fair trial and due process); *Estes v. Texas*, 381 U.S. 532 (1965) (televised pretrial hearing and mass publicity throughout trial infringed on defendant's right to a fair trial); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (denial of venue change following broadcast of "interview," in which suspect confessed to crime prior to arraignment, violated defendant's due process); *Irvin v. Dowd*, 366 U.S. 717 (1961) (massive publicity and police-issued press releases regarding defendant's confession made change of venue to adjoining county ineffective and denied defendant a fair trial).

<sup>16</sup> 384 U.S. at 362.

<sup>17</sup> *Id.* at 362-63.

worthy of disciplinary measures.<sup>18</sup>

In response to this mandate, the American Bar Association (ABA) appointed the Advisory Committee on Fair Trial and Free Press to propose guidelines (hereinafter referred to as the Reardon Report) that would prevent prejudicial publicity during criminal proceedings.<sup>19</sup> The committee stated that while freedom of speech and freedom of the press should be "zealously preserved," these rights should be balanced against their potential effect on other fundamental rights, such as the right to a fair and impartial trial.<sup>20</sup>

The Reardon Report recommended that attorneys be prohibited from commenting about information regarding pending criminal litigation if a "reasonable likelihood" existed that the dissemination of such information would interfere with a fair trial.<sup>21</sup> The report 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 statements concerning the following subjects: the defendant's prior criminal record, character, or reputation, except for factual data;<sup>22</sup> 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.<sup>23</sup> Information regarding the circumstances of the arrest, seized evidence, judicial scheduling, or assistance needed for the investigation could be announced.<sup>24</sup> During the trial, lawyers could only refer to or quote from information in public records.<sup>25</sup> 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.<sup>26</sup>

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<sup>18</sup> *Id.* at 363.

<sup>19</sup> Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (Approved Draft 1968) [hereinafter Reardon Report]. The committee was also formed in part due to the Warren Commission, which reviewed the events surrounding Lee Harvey Oswald's death in 1964 and called for steps to create a proper balance between the public's right to information and an individual's right to a fair trial. *Id.* at 19.

<sup>20</sup> Reardon Report, *supra* note 19, at 16.

<sup>21</sup> *Id.* at 82.

<sup>22</sup> Such factual data included the name, age, residence, and any information necessary for apprehension of the suspect. *Id.* at 83.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 83-84.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 84.

In an effort to establish uniform federal and state standards, the Committee on the Operation of the Jury System (hereinafter referred to as the Kaufman Committee), echoed the recommendations of the Reardon Report, relying on district courts to control the flow of prejudicial publicity.<sup>27</sup> Recognizing that lawyers disseminated most of the publicity in criminal cases, the committee advocated 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>28</sup> The committee also urged courts to enforce violations with local disciplinary rules.<sup>29</sup>

The Reardon Report guidelines, which were endorsed by the Kaufman Committee, became the basis of Disciplinary Rule 7-107,<sup>30</sup> which outlined permissible and non-permissible comments that lawyers could make to the media. The disciplinary rule became part of the ABA's Model Code of Professional Conduct, which every state

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<sup>27</sup> Report on the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 407 (1968).

<sup>28</sup> *Id.* at 401, 406.

<sup>29</sup> *Id.* at 401.

<sup>30</sup> Disciplinary Rule 7-107 states:

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

(1) Information contained in the public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

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

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

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

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

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

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

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

- (1) The name, age, residence, occupation, and family status of the accused.
- (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
- (3) A request for assistance in obtaining evidence.
- (4) The identity of the victim of the crime.
- (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
- (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
- (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
- (8) The nature, substance, or test of the charge.
- (9) Quotations from or references to public records of the court in the case.
- (10) The scheduling or result of any step in the judicial process.
- (11) That the accused denies the charge made against him.

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

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

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

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

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
- (3) The performance or results of any examination or test or the refusal or failure of a party to submit to such.
- (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
- (5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
- (3) Physical evidence or the performance or results of any examinations or tests of the refusal or failure of a party to submit to such.
- (4) Any other matter reasonably likely to interfere with a fair hearing.

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

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

ultimately adopted.<sup>31</sup> The Model Code is designed to serve as a guide for attorney conduct,"<sup>32</sup> and failure to comply with these rules may constitute invocation of disciplinary proceedings.<sup>33</sup>

In *Chicago Council of Lawyers v. Bauer*,<sup>34</sup> the first appellate review of the ABA rules governing attorneys' extrajudicial speech,<sup>35</sup> the Seventh Circuit struck down the "overbroad" ABA standard, which restricted attorneys' comments about pending litigation if such statements presented a "reasonable likelihood" of interfering with a defendant's right to a fair trial.<sup>36</sup> In its place, the court proposed that judges proscribe only those comments that posed a "serious and imminent threat" to the fair administration of justice.<sup>37</sup> The court reasoned that this narrower standard would put attorneys on stricter notice regarding extrajudicial comments so they would not have to tread the amorphous ground of "reasonable likelihood," as set forth in DR 7-107.<sup>38</sup>

In addition to restricting attorneys' comments pending litigation, the Seventh Circuit endorsed specific rules, which incorporated the "serious and imminent threat" standard, to govern the type of comments allowed during the trial process.<sup>39</sup> Despite the stricter "serious and imminent threat" standard, the Seventh Circuit held DR 7-107(A) unconstitutional. According to the court, this rule,<sup>40</sup> could not apply to criminal defense attorneys because it would prevent them from serving as a check against government abuses during the prosecutorial-based investigatory stage.<sup>41</sup> More importantly, the court could not justify the broad restrictions mandated by DR 7-107(A) during the investigation of a criminal matter, when prosecution of a case could not be assured and potential prejudice was too remote.<sup>42</sup>

Largely as a result of the *Bauer* decision, an ABA Task Force on Fair Trial and Free Press (hereinafter referred to as the Goodwin Committee) imposed a stricter standard, prohibiting lawyers from

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<sup>31</sup> Patricia A. Sallen, Comment, *Gag Me With a Rule—Arizona Rules of Professional Conduct Rule 3.6 (1985)*, 114 ARIZ. ST. L.J. 115, 122-24 (1987).

<sup>32</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble (1981).

<sup>33</sup> *Id.*

<sup>34</sup> 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

<sup>35</sup> Sally R. Weaver, *Judicial Restrictions on Attorneys' Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech*, 33 VAND. L. REV. 499, 506 (1980).

<sup>36</sup> *Bauer*, 522 F.2d at 249.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 249-51.

<sup>40</sup> See DR 7-107, *supra* note 30.

<sup>41</sup> *Bauer*, 522 F.2d at 253.

<sup>42</sup> *Id.*



disseminating information that would pose a "clear and present danger" to the fairness of a trial.<sup>43</sup> The Committee recognized that public comment about police work, criminal cases, and the administration of criminal justice are areas of "pure speech," entitled to the strongest possible presumption of First Amendment protection.<sup>44</sup> The "reasonable likelihood" standard provided too loose a threshold to offer lawyers full protection of their First Amendment rights. As a result, the Goodwin Committee proposed that to be sanctioned, an attorney's extrajudicial comments had to meet four criteria: (1) the restriction had to promote a legitimate governmental interest; (2) the comment had to seriously threaten the governmental interest to be protected; (3) the threat had to be likely to occur imminently; and (4) the restriction had to be necessary to prevent the governmental interest from being jeopardized.<sup>45</sup> The Committee also eliminated the per se prohibitions regarding extrajudicial statements, recognizing that while statements have the potential to undermine the fairness of a trial, such a result was not inevitable.<sup>46</sup> The ABA's House of Delegates adopted the Goodwin Report in August 1978.<sup>47</sup>

Despite the Goodwin Report, in *Hirschkop v. Snead*,<sup>48</sup> the second appellate case to interpret attorney no-comment rules, the Fourth Circuit reverted back to the original standard of "reasonable likelihood" proposed by the Reardon Report.<sup>49</sup> The appellate court approved the "reasonable likelihood of interference" criterion because DR 7-107 clearly listed the subject matters on which lawyers could and could not comment. This clarity made lawyers aware, not only that publication of certain kinds of information was prohibited, but also that courts had the power to prohibit this action "without extended controversy over the immediacy and gravity of the threatened harm in the particular case."<sup>50</sup>

The Fourth Circuit limited its holding to criminal and juvenile jury trials. To apply this standard to anything but jury proceedings, the court reasoned, would unfairly and substantially restrict attor-

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<sup>43</sup> ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press 1 (2d Tent. Draft 1978) [hereinafter Goodwin Report].

<sup>44</sup> *Id.* at 2-3. See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 586-87 (1976) (Brennan, J., concurring).

<sup>45</sup> Goodwin Report, *supra* note 43, at 3.

<sup>46</sup> *Id.* at 4.

<sup>47</sup> Stephanie J. Baker, Comment, *Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107*: *Hirschkop v. Snead*, 41 OHIO ST. L.J. 771, 780 (1980).

<sup>48</sup> 594 F.2d 356 (4th Cir. 1979) (en banc).

<sup>49</sup> *Id.* at 362.

<sup>50</sup> *Id.* at 368.

neys' First Amendment rights. For this reason, the court declared this standard constitutionally overbroad and void for vagueness, as it pertained to bench trials, civil litigation, administrative hearings, and disciplinary hearings.<sup>51</sup>

In the early 1980s, the ABA drafted Model Rule 3.6<sup>52</sup> in an ef-

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<sup>51</sup> *Id.* at 371-74. The Court specifically prohibited attorneys in criminal (DR 7-107(D)), juvenile (DR 7-107(F)), disciplinary (DR 7-107(F)), civil (DR 7-107(G)(5)), and administrative proceedings (DR 7-107(H)(5)) from commenting on "other matters that are reasonably likely to interfere with a fair trial."

<sup>52</sup> Rule 3.6 Trial Publicity

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

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

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

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

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

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

(5) information the lawyer knows or should reasonably 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

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

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

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

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

(4) the scheduling or result of any step 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:

(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 investigation and arresting officers or agencies and the length of the investigation.

fort to balance the interests of fair trial with free expression.<sup>53</sup> The ABA based Rule 3.6 on the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.<sup>54</sup>

Rule 3.6 differs from DR 7-107 in three ways. First, Rule 3.6 adopts a standard somewhere in between *Bauer* and *Hirschkop*, requiring that impermissible speech have a "substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>55</sup> Second, Rule 3.6 prevents an attorney from discussing or describing seized physical evidence because it may be "substantially prejudicial,"<sup>56</sup> especially if the court grants the defense's pretrial motion to suppress the evidence at trial.<sup>57</sup>

Most importantly, Rule 3.6 presumes certain information will have a substantial likelihood of prejudicing a trial.<sup>58</sup> Rule 3.6 eliminates the categories of statements that can be made at various stages of the judicial process and instead, it creates six categories that *presumptively* violate the "substantial likelihood" standard if used in a civil or criminal jury trial or pertain to a proceeding that could result in imprisonment.<sup>59</sup> By creating this presumption, no-comment rules anticipate that certain information will necessarily prejudice a trial.

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<sup>53</sup> Thirty-two states have adopted ABA Model Rule 3.6 verbatim or with insignificant changes. The following states have adopted the rule as written: Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, Nevada, New Mexico, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Wyoming. Delaware, Florida, Louisiana, Montana, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Texas, and Wisconsin have adopted Rule 3.6 with minor changes. Michigan and Washington have adopted only subsection (a) of the rule, and Minnesota, which also only adopted subsection (a), applies solely to pending criminal jury trials. Utah adopted a version of Rule 3.6 that employs a "substantial likelihood of materially influencing" test.

States that have adopted DR 7-107 verbatim include: Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, Ohio, Tennessee, and Vermont. North Carolina uses the "reasonable likelihood of . . . prejudic[e]" test. Virginia is the only state to have explicitly adopted a "clear and present danger" standard, although four states—Illinois, Maine, North Dakota, and Oregon—and the District of Columbia have adopted standards that approximate this high threshold. *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2741 (1991).

<sup>54</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> This Comment challenges this presumption since the same information that may prejudice a trial will become public during pretrial proceedings. See *infra* Part V.

<sup>59</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

## III. THE SUPREME COURT ACCESS-TO-INFORMATION CASES

Attorney no-comment rules were needed throughout the 1960s and 1970s due to courts' inexperience with publicity stemming from high-profile cases.<sup>60</sup> By the mid-1980s, the Supreme Court had decided a series of access-to-information cases, which granted the public and the media the right to attend pretrial proceedings.<sup>61</sup> These decisions prevented trial courts from suppressing information without providing a specific justification and a showing that less drastic mechanisms could not achieve the same effect. The Court mandated a heavy burden of proof in order to protect coveted First Amendment rights while, at the same time, assuring a defendant of his constitutional right to a fair trial.<sup>62</sup>

These decisions incrementally eroded courts' power to close courtroom proceedings or suppress information with a standard one-line justification that such information would materially prejudice trial proceedings. Through these decisions, the Court systematically prohibited courts from imposing gag orders, which prevent the media from publishing or broadcasting information emanating from judicial proceedings, unless the appropriate burden of proof was met.<sup>63</sup> Next, the Court prevented courts from closing criminal trials,<sup>64</sup> *voir dire*,<sup>65</sup> suppression hearings,<sup>66</sup> and preliminary hearings.<sup>67</sup> The Court reasoned that such restrictive mechanisms, even when used to ensure criminal defendants of a fair trial, proved too broad, too severe, and too invasive of First Amendment rights.<sup>68</sup> By opening the courtroom doors as a matter of constitutional right, the Court made available to the public the very same information that attorney no-comment rules banned. This judicially mandated public access to the courts defeated the very design and purpose of attorney no-comment rules.

In *Nebraska Press Association v. Stuart*,<sup>69</sup> the trial court issued a restrictive order, prohibiting publication of evidence and testimony

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<sup>60</sup> See *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>61</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise I*, 464 U.S. 501 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise II*, 478 U.S. 1 (1986).

<sup>62</sup> See *Nebraska Press*, 427 U.S. 539.

<sup>63</sup> *Id.*

<sup>64</sup> *Richmond Newspapers*, 448 U.S. 555.

<sup>65</sup> *Press-Enterprise I*, 464 U.S. 501.

<sup>66</sup> *Waller*, 467 U.S. 39 (1984).

<sup>67</sup> *Press-Enterprise II*, 478 U.S. 1 (1986).

<sup>68</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976).

<sup>69</sup> *Id.*

surrounding the subject of the trial until a jury was selected. The evidence pertained to the murder of a Nebraska family, and it included: the suspect's confession to police; his statements to third parties; the contents of a note he wrote on the night of the crime; certain medical testimony; the identity of those sexually assaulted; and the nature of the assaults.<sup>70</sup> On appeal, the Nebraska Supreme Court upheld the restrictions imposed by the district court, but it limited the gag order to the defendant's confessions and admissions, and other "strongly implicative" facts.<sup>71</sup>

The United States Supreme Court categorically denied that pretrial publicity inevitably leads to an unfair trial.<sup>72</sup> Factors that determine the degree of prejudice include the tone and extent of the publicity, as well as the judge's efforts to mitigate the effects of pretrial publicity.<sup>73</sup> Considered the most serious infringement of First Amendment rights, a prior restraint is an "immediate and irreversible sanction" that freezes publication of important information.<sup>74</sup>

While the Court validated the trial judge's concern about the potentially harmful effects of pretrial publicity, it noted that the judge did not attempt to lessen the prejudicial impact through tactics such as change of venue, continuance, intensive *voir dire*, jury instructions, or sequestration.<sup>75</sup> The Court further ruled that the trial court's order violated other principles that cannot be overridden simply to enforce this prior restraint. For instance, at the preliminary hearing, which was open to the press and public, testimony referred to the suspect's confession to police and statements made to third parties.<sup>76</sup> The original gag order prohibited reporting this information, which stood in direct conflict with the established principle that the press can report anything that occurs in the courtroom.<sup>77</sup> On the basis of this principle, the testimony given in the preliminary hearing could not have been subject to prior restraint

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<sup>70</sup> *Id.* at 543-44.

<sup>71</sup> *Id.* at 545.

<sup>72</sup> *Id.* at 554, 565.

<sup>73</sup> *Id.* at 554-55.

<sup>74</sup> *Id.* at 559.

<sup>75</sup> *Id.* at 564-65.

<sup>76</sup> *Id.* at 543.

<sup>77</sup> The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. CONST. amend. I. To further support this constitutional right, the Supreme Court held that "[i]t is true that the public has the right to be informed as to what occurs in its courts, . . . reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court. . . ." *Estes v. Texas*, 381 U.S. 532, 541-42 (1965).

once the hearing was held.<sup>78</sup> As a result, the Supreme Court overruled the imposition of a gag order, thereby allowing public dissemination of evidence and testimony prior to jury selection.<sup>79</sup>

The Supreme Court increased public accessibility to court proceedings in *Richmond Newspapers, Inc. v. Virginia*,<sup>80</sup> holding that the public and press had a constitutional right to attend criminal trials. In this case, the indictment of a defendant for the murder of a hotel employee resulted in four trials: the first conviction was reversed after evidence was improperly admitted; the second and third trials were declared mistrials.<sup>81</sup> At the onset of the fourth trial, the court granted the defense attorney's request to close the courtroom to the public. The media argued that the judge had not based his ruling on any evidentiary findings or considered less drastic alternatives.<sup>82</sup> The trial court upheld its ruling, reasoning that closing the trial "doesn't completely override all rights of everyone else."<sup>83</sup> The next day, the trial judge acquitted the defendant in a directed verdict.<sup>84</sup>

In reversing the trial court, the Supreme Court held that an open trial served a variety of purposes. First, public trials helped ensure propriety and integrity in the judicial process, and they deterred perjured testimony, as well as prosecutorial and judicial misconduct.<sup>85</sup> Second, an open trial provided a prophylactic outlet for societal concern, by satiating the public's appetite for justice and uniting a community in shared emotion.<sup>86</sup> Third, the public learned about the judicial system, and state and federal government, from attending trials.<sup>87</sup>

The Court wrote that the First and Fourteenth Amendments shared a common goal: to assure the freedom to communicate about government functioning.<sup>88</sup> When the doors of a courtroom close, so, too, does the right to express and receive ideas about government processes. This freedom would "lose much meaning if access to observe the trial could, as it was here, be foreclosed

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<sup>78</sup> *Estes*, 381 U.S. at 567-68.

<sup>79</sup> *Id.* at 570.

<sup>80</sup> 448 U.S. 555 (1980).

<sup>81</sup> *Id.* at 559.

<sup>82</sup> *Id.* at 560.

<sup>83</sup> *Id.* at 561.

<sup>84</sup> *Id.* at 562.

<sup>85</sup> *Id.* at 569.

<sup>86</sup> *Id.* at 571-72.

<sup>87</sup> *Id.* at 572.

<sup>88</sup> *Id.* at 575.

arbitrarily.”<sup>89</sup> The Court held that even though the public’s right to attend a criminal trial is not explicitly stated in the Constitution, it is a fundamental right implicit in the First Amendment.<sup>90</sup> The Court further criticized the trial court for its failure to explore alternatives to closure.<sup>91</sup> Without any findings to support public exclusion, the Court ordered that criminal trials must be open to the public.<sup>92</sup>

Building on the *Richmond* principle, the Court further expanded the rights of the press by allowing its presence at *voir dire* proceedings.<sup>93</sup> Prior to jury selection in a rape and murder trial, newspaper publisher Press-Enterprise Co. requested that *voir dire* be open to the public and the press. The trial judge ruled that this would inhibit the potential jurors’ candor, which was necessary for the defendant to receive a fair trial. The judge allowed the public and press to be present for the general questioning, but privately conducted all specific questioning regarding issues such as death penalty and sexual crimes. During six weeks of *voir dire*, only three days were open to the public.<sup>94</sup> The court also denied Press-Enterprise’s request for copies of the *voir dire* transcripts, claiming that their release violated the jurors’ right to privacy.<sup>95</sup> The California Court of Appeal denied Press-Enterprise’s petition to release the transcript, and it refused to reverse the trial court’s decision to close the *voir dire* hearing.<sup>96</sup> The California Supreme Court denied petitioner’s request for a hearing.<sup>97</sup>

The United States Supreme Court reversed the appellate court and ordered the *voir dire* proceedings open to the public and press.<sup>98</sup> Drawing upon its reasoning in *Richmond*, the Court held that public access enhanced the fairness of the judicial system and unified the community’s cathartic reaction to violent crime and its need for justice.<sup>99</sup> The Court stated, “Closed hearings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.”<sup>100</sup> The trial court should have explained

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<sup>89</sup> *Id.* at 577.

<sup>90</sup> The Court did not address whether this same right applies to civil cases, but it noted that historically, both civil and criminal trials have been presumptively open. *Id.* at 580.

<sup>91</sup> *Id.* at 580-81.

<sup>92</sup> *Id.* at 581.

<sup>93</sup> *Press-Enterprise I*, 464 U.S. 501 (1984).

<sup>94</sup> *Id.* at 503.

<sup>95</sup> *Id.* at 504.

<sup>96</sup> *Id.* at 504-05.

<sup>97</sup> *Id.* at 505.

<sup>98</sup> *Id.* at 504-05.

<sup>99</sup> *Id.* at 508-09.

<sup>100</sup> *Id.* at 509.

why these specific conversations required privacy, rather than simply making a blanket statement about inappropriate areas for public discussion.<sup>101</sup> Likewise, the court could have released those parts of the transcript that were "dull and boring,"<sup>102</sup> leaving sensitive sections under seal.<sup>103</sup> With the trial court considering nothing short of closure, the Court held that *voir dire* should have been open to the public.<sup>104</sup>

That same year, the Supreme Court increased public access to pretrial hearings, mandating that the stringent *Press-Enterprise I* criteria<sup>105</sup> be satisfied before closure of a suppression hearing may occur.<sup>106</sup> Prior to the trial in *Waller v. Georgia*, the defendants tried to suppress lawful wiretaps involving a lottery operation, as well as all evidence collected during lawful searches. The state moved to close the suppression hearing, arguing that in order to rebut the motion to suppress evidence, it would introduce evidence that might violate the privacy of individuals other than the defendants, which would taint the evidence for future prosecutions.<sup>107</sup> The court ordered the seven-day suppression hearing closed, during which time less than 150 minutes of wiretap tapes were played. These tapes mentioned only one person who was not named in the indictment.<sup>108</sup> The Supreme Court reversed, stating that the court failed to give proper weight to Sixth Amendment concerns, namely the defendant's right to a public trial.<sup>109</sup>

The Court cited a litany of recent Supreme Court cases that balanced a defendant's right to a fair trial with the right to open court proceedings.<sup>110</sup> While these cases were based on First

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<sup>101</sup> *Id.* at 504.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 513.

<sup>104</sup> *Id.*

<sup>105</sup> The *Waller* Court held that the party seeking to close the hearing must state an overriding interest likely to be prejudiced; the closure cannot be broader than necessary to protect the specific interest; the trial court must consider reasonable alternatives to closure; and the court must make findings that support the closure. *Waller v. Georgia*, 467 U.S. 39 (1984) (citing *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 42.

<sup>108</sup> *Id.* at 42-43. A jury later acquitted petitioners of racketeering but convicted them of the gambling charges.

<sup>109</sup> *Id.* at 43.

<sup>110</sup> *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (a majority of the Court said the public had a qualified constitutional right to attend pretrial suppression hearings, although the Court did not consider this specific question); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and *Globe Newspaper Co. v. Sup. Ct. for Norfolk County*, 457 U.S. 596 (1982) (both holding that the public and media have a constitutional right to attend criminal trials); *Press-Enterprise I*, 464 U.S. 501 (1984) (holding that



Amendment protection, the Court reasoned that the Sixth Amendment guarantee of a public trial<sup>111</sup> also ensured that this hearing was fair to the defendant.<sup>112</sup> "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility . . ."<sup>113</sup>

The Court stated that a suppression hearing may be as important as the actual trial.<sup>114</sup> Often, in suppression hearings, police officers must take the stand and justify their conduct in procuring invasive orders and seizing evidence.<sup>115</sup> These justifications are given under oath and subject to cross-examination by opposing counsel. Such testimony may produce allegations of police and prosecutorial misconduct, which society has a strong interest in exposing and subjecting to public scrutiny.<sup>116</sup>

To avoid indiscriminate closure of suppression hearings, the Court held that the *Press-Enterprise I* test must be satisfied:

The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support closure.<sup>117</sup>

Using this standard, the Court found that the prosecutor's rationale for closure was based solely on the evidence involving the wiretaps, and that the proffer did not specify the privacy interests involved, the effected portion of the tapes, or the manner in which such privacy would be violated.<sup>118</sup> In addition, the trial court failed to consider any alternatives to total closure, such as closing only those parts of the hearing that jeopardized specific privacy interests.<sup>119</sup> As a result, closure of this suppression hearing was deemed unconstitutional.

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the public and press have a First Amendment right to attend *voir dire* proceedings). *Waller*, 467 U.S. at 44-45.

<sup>111</sup> The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI.

<sup>112</sup> *Waller*, 467 U.S. at 46.

<sup>113</sup> 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).

<sup>114</sup> *Waller*, 467 U.S. at 46 (citing *Gannett*, 443 U.S. at 397 n.1 (Powell, J., Burger, C.J., concurring), 434-36 (Blackmun, J., dissenting in part)).

<sup>115</sup> *Id.* at 47.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 48 (citing *Press-Enterprise I*, 464 U.S. 501, 511-12 (1984)). See *supra* notes 93-104 and accompanying text.

<sup>118</sup> *Waller*, 467 U.S. at 48.

<sup>119</sup> *Id.* at 48.

In *Press-Enterprise Co. v. Superior Court of California*,<sup>120</sup> the Court extended *Waller* by ruling that the media and public had a constitutional right to attend preliminary hearings. The defendant, a nurse charged with killing twelve patients by lethal injection, moved to close the preliminary hearing.<sup>121</sup> Despite the fact that such a hearing is presumed open unless a defendant's right to a fair trial is at risk, the magistrate granted the motion because it feared the press would only report one side of the case.<sup>122</sup> When the hearing ended forty-one days later, the magistrate denied *Press-Enterprise's* request for the transcripts and sealed the record.<sup>123</sup>

The United States Supreme Court cited the nearly uniform practice of state and federal courts to conduct preliminary hearings in open court.<sup>124</sup> The Court compared the preliminary hearing to a trial: in both, the accused has a right to appear in court, to be represented by counsel, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.<sup>125</sup> Since criminal trials are open to the public, the Court reasoned that preliminary hearings should also be open.<sup>126</sup> In addition, the absence of a jury at preliminary hearings makes the presence of the public and media all the more essential as a safeguard against prosecutorial misconduct and zealotry.<sup>127</sup> Again, the Court advised the trial judge to consider alternatives before making such aggressive decisions.<sup>128</sup>

Together, these five Supreme Court access-to-information cases<sup>129</sup> establish a strong foundation supporting the public's right to pretrial and trial information within the courtroom. By requiring certain conditions to be met before a courtroom is closed or a gag order is imposed, the Court reinforced that First Amendment rights are a coveted societal value, deserving the utmost protection. Any

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<sup>120</sup> *Press-Enterprise II*, 478 U.S. 1 (1986).

<sup>121</sup> *Id.* at 3. At the preliminary hearing, the state presented primarily medical and scientific evidence, as well as the testimony of some of the defendant's co-workers. *Id.* at 4.

<sup>122</sup> *Id.* at 4.

<sup>123</sup> *Id.* at 5. The court later released the transcript after the defendant waived his right to a jury trial. *Id.*

<sup>124</sup> *Id.* at 10. The Court distinguished between grand jury proceedings, which are typically closed to the public, and preliminary hearings, which are conducted in open court before a magistrate.

<sup>125</sup> *Id.* at 12.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 12-13.

<sup>128</sup> *Id.* at 14-15.

<sup>129</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise I*, 464 U.S. 501 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise II*, 478 U.S. 1.

limitation on these rights, absent a showing that infringement is necessary to effectively protect an overriding interest, is unconstitutional.

#### IV. THE SUPREME COURT'S DECISION IN *GENTILE V. STATE BAR OF NEVADA*

In *Gentile v. State Bar of Nevada*, the United States Supreme Court upheld the "substantial likelihood of material prejudice" standard used to govern lawyers' extrajudicial speech.<sup>130</sup> It also declared that Nevada Rule 177, as written, was unconstitutionally vague because it failed to clearly distinguish between permissible and impermissible speech.<sup>131</sup> As a result of its grammatical ambiguity, the rule failed to provide Gentile with fair notice as to what he could say without fear of discipline.<sup>132</sup> In its attempt to address attorney no-comment rules, however, the Court failed to remedy the ambiguity of the rule. Moreover, it did not take into consideration the previously decided access-to-information cases, which unravel the very purpose of attorney no-comment rules.

On January 31, 1987, undercover Las Vegas police officers discovered four kilograms of cocaine and almost \$300,000 in travelers' checks missing from a safe deposit box, which was rented by the police department's Intelligence Bureau from Western Vault Corporation.<sup>133</sup> Police quickly discounted as suspects the two police officers who had access to the deposit box<sup>134</sup> and instead focused on Western Vault owner Grady Sanders,<sup>135</sup> represented by attorney Dominic Gentile. During the investigation, the police commander announced that the two officers passed polygraph tests, but that Western Vault would not allow its employees to submit to lie detector tests.<sup>136</sup> In February 1988, the Clark County grand jury indicted Sanders.<sup>137</sup> Six weeks after the theft, Western Vault closed due to

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<sup>130</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2742-45 (1991).

<sup>131</sup> *Id.* at 2731.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2720.

<sup>134</sup> Harold Hyman, *Metro Uses Dogs to Search Safes*, LAS VEGAS SUN, Feb. 12, 1987; Joint Appendix, *supra* note 1, at 110.

<sup>135</sup> Alan Tobin, *Officer: Vault Heist Targeted Metro Sting*, LAS VEGAS REV.-J., Mar. 12, 1987, at 1B; Joint Appendix, *supra* note 1, at 90-91.

<sup>136</sup> Alan Tobin & Warren Bates, *Vault Owner Indicted in Deposit Box Thefts*, LAS VEGAS REV.-J., Feb. 6, 1988, at 1A; Pauline Bell & Harold Hyman, *Metro Missing \$1.3 Million in Drugs, Checks, Jury Indicts Vault Owner on \$2.5 Million Theft Charge*, LAS VEGAS SUN, Feb. 6, 1988, at 1A; Joint Appendix, *supra* note 1, at 100-03, 127-29.

<sup>137</sup> Sanders was charged with two counts of racketeering, eight counts of grand larceny, and one count of trafficking a controlled substance. Tobin & Bates, *supra* note 136; Joint Appendix, *supra* note 1, at 100-03.

unfavorable press, the issuance of search warrants at the facility, and the breach of client confidentiality.<sup>138</sup>

Immediately following the arraignment, Gentile held a press conference to proclaim his client's innocence and combat negative pretrial publicity.<sup>139</sup> In a brief statement, Gentile presented his theory that the two police officers were the most likely suspects, and that three potential witnesses were known drug dealers and convicted money launderers.<sup>140</sup> Noting Nevada's Rules of Professional Responsibility, Gentile refused to comment about which witnesses had drug backgrounds or about inadmissible trial evidence, such as polygraph test results.<sup>141</sup> A jury acquitted Sanders of all charges.<sup>142</sup>

The State Bar of Nevada filed a complaint against Gentile, charging that his statements at the press conference violated Nevada Supreme Court Rule 177,<sup>143</sup> which prohibits attorneys from making extrajudicial statements that a lawyer knows or reasonably should know would have a "substantial likelihood of materially prejudicing" an adjudication. The Disciplinary Board determined that Gentile violated the rule and recommended a private reprimand.<sup>144</sup> The

<sup>138</sup> Alan Tobin, *Vault Firm to Close its Doors*, LAS VEGAS REV.-J., Mar. 26, 1987, at 1B; *Burglarized Vault Firm Closes Doors*, LAS VEGAS SUN, Mar. 26, 1987; Joint Appendix, *supra* note 1, at 92-93, 114.

<sup>139</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2728 (1991).

<sup>140</sup> *Id.* at 2736-37.

<sup>141</sup> "QUESTION FROM THE FLOOR: Dominic, you mention you question the credibility of some of the witnesses, some of the people named as victims in the government indictment.

Can we go through it and elaborate on their backgrounds, interests—

MR. GENTILE: I can't because ethics prohibit me from doing so.

Last night before I decided I was going to make a statement, I took a good close look at the Rules of Professional Responsibility. There are things that I can say and there are things that I can't. Okay?

I can't name which of the people have the drug backgrounds. I'm sure you guys can find that by doing just a little bit of investigative work."

*Id.* at 2731-32.

<sup>142</sup> *Id.* at 2731.

<sup>143</sup> Nevada Supreme Court Rule 177 uses the same language as Model Rule 3.6. See Model Rule 3.6, *supra* note 52.

<sup>144</sup> The board focused on the following six statements made by Gentile:

(1) "... the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being levelled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Traveller's checks, is Detective Steve Scholl."

(2) "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Traveller's checks than any other living human being."

(3) "Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of

Nevada Supreme Court affirmed.<sup>145</sup>

The United States Supreme Court considered whether courts could regulate attorneys' speech by the same standard applied to the press—"clear and present danger" of "actual prejudice or imminent threat"—or whether courts could impose disciplinary action by applying a lower standard.<sup>146</sup> The Court held that the lower threshold of "substantial likelihood of material prejudice" satisfied the First Amendment, but that Nevada's Rule 177<sup>147</sup> was "void for vagueness" because its safe-harbor provisions misled Gentile into believing his speech was protected.<sup>148</sup>

Justice Rehnquist, who authored a discrete part of the majority opinion,<sup>149</sup> stated that attorney speech has always been constrained by limits both in and out of the courtroom.<sup>150</sup> For instance, while in court, a lawyer cannot oppose a court ruling beyond what is necessary to preserve an issue for appeal.<sup>151</sup> Likewise, out of court, attorneys are subject to ethical restrictions on speech that do not apply to the average citizen. According to Justice Rehnquist, lawyers are regulated by a higher standard because they are officers of the court, whose speech may be interpreted as "especially authoritative."<sup>152</sup> As a result, they must adhere to the governing principles of the

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whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something."

(4) "Now, up until this moment, of course, that [the other victims] started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them."

(5) "I think Grady Sanders was indicted because he—he was a scapegoat the day they opened the [safe-deposit] box."

(6) "We've got some video tapes that if you take a good look at them, I'll tell you what, he [Detective Scholl] either had a hell of a cold or he should have seen a better doctor."

The Board concluded these statements had a substantial likelihood of materially prejudicing the Sanders trial. First, they related to the character, credibility, reputation, and criminal record of witnesses, which violated Rule 177(2)(a). Second, they contained an opinion regarding Sanders' guilt or innocence, prohibited by Rule 177(2)(d). Joint Appendix, *supra* note 1, at 2-4.

<sup>145</sup> *Gentile v. State Bar of Nevada*, 787 P.2d 386, 387 (Nev. 1990). See also *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991).

<sup>146</sup> *Gentile*, 111 S. Ct. at 2742-43.

<sup>147</sup> Nevada Supreme Court Rule 177 uses the same language as Model Rule 3.6. See Model Rule 3.6, *supra* note 52.

<sup>148</sup> *Gentile*, 111 S. Ct. at 2731.

<sup>149</sup> Justice Rehnquist authored the first two sections of the majority opinion and Justice Kennedy wrote the last section. Justices White, O'Connor, Scalia, and Souter joined Justice Rehnquist in his majority opinion.

<sup>150</sup> *Gentile*, 111 S. Ct. at 2740-41.

<sup>151</sup> *Id.* at 2743.

<sup>152</sup> *Id.* at 2745.

criminal justice system, which assure defendants of an impartial trial and maintain the fair administration of justice.<sup>153</sup>

Justice Rehnquist upheld the constitutionality of the "substantial likelihood of material prejudice" standard as one which provides a permissible balance between attorneys' First Amendment rights in pending cases and the state's interest in fair trials.<sup>154</sup> First, this standard protects the integrity and fairness of the state judicial system.<sup>155</sup> Second, it imposes "only narrow and necessary" limitations on attorney speech: it is limited to comments that are substantially likely to have a materially prejudicial effect; it is equally applied to all attorneys in a pending case; and it simply postpones such comments until after trial.<sup>156</sup> The Court added that this standard prevents attorneys from imposing costs on the judicial system through procedures, such as change of venue or extended *voir dire*, which cannot always mute all effects of pretrial publicity.<sup>157</sup> In the name of preserving the integrity of the trial process, Justice Rehnquist stated that such limitations are justified.<sup>158</sup>

Justice Kennedy,<sup>159</sup> in a partial concurrence,<sup>160</sup> did not consider the "substantial likelihood of material prejudice" standard "necessarily flawed."<sup>161</sup> The phraseology of varying standards, argued Justice Kennedy, was not determinative: "A rule governing speech . . . need not use the words 'clear and present danger' in order to pass constitutional muster."<sup>162</sup> He argued that the difference among standards, such as "clear and present danger," "substantial likelihood of material prejudice," and "serious and imminent threat," may be semantics.<sup>163</sup> Regardless of the wording, each standard must assess proximity and degree of harm.<sup>164</sup> While Rule 177—Nevada's adaptation of attorney no-comment rules—meets these requirements under the First Amendment, Justice Kennedy argued that the Nevada Supreme Court did not interpret the

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<sup>153</sup> *Id.* at 2744.

<sup>154</sup> *Id.* at 2745.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Justices Marshall, Blackmun, and Stevens joined with Justice Kennedy in Parts I and II of his opinion.

<sup>160</sup> Although concurring, Justice Kennedy comes from a diametrically opposed view on the role and responsibility in communicating information about a client's case, despite the potential impact on trial.

<sup>161</sup> *Gentile*, 111 S. Ct. at 2725 (Kennedy, J., concurring).

<sup>162</sup> *Id.* (Kennedy, J., concurring).

<sup>163</sup> *Id.* (Kennedy, J., concurring).

<sup>164</sup> *Id.* (Kennedy, J., concurring).

rule in conformity with these principles.<sup>165</sup> Gentile should not have reasonably known that his comments would create a substantial likelihood of materially prejudicing his client's case, said Justice Kennedy, nor did the Nevada Supreme Court offer any proof to this effect.<sup>166</sup>

Justice Kennedy validated Gentile's motives for holding the press conference: to counter prejudicial pretrial publicity and to prevent further suffering by his client.<sup>167</sup> A lawyer may take reasonable steps to defend a client's reputation and offset adverse consequences of prosecution, Justice Kennedy wrote, especially if the prosecution is unjust or improper.<sup>168</sup> A defense attorney, through lawfully permitted strategies, may try to get indictment charges dismissed or reduced, including demonstrating "in the court of public opinion that the client does not deserve to be tried."<sup>169</sup>

Justice Kennedy noted that (1) Gentile's press conference occurred well before the trial; (2) Clark County contained a large jury pool from which to select an untainted jury; (3) Gentile did not discuss any inadmissible evidence, such as polygraph results or any item recovered in searches; (4) the media excerpted coverage of the press conference so that the public did not hear most of the comments; (5) despite the press conference, the general public favored the prosecution due to repeated police and prosecution statements during the preceding months; and (6) both jury selection and the trial proceeded without incident.<sup>170</sup> As a result, Justice Kennedy concluded that no prejudicial harm occurred to warrant Gentile's reprimand.

Unlike the majority, Justice Kennedy<sup>171</sup> did not believe that Nevada should be allowed to interpret its requirement of "substantial likelihood of material prejudice" using more deferential criteria than the accepted First Amendment standard.<sup>172</sup> He rejected the majority's balancing of the state's interest in regulating attorney speech against a lawyer's First Amendment rights, explaining that the contexts in which such a test is appropriate—commercial speech by lawyers or limitations on the use of information obtainable only

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<sup>165</sup> *Id.* at 2725-26 (Kennedy, J., concurring).

<sup>166</sup> *Id.* at 2726 (Kennedy, J., concurring).

<sup>167</sup> *Id.* at 2728 (Kennedy, J., concurring).

<sup>168</sup> *Id.* at 2728-29 (Kennedy, J., concurring).

<sup>169</sup> *Id.* at 2729 (Kennedy, J., concurring).

<sup>170</sup> *Id.* at 2729-30 (Kennedy, J., concurring).

<sup>171</sup> Justice Kennedy's discussion of his disagreement with a portion of the majority decision is found in sections IV and V of the opinion.

<sup>172</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2732 (1991) (Kennedy, J., dissenting).

through the discovery process—did not apply in *Gentile*.<sup>173</sup> Justice Kennedy also disagreed with the majority's belief that attorney speech must be regulated to ensure an impartial trial. Constitutionally protected rights, he said, outweigh infractions of disciplinary rules.<sup>174</sup>

According to Justice Kennedy, even if the Court balanced whether a substantial government interest is furthered by limiting speech and whether this limitation is tailored to protect the specific governmental interest at issue, Nevada's interpretation of Rule 177 would still fail.<sup>175</sup> Without any cited factual or anecdotal proof that a defense lawyer's public statements have ever prejudiced the state's prosecution of a case, or any empirical data showing the pervasive danger of prejudice due to pretrial publicity, little justification exists for a lower standard of First Amendment scrutiny.<sup>176</sup> The police and prosecution have far more ways, both within and beyond the scope of no-comment rules, to disseminate information to the public.<sup>177</sup> The defendant, however, may not feel free to speak, fearful of self-incrimination and tainting his defense. Without an advocate, a defendant is mute.<sup>178</sup> This result reinforces the conclusion that blanket rules governing defense attorneys' speech should first be subject to First Amendment scrutiny.<sup>179</sup>

Attorney no-comment rules do not prohibit an attorney from speaking with the press, wrote Justice Kennedy.<sup>180</sup> Even as an "officer of the court," a lawyer may comment to the press, so long as the statements do not have a substantial likelihood of prejudicing a trial or adjudicative proceeding.<sup>181</sup> Lawyers, unlike nonparticipants in the legal system, have a fiduciary obligation to the court, which prohibits them from thwarting the judicial process. If sequestration or continuances became continually necessary as a result of the prejudicial effect of attorneys' speech, "a substantial governmental in-

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<sup>173</sup> *Id.* at 2733 (Kennedy, J., dissenting).

<sup>174</sup> *Id.* at 2734 (Kennedy, J., dissenting).

<sup>175</sup> *Id.* (Kennedy, J., dissenting).

<sup>176</sup> *Id.* (Kennedy, J., dissenting). In the oral argument before the Supreme Court, the State Bar of Nevada admitted that Rule 177(2) created no evidentiary presumption at an adjudicative proceeding. In other words, while Rule 177 provides guidance, the bar still bears the burden of proving, by clear and convincing evidence, that the extrajudicial statements caused a substantial likelihood of material prejudice. Transcript of Oral Argument before the Supreme Court of the United States in the Matter of *Gentile v. State Bar of Nevada* (Apr. 15, 1991).

<sup>177</sup> *Gentile*, 111 S. Ct. at 2735 (Kennedy, J., dissenting).

<sup>178</sup> *Id.* (Kennedy, J., dissenting).

<sup>179</sup> *Id.* (Kennedy, J., dissenting).

<sup>180</sup> *Id.* (Kennedy, J., dissenting).

<sup>181</sup> *Id.* (Kennedy, J., dissenting).



terest might support additional regulation of speech.”<sup>182</sup> In this case, however, Gentile’s speech carried so little weight that the Court could not wholly recommend restriction of attorney free speech.<sup>183</sup> Rule 177’s application to *Gentile* “represents a limitation of First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood”<sup>184</sup> to justify this limitation.

In his part of the majority opinion,<sup>185</sup> Justice Kennedy held Rule 177, as interpreted by the Nevada Supreme Court, void for vagueness because the safe-harbor provisions of Rule 177(3) led Gentile to believe he could comment on certain topics without fear of discipline. Under Rule 177(3)(a), an attorney may discuss “without elaboration” the general nature of a defense, “notwithstanding” subsections 1 and 2(a-f).<sup>186</sup> Thus, a lawyer can comment on his client’s general defense theory “without elaboration,” even if the remarks refer to the character, credibility, reputation, or criminal record of witnesses, or if the lawyer knows or reasonably should have known the statement will have a substantial likelihood of material prejudice.<sup>187</sup>

The Court stated that a lawyer’s right to comment on the “general” nature of the defense theory “without elaboration” provided insufficient guidelines.<sup>188</sup> An attorney trying to work within the context of these rules is forced to “guess at its contours,” resulting in haphazard speculation about proper usage.<sup>189</sup> Without a settled interpretation of these rules, “the lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.”<sup>190</sup> Gentile believed he was abiding by Rule 177(3) by refusing to elaborate on the backgrounds of potential witnesses.<sup>191</sup> Nonetheless, the Nevada Supreme Court said these comments went beyond the scope of appropriate speech.<sup>192</sup> That Gentile violated the rules even after researching them proved that Rule 177 creates a trap for both the wary and

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<sup>182</sup> *Id.* at 2735-36 (Kennedy, J., dissenting).

<sup>183</sup> *Id.* at 2736 (Kennedy, J., dissenting).

<sup>184</sup> *Id.* (Kennedy, J., dissenting).

<sup>185</sup> Justices Marshall, Blackmun, Stevens, and O’Connor joined Justice Kennedy in holding Rule 177 void for vagueness.

<sup>186</sup> *Gentile*, 111 S. Ct. at 2731.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 2732.

unwary.<sup>193</sup>

Dissenting to the majority's ruling that Rule 177 was void for vagueness, Justice Rehnquist<sup>194</sup> argued that for a rule to be overbroad, it must prohibit constitutionally protected conduct,<sup>195</sup> and to be unconstitutional, the overbreadth must be substantial.<sup>196</sup> Rule 177 is no broader than required to protect the State's interests: it applies only to lawyers involved in pending cases and only to comments that present a risk of material prejudice to a trial.<sup>197</sup>

According to Justice Rehnquist, Rule 177 provided Gentile with sufficient notice of discipline because it listed unacceptable conduct that posed a threat to the fair administration of justice.<sup>198</sup> Having studied the rules, Gentile could not complain about a lack of notice because he admitted he called the press conference specifically to influence potential jurors.<sup>199</sup> While the dissent acknowledged that Gentile held the press conference well in advance of trial, it agreed with the Nevada Supreme Court that Gentile timed his comments, which immediately followed his client's arraignment, to have maximum impact. Gentile would not have held the press conference, the dissent argued, if he had not believed he would have a substantial likelihood of influencing the venire and countering previous publicity.<sup>200</sup> The dissent concluded that, as an attorney, Gentile swore to uphold the Rules of Professional Conduct; the First Amendment did not excuse him from honoring this oath.<sup>201</sup>

The Supreme Court access-to-information cases demonstrate a strong presumption for First Amendment rights, criticizing trial courts for attempting to restrict the public's access to information through open court proceedings. Within these proceedings, however, the same prejudicial information prohibited by attorney no-comment rules is available for public consumption in open court. These two lines of cases are not reconciled in *Gentile* and, as a result, they stand pitted on a "collision course"<sup>202</sup> with each other.

Two ways exist for prejudicial information to be disseminated

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<sup>193</sup> *Id.*

<sup>194</sup> Justices White, Scalia, and Souter joined Justice Rehnquist in his dissent.

<sup>195</sup> *Gentile*, 111 S. Ct. at 2746 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)) (Rehnquist, C.J., dissenting).

<sup>196</sup> *Id.* (citing *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 485 (1989)) (Rehnquist, C.J., dissenting).

<sup>197</sup> *Id.* (Rehnquist, C.J., dissenting).

<sup>198</sup> *Id.* (Rehnquist, C.J., dissenting).

<sup>199</sup> *Id.* (Rehnquist, C.J., dissenting).

<sup>200</sup> *Id.* at 2747 (Rehnquist, C.J., dissenting).

<sup>201</sup> *Id.* (Rehnquist, C.J., dissenting).

<sup>202</sup> My apologies to Justice O'Connor, who used the phrase in reference to *Roe v. Wade* in *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983).

to the public prior to trial. An attorney may talk to the press outside of the courtroom, or an attorney may talk to a judge or magistrate in open court proceedings. By restraining a lawyer's extrajudicial speech, the Court in *Gentile* ignores the practical way in which information is disseminated. For instance, evidence seized without a search warrant may be discussed in a publicly filed motion to suppress and later argued at a hearing in open court. This Comment argues that in seeking to preclude this information from public consumption, the Court imposes an unconstitutional restraint on lawyers that ultimately does not accomplish its intended purpose.

Historically, the Court has carefully guarded freedom of speech, deeming prior restraints the "most serious and the least tolerable infringement on First Amendment rights."<sup>203</sup> To justify imposition of a prior restraint, parties have traditionally carried a heavy burden of proof. A unanimous Supreme Court held in *Organization for a Better Austin v. Keefe* that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."<sup>204</sup> Likewise, in *Procurier v. Martinez*, the Court declared that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."<sup>205</sup> The Court upheld the high value placed on free speech in *Press-Enterprise I* by imposing an equally stringent standard that required court hearings to be open to the public unless an overriding interest is likely to be prejudiced.<sup>206</sup> Further, the closure must be no broader than is necessary to protect that interest, and the trial court must consider reasonable alternatives to closure.<sup>207</sup> If these conditions are not met so that a prior restraint or closure fails to accomplish its intended purpose, the limitation is unconstitutional.<sup>208</sup>

Attorney no-comment rules impose a serious prior restraint on speech, but they fail to show that the overriding interest in a defendant's right to a fair trial is likely to be prejudiced. The fact that the same information these rules seek to suppress surfaces in public,

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<sup>203</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1975). See also *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>204</sup> *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (respondent real estate broker did not meet heavy burden to justify imposition of prior restraint on community's peaceful distribution of informational pamphlets).

<sup>205</sup> *Procurier v. Martinez*, 416 U.S. 396, 413 (1974) (prison officials' censorship of inmates' direct personal correspondence violated prisoners' First Amendment rights).

<sup>206</sup> *Press-Enterprise I*, 464 U.S. 501, 510-11 (1984). Such alternatives include *voir dire*, change of venue, continuance, extensive jury instructions, or jury sequestration.

<sup>207</sup> *Id.*

<sup>208</sup> See *Org. for a Better Austin*, 402 U.S. 415; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Press-Enterprise II*, 478 U.S. 1 (1986).

pretrial, and trial proceedings indicates that the restraint is, at the very least, ineffective and, at most, unconstitutional. Attorney no-comment rules do not prevent an attorney from disseminating information; they only postpone the time and change the forum in which this information is discussed. These rules fail to accomplish the narrowly tailored goal of protecting certain prejudicial information from public dissemination and therefore, they cannot constitutionally justify restriction of lawyers' free speech.

## V. ELIMINATION OF ATTORNEY NO-COMMENT RULES

As previously stated, almost all information prohibited by attorney no-comment rules becomes available at various pretrial hearings. Such proceedings include preliminary hearings, in which the judge assesses whether probable cause exists to hold a suspect over for trial;<sup>209</sup> bond hearings, in which the judge determines whether to release a defendant on bail, and if so, sets the amount of the bond;<sup>210</sup> arraignment, where the judge advises a defendant of the formal charges against him, and the defendant enters a plea;<sup>211</sup> and suppression hearings, in which a defendant seeks to prevent the introduction of evidence on legal grounds.<sup>212</sup> While these procedures may vary between federal and state jurisdictions, all courts hold pretrial hearings that elicit similar information.

Model Rule 3.6 prohibits all extrajudicial statements that a lawyer should reasonably know will have a "substantial likelihood of materially prejudicing an adjudicative hearing."<sup>213</sup> It also lists seven categories from which an attorney may state information, but without elaboration.<sup>214</sup> Nearly all the information banned by Model Rule 3.6 is available in routine courtroom procedures that are open to the public. As a result, the realities of legal procedure and the practical effect of the access-to-information cases thwart the pur-

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<sup>209</sup> WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE*, § 14.1(a) (1985).

<sup>210</sup> *Id.* §§ 12.1(a),(b).

<sup>211</sup> *Id.* § 20.4.

<sup>212</sup> *Id.* § 10.5(a).

<sup>213</sup> See Model Rule 3.6, *supra* note 52.

<sup>214</sup> *Id.* These categories include the general nature of the claim or defense; the information available in public records; the fact that an investigation is ongoing and the general scope of the investigation, including the offense or claim or defense involved and the identity of the persons, except where prohibited by law; the scheduling or result of any litigation stage; a request for assistance in gathering evidence; a danger warning concerning the behavior of a person involved if an individual or the public interest is at risk; and in a criminal case, basic facts about the status of the accused; information to aid in the apprehension of the accused, if necessary; the fact, time, and place of arrest; and the identity of the agencies or officers involved in the arrest or investigation.

pose of attorney no-comment rules, which is to prevent dissemination of information that might prejudice a defendant's trial.

Model Rule 3.6 prohibits attorneys from disseminating much of the same information that becomes available during an open-court preliminary hearing. Model Rule 3.6(b)(1) bars discussion of the character, credibility, reputation, or criminal record of a party, suspect, or witness in a criminal investigation, as well as a witness' identity or expected testimony.<sup>215</sup> Yet, a witness' identity is immediately known upon taking the stand at a preliminary hearing, and his credibility may be tested through opposing counsel's cross-examination. All witnesses, especially those who have a checkered criminal past or are cooperating with the government place their character and credibility at issue, specifically if their testimony will affect whether the suspect will be tried.

Even if the only witness at a preliminary hearing is a police officer, the very information that attorney no-comment rules prohibit is likely to be revealed. For instance, according to Model Rule 3.6(c)(7),<sup>216</sup> attorneys may state only the bare facts—without elaboration—about the following information: the accused's identity, residence, occupation, and family status; the fact, time, and place of arrest; and the identity of investigating and arresting officers or agencies. Yet, if a suspect is arrested at home or while on the job, details about the suspect's home or work, as well as information about the suspect's family and the nature of the arrest will be disclosed. In fact, the officer may fully testify as to his detailed participation in the arrest.

Information apt to be revealed by law enforcement officers includes the execution of any search,<sup>217</sup> interviews of witnesses on the scene,<sup>218</sup> interrogations of the suspect, the performance of any inculpatory tests,<sup>219</sup> such as a breathalyzer, blood, or drug tests, and whether the suspect made a statement or exercised her right to silence<sup>220</sup> pursuant to a Miranda warning.<sup>221</sup> Even if this information is not disclosed on direct examination, the defense attorney may cross-examine the witness and extract this same information. In addition, a material witness who testifies at the preliminary hearing also violates the intent of no-comment rules by publicizing his ex-

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<sup>215</sup> See Model Rule 3.6(b)(1), *supra* note 52.

<sup>216</sup> *Id.*

<sup>217</sup> See Model Rule 3.6(b)(3), *supra* note 52.

<sup>218</sup> See Model Rule 3.6(b)(1), *supra* note 52.

<sup>219</sup> See Model Rule 3.6(b)(3), *supra* note 52.

<sup>220</sup> See Model Rule 3.6(b)(2), *supra* note 52.

<sup>221</sup> The contents of the admission or confession may not necessarily be disclosed at the preliminary hearing pursuant to evidentiary rules regarding hearsay.

pected testimony. While lawyers often try to prevent witnesses from testifying on the record prior to the actual trial so as not create impeachment material, this is not always avoidable. In such cases, a witness may testify at the preliminary hearing as to specific actions allegedly committed by the defendant; the witness may then later recount this same testimony during the actual trial. By previewing his testimony during a pretrial hearing, the witness may impede the very purpose of preventing an attorney from discussing anticipated testimony.

In *Gentile*, the local media covered most of the information that Gentile "disclosed" to the public well before any preliminary proceedings. The daily newspapers reported the theft in February 1987<sup>222</sup> and proceeded to divulge other information that normally would surface during a preliminary hearing, such as the officers' names, the main suspect (Grady Sanders),<sup>223</sup> his occupation,<sup>224</sup> place of business,<sup>225</sup> alleged past bad acts,<sup>226</sup> Sanders' rebuttal to these reported acts,<sup>227</sup> and the results of the police officers' polygraph<sup>228</sup> and drug<sup>229</sup> tests. Had the press not reported this information, many of the details may not have been known until trial since a state grand jury indicted Sanders,<sup>230</sup> eliminating the need for a preliminary hearing.<sup>231</sup> Unless the court seals the grand jury indictment, however, the document is usually available and contains such information as the approximate date of the offense, the alleged crime, and the name of the defendant and any co-conspirators.<sup>232</sup>

Bond hearings, which are typically open to the public, may also

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<sup>222</sup> Alan Tobin, *Burglary of Police Vault Probed*, LAS VEGAS REV.-J., Feb. 2, 1987, at 1A; Ed Koch, *Loot, Drugs Stolen from Metro Safe*, LAS VEGAS SUN, Feb. 2, 1987, at 1A; Joint Appendix, *supra* note 1, at 84-86, 104-05.

<sup>223</sup> Tobin, *supra* note 135; Joint Appendix, *supra* note 1, at 90-91.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Detective Thomas Dillard filed an affidavit with the Clark County District Court, alleging that in the past, Sanders previously had drilled open customers' deposit boxes without permission and found illegal drugs at least 15 times, but he did not report these incidents to the police. Tobin, *supra* note 222.

<sup>227</sup> Synopsis of KLAS News Broadcasts (Mar. 10, 1987); Joint Appendix, *supra* note 1, at 130.

<sup>228</sup> Ed Koch, *Reward Offered in Vault Cases; 2 Officers Cleared*, LAS VEGAS SUN, Mar. 11, 1987; Joint Appendix, *supra* note 1, at 112-13.

<sup>229</sup> *9 Pounds of Cocaine Part of Metro Heist*, LAS VEGAS REV.-J., Feb. 5, 1987, at 1B; Joint Appendix, *supra* note 1, at 88-89.

<sup>230</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2728 (1991).

<sup>231</sup> In grand jury proceedings, neither the hearing nor the evidence presented to the grand jury are open to the public. LAFAVE & ISRAEL, *supra* note 209, §§ 8.1, 8.5(b).

<sup>232</sup> Federal Rule of Criminal Procedure 7(c) states that "the indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." FED. R. CRIM. P. 7(c). Many states have provisions that are almost

reveal certain information that attorney no-comment rules attempt to conceal. At a bond hearing, the judge determines if a suspect may be released on a personal or recognizance bond, which does not require a monetary deposit, or a cash bail bond, which requires that at least ten percent of the total amount of the bond be paid to assure the defendant's appearance at future court proceedings.<sup>233</sup>

At bond hearings in state courts, a judge weighs the nature and severity of a crime, the strength of the case against the defendant, and the suspect's prior criminal record.<sup>234</sup> In federal courts, judges usually consider a larger number of factors in their determinations, pursuant to the 1984 Bail Reform Act.<sup>235</sup> In order to show that the suspect has strong community ties that will ensure his presence at trial, the defense attorney may discuss the suspect's family, employment, residence, and even reputation in the community.<sup>236</sup> This is the same information either prohibited or strictly curtailed outside of the courtroom under Model Rule 3.6.<sup>237</sup> Likewise, the prosecution may bring to light a suspect's prior criminal history to show that the suspect is a threat to society or to negatively reflect his character in order to increase the amount of the bond. As previously discussed, attorney no-comment rules ban references to the defendant's character and past criminal record.<sup>238</sup>

Information that is precluded by attorney no-comment rules also surfaces in open-court arraignments. At the arraignment, the defendant appears in court and enters a plea of either not guilty, guilty, not guilty by reason of insanity, or *nolo contendere*, which has the same effect as a guilty plea.<sup>239</sup> This pretrial proceeding is at odds with Model Rule 3.6(b)(4),<sup>240</sup> which bans comments that contain "any opinion as to the guilt or innocence" of a defendant. While a formal plea disclosed at arraignment may not be considered

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identical to the federal rules provisions. LAFAYE & ISRAEL, *supra* note 209, §§ 19.2 (a),(d).

<sup>233</sup> LAFAYE & ISRAEL, *supra* note 209, § 12.1(b).

<sup>234</sup> *Id.* A judge has the discretion to inquire into a defendant's character and background, but he may choose not to do so due to time constraints. *Id.*

<sup>235</sup> The 1984 Bail Reform Act, 18 U.S.C. § 3142(g) (1985), specifies that the following factors should be considered in determining bail conditions for federal crimes: the nature of the crime; the weight of the evidence against the suspect; the history and characteristics of the individual, including character, physical and mental condition, family and community ties, employment, financial resources, past alcohol or drug abuse, past criminal record, any danger posed to society, and parole or probationary status, if applicable, at the time of the offense or arrest.

<sup>236</sup> LAFAYE & ISRAEL, *supra* note 209, § 12.1(d).

<sup>237</sup> See Model Rule 3.6(b)(1) and 3.6(c)(7)(i), *supra* note 52.

<sup>238</sup> See Model Rule 3.6(b)(1), *supra* note 52.

<sup>239</sup> LAFAYE & ISRAEL, *supra* note 209, § 20.4(a).

<sup>240</sup> See Model Rule 3.6(b)(4), *supra* note 52.

an "opinion," the plea itself constitutes a statement that the defense intends to prove through evidence presented at trial. In that sense, Grady Sanders' "not guilty" plea at the arraignment did not differ significantly from Gentile's statement regarding Sanders' innocence at the press conference:

When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and the money . . . is Detective Steve Scholl.<sup>241</sup>

Obviously, if the defendant pleads guilty to the charges against him, there is no risk that attorney comments will prejudice the defendant, as no adjudicative hearing will take place. However, if the defendant pleads not guilty, the judge will set a trial schedule. At this time, the defense may inform the court of plans to file pretrial motions, such as a suppression motion, which may seek to exclude certain evidence alleged to have been obtained illegally.<sup>242</sup>

Pretrial hearings often bring to light information specifically prohibited by Model Rule 3.6, namely the existence or contents of a confession, admission, or statement by the suspect;<sup>243</sup> the performance or results of an examination or test;<sup>244</sup> statements concerning the character, credibility, or reputation of a witness;<sup>245</sup> or information the lawyer knows or should reasonably know will be inadmissible as evidence at trial, such as illegally seized property.<sup>246</sup> In a written suppression motion or at an in-court hearing, Fourth Amendment<sup>247</sup> and Fifth Amendment<sup>248</sup> violations, in the form of

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<sup>241</sup> Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada at 4, *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991) (No. 89-1836). Although Gentile did not carry the burden of proving who committed the crime, jurors stated that had Scholl been charged, they would have convicted him. Joint Appendix, *supra* note 1, at 34.

<sup>242</sup> LAFAYE & ISRAEL, *supra* note 209, § 10.1(a). This evidence may be mentioned as early as the preliminary hearing, however, the circumstances are most fully discussed at the suppression hearing. The suppression hearing is presumptively open, according to *Waller v. Georgia*, 467 U.S. 39 (1984), unless the party who moves to close the hearing presents an overriding interest that is likely to be prejudiced; the closure is no broader than necessary to protect the interest; the trial court considers alternatives to closure; and the findings adequately support closure of the hearing.

<sup>243</sup> See Model Rule 3.6(b)(2), *supra* note 52.

<sup>244</sup> See Model Rule 3.6(b)(3), *supra* note 52.

<sup>245</sup> See Model Rule 3.6(b)(1), *supra* note 52.

<sup>246</sup> See Model Rule 3.6(b)(5), *supra* note 52.

<sup>247</sup> The Fourth Amendment protects people against "unreasonable searches and seizures" and requires search warrants to be supported by probable cause and itemized regarding the location to be searched and the persons or items to be seized. U.S. CONST. amend. IV.



coerced confessions, illegally seized evidence, or warrantless searches,<sup>249</sup> are most likely to be cited as the cause of the illegally seized evidence. The defense may also allege police and/or prosecutorial misconduct, including the names of the officers involved in such misconduct, the nature of the violation, the contents of any confession, and/or the items seized in the search. Attorney no-comment rules, while prohibiting public discussion by lawyers, do not prevent the information from entering the public forum. What is forbidden to be discussed outside the courtroom is often the very same information discussed in the open courtroom.

This process of public dissemination is illustrated in the Sanders' case. Shortly after the theft, police announced that the two intelligence bureau detectives with access to the vault had voluntarily taken and passed drug tests.<sup>250</sup> At his press conference, Gentile stated that:

[T]he person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' checks, is Detective Steve Scholl. There is far more evidence that will establish that Detective Scholl took these drugs . . . than any other living human being. . . . We've got some videotapes that if you take a look at them . . . [Detective Scholl] either had a hell of a cold or he should have seen a better doctor.<sup>251</sup>

In a pretrial motion, Gentile sought to compel production of hair exemplars from Detective Steve Scholl and two other detectives, believed by Gentile to have used cocaine.<sup>252</sup> In this motion, Gentile stated the underlying facts surrounding the detectives' access to the safe deposit box containing large amounts of cocaine; the high degree of inaccuracy of urinalysis tests for the detection of cocaine; and the relevancy of an accurate drug test to link the missing drugs to the detectives.<sup>253</sup> "It would not be unreasonable to infer that some amount of this [4,000 grams of] cocaine is still in existence, and has been used slowly over the last year and a half by these officers, or, in the alternative, has been sold by them," asserted Gentile.<sup>254</sup>

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<sup>248</sup> The Fifth Amendment protects against compelled self-incrimination and the deprivation of "life, liberty, or property without due process of law." U.S. CONST. amend. V.

<sup>249</sup> *LAFAVE & ISRAEL*, *supra* note 209, §§ 10.3(b),(c).

<sup>250</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2727 (1991).

<sup>251</sup> *Gentile*, 111 S. Ct. at 2736-37, 2739.

<sup>252</sup> Motion to Compel Production of Hair Exemplars from Detective Steve Scholl, Detective Louis Detiberiis, and Former Detective Edward Schaub (July 1988) (on file with Clark County District Court).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

The information, disclosed in the judicial proceedings described above, is part of the public record, unless it is sealed by court order. According to Supreme Court decisions, the court proceedings in which this information is discussed, are open to the public.<sup>255</sup> The public and press may attend these proceedings; they may listen to the information discussed between the witnesses, attorneys, and judge; and they may publish or disseminate such information. Yet, according to attorney no-comment rules, lawyers are prohibited from discussing this same information outside of the courtroom. These rules do not alter the fact that this information is, in fact, disseminated prior to trial; it merely alters the timing of such dissemination, postponing it until it is discussed in open court, rather than outside of court, where it risks prejudicing the jury.

Strong policy reasons exist for allowing the early release of this information, many of which mirror the reasons given by the United States Supreme Court in its decisions to allow public access to court proceedings. First, the public has an inherent interest in maintaining a check on the judicial system and its actors. Allowing lawyers to comment on improper behavior by prosecutors, police officers, and even judges increases public awareness and motivates societal action. Justice Kennedy noted the important role attorneys play in communicating with the public:

To the extent the press and the public rely upon attorneys for information because attorneys are well-informed, this may prove the value to the public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions.<sup>256</sup>

The Supreme Court also recognized that suppression of what may be considered prejudicial information masks larger, societal issues that may only be reformed through public awareness and access to information.

[D]isclosure of the circumstances surrounding the obtaining of an involuntary confession or the conduct of an illegal search . . . may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargaining proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the de-

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<sup>255</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise I*, 464 U.S. 501 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise II*, 478 U.S. 1 (1986).

<sup>256</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2735 (1991) (Kennedy, J., concurring).

tails of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice; commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern . . . ; dissemination of the fact that indicted individuals who had been accused of similar misdeeds in the past had not been prosecuted or had received only mild sentences may generate crucial debate on the functioning of the criminal justice system; revelation of the fact that despite apparently overwhelming evidence of guilt, prosecutions were dropped or never commenced against large campaign contributors or members of special interest groups may indicate possible corruption among government officials; and disclosure of the fact that a suspect has been apprehended as the perpetrator of a heinous crime may be necessary to calm community fears that the actual perpetrator is still at large.<sup>257</sup>

Attorney no-comment rules muzzle those individuals who are often in the best position to create awareness.<sup>258</sup> Lawyers usually have greater access to information than even the courts, where not all evidence of interest to the public may surface. Because of their unique access to information, attorneys may be seen as especially authoritative or persuasive.<sup>259</sup> The trial process and the backlog of cases that plague most courtrooms further delay public knowledge of this misconduct, so that by the time it is brought to the public's attention, the community's interest and energy may have waned or been diverted.

In *Gentile*, defense counsel could not elaborate about his theory that undercover detective Steve Scholl stole the drugs and money missing from the vault. Gentile could not comment about his independent probe of Scholl,<sup>260</sup> his knowledge that Scholl used cocaine,<sup>261</sup> or the reasons why the polygraph tests administered by Ray Slaughter, the private detective who was later arrested and tried

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<sup>257</sup> *Nebraska Press*, 427 U.S. at 605-06.

<sup>258</sup> See generally *Gentile*, 111 S. Ct. at 2735 (Kennedy, J., concurring).

<sup>259</sup> *Id.* at 2733, 2735 (Kennedy, J., concurring).

<sup>260</sup> "QUESTION FROM THE FLOOR: Have you conducted your own investigation of Detective Scholl and his role in this?"

MR. GENTILE: Well, yes. The answer to this is yes. And I'm not—not only at liberty to discuss that, George, but the fact is that I would be a pretty dumb lawyer if I gave it up now, wouldn't I?"

Press Conference Re Grady Sanders by Dominic Gentile in Las Vegas, Nev. (Feb. 5, 1988).

<sup>261</sup> Gentile said in the press conference that "[The police] were playing very fast and loose. . . . We've got some videotapes that if you take a look at them, I'll tell you what, [Detective Scholl] either had a hell of a cold or he should have seen a better doctor." *Gentile*, 111 S. Ct. at 2739.

on federal drug charges, could not be trusted.<sup>262</sup> The police department, headed by the popular Sheriff Moran, instituted a full-fledged public relations campaign, which lauded the work of the two officers and commended the police in their investigation.<sup>263</sup> For every negative or accusatory comment made about these officers or the police force in general, a police spokesperson rebutted with assurances of competence and the constant reminder that the officers in question had passed polygraph tests.<sup>264</sup> And when Gentile held a press conference to offset this adverse publicity, the police countered with its own press conference.<sup>265</sup>

The *Gentile* case demonstrates in a dramatic fashion that the public does not benefit from the withholding of such important information until trial. By waiting until the appropriate court proceeding for evidence to publicly surface—especially information that impacts directly on society—public confidence may erode and community activism may ebb. This delay continues until such information finally comes to light during a pretrial hearing or at the trial itself.

Trial judges must determine the existence of probable cause, or the guilt or innocence of a defendant. They are in no position to investigate charges of police or prosecutorial conduct at that time. More often, a public investigation must take place, which removes the issue from the court and places it within a bureaucratic office.

Ironically, while no-comment rules prohibit attorneys from disseminating “prejudicial” information through extrajudicial statements, the later this information gets out through court proceedings, the more likely it is to have the very same prejudicial effect that judges fear will threaten a jury’s impartiality. For instance, Gentile intentionally held the press conference the day his client was arraigned, knowing that, as a result of the six-month delay, his statements would *not* prejudice his client’s trial.<sup>266</sup> Had this information come out closer to the trial date, the likelihood of tainting the trial process would have substantially increased.

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<sup>262</sup> “QUESTION FROM THE FLOOR: Did the cops pass the polygraph?”

MR. GENTILE: Well, I would like to give you a comment on that, except that Ray Slaughter’s trial is coming up and I don’t want to get in the way of anybody being able to defend themselves.

QUESTION FROM THE FLOOR: Do you think the Slaughter case—that there’s a connection?

MR. GENTILE: Absolutely. I don’t think there is any question about it, and—”

*Id.* at 2732.

<sup>263</sup> Tobin, *supra* note 222.

<sup>264</sup> Koch, *supra* note 228.

<sup>265</sup> Tobin & Bates, *supra* note 136; Joint Appendix, *supra* note 1, at 100-03.

<sup>266</sup> Joint Appendix, *supra* note 1, at 44.

The indiscriminate application of attorney no-comment rules also unfairly burdens the defense. While these rules are intended to apply to lawyers on both sides, in fact, the prosecution has a mouthpiece that is not regulated: the police. Most information in state criminal cases, as demonstrated in *Gentile*, comes from the police. These law enforcement officers are not subject to the same rules by which "officers of the court" must abide. As a result, police are free to divulge prejudicial information to the public and press, which benefits the public image and efforts of both the prosecutor, as well as the police department. These efforts often lead to an arrest or the filing of an indictment or information, which in itself may be a presumption of probable guilt to some citizens.

Unable to counter this inference, the defendant must live with this presumption until trial. During the pretrial and trial period, the defendant cannot respond through defense counsel to the accusations in extrajudicial statements. In contrast, often acting as the prosecution's mouthpiece, the police has free reign to disseminate probative information about the case. Even if acquitted, a defendant may not necessarily be vindicated in the public eye. A trial verdict may be less widely and/or more obscurely publicized, than the original accusation.<sup>267</sup> While Model Rule 3.6 seeks to preserve a defendant's constitutional right to a fair trial, in reality, the system does not accomplish its goals.

#### VI. POSSIBLE EFFECTS OF ABOLISHING ATTORNEY NO-COMMENT RULES

Attorney no-comment rules pose an unconstitutional limitation on free speech and should be abolished. A world without attorney no-comment rules, however, is not a world without standards on extrajudicial speech. Attorney no-comment rules put the onus on lawyers to curb their extrajudicial speech, and state disciplinary commissions to discipline those lawyers who violate the rules. Abolishment of no-comment rules shifts the burden back to the trial courts, reverting to the system as it existed prior to the establishment of these rules. The lower courts, having learned how to handle high-profile cases, are equipped to monitor lawyers' extrajudicial speech without the ambiguity of attorney no-comment rules.

Rather than abolishing attorney no-comment rules, state supreme courts could choose to modify their local disciplinary rules

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<sup>267</sup> Joel H. Swift, *Restraints on Defense Publicity in Criminal Jury Cases*, 1984 UTAH L. REV. 45, 76 (1984).

in an attempt to eliminate the vagueness cited by the Supreme Court in *Gentile*. To wit, the State Bar of Nevada is currently considering a modification of Rule 177, which states:

A lawyer shall not make any extrajudicial statement that would reasonably be expected 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; however, a lawyer may make a statement if the lawyer has a good faith belief, based upon the totality of facts and circumstances known to the lawyer at the time, that the content of the statement is admissible at a subsequent hearing or trial or properly arguable from anticipated evidence; and

- (a) protects the public from substantial future harm; or
- (b) protects the lawyer's client from substantial prejudicial publicity not initiated by the lawyer or his client; or
- (c) reveals governmental corruption or abuse of power.<sup>268</sup>

While these changes may facially clarify the rule, there is no guarantee that they will be uniformly interpreted or lend themselves to a consistent interpretation by lawyers, state disciplinary commissions, or state supreme courts. Furthermore, state supreme courts are too far removed from the fact-specific situations in which extrajudicial speech violations are likely to occur. Their ability to gauge such extrajudicial speech is further stymied by the fact that attorneys often are not brought up on disciplinary charges until well after the prejudicial information has been disseminated and the adjudicative proceeding is over. In *Gentile's* case, more than six months elapsed between the press conference and the complaint filed against *Gentile*, charging him with violating Rule 177.<sup>269</sup> And it was not until February 1990 when the Supreme Court of Nevada ordered that *Gentile* be privately reprimanded for his violation of Rule 177.<sup>270</sup>

Instead of encouraging state supreme courts to revise the disciplinary rule and monitor attorney conduct after-the-fact, judicial review of lawyers' extrajudicial speech at the trial level would force the courts to develop a consistent standard to control the dissemination of prejudicial information so as not to create "a trap for the wary as well as the unwary,"<sup>271</sup> which currently exists in attorney no-comment rules. Trial courts are more equipped than state supreme courts, which typically oversee state disciplinary commissions, to regulate such speech. After all, lower courts preside over adjudica-

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<sup>268</sup> Dominic P. Gentile, *Proposed Revision to Supreme Court Rule 177*, THE NEVADA LAWYER, Jan. 1993, at 7.

<sup>269</sup> *Gentile v. State Bar of Nevada*, 787 P.2d 386 (Nev. 1990).

<sup>270</sup> *Id.*

<sup>271</sup> *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2732 (1991).

tive proceedings, and they are in a better position to assess possible prejudicial information and protect a defendant's right to a fair trial. Rather than attempting to enforce ambiguous ethical and disciplinary rules, trial courts' may ease this conflict by establishing a constitutional standard by which to impose trial-participant gag orders and monitor attorneys' extrajudicial speech. The creation of such guidelines will instruct both judges, who must enforce this standard, as well as participants in extrajudicial speech, who must abide by this standard or risk serious repercussions. While lower courts do not have the power to censure, suspend, or disbar lawyers, they may impose fines, hold lawyers in contempt of court, or refer them to the state disciplinary board, the immediacy of which serves as an effective deterrent. Abolishment of attorney no-comment rules, therefore, allows trial courts to monitor lawyers' extrajudicial speech and impose necessary sanctions.

It is possible that without formal disciplinary rules with which to censure lawyers, courts may be tempted to respond to their fear of unrestrained dissemination of prejudicial information by gagging the media or closing courtrooms. Trial courts, however, are more knowledgeable and experienced at handling high-profile cases than they were twenty years ago. They now know, from Supreme Court access-to-information rulings,<sup>272</sup> that less invasive procedures, such as change of venue, continuance, jury instructions and sequestration, and extensive *voir dire*, can and should be used to curb prejudicial speech before imposing more severe measures, such as courtroom closure or gag orders. Furthermore, First Amendment jurisprudence<sup>273</sup> suggests that higher courts are apt to reverse gag orders that are hastily imposed by trial courts. The Supreme Court has emphasized that use of these tactics to suppress information are an instrument of last resort. The Court has clearly stated that the public's right of access to the courtroom prevails unless a higher interest, such as a defendant's right to fair trial, is at risk.<sup>274</sup> Only when this higher interest is at stake may gag orders or courtroom closure be issued, and even then, courts must narrowly craft these procedures to specifically serve that higher interest.<sup>275</sup>

Even with this guidance from the Supreme Court, however, the

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<sup>272</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise I*, 464 U.S. 501 (1984); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise II*, 478 U.S. 1 (1986).

<sup>273</sup> The First Amendment access-to-information cases discussed herein require trial courts to use less severe tactics before imposing a gag order. See *supra* part III.

<sup>274</sup> See *Richmond*, 448 U.S. 555 (1980); *Press-Enterprise I*, 464 U.S. 501 (1984).

<sup>275</sup> *Press-Enterprise I*, 464 U.S. at 509-10.

abolishment of attorney no-comment rules may cause judges to gag trial participants, as opposed to the media. Judges may be inclined to issue gag orders to ensure smooth trials, free from accusations regarding prejudicial publicity due to extrajudicial speech.<sup>276</sup> They may also gag trial participants to prevent criticism of judicial performance in handling sensitive cases and protecting defendants' Sixth Amendment rights.<sup>277</sup> The uncertainty and fear associated with prejudicial publicity may also cause judges to prematurely curtail trial-participant speech. Often, the decision to gag is made even before the prejudicial impact of publicity can be accurately assessed.<sup>278</sup>

An increase in trial-participant gag orders, however, is not necessarily harmful. First, the practical effect of the Supreme Court's access-to-information decisions, which allows lawyers to discuss potentially prejudicial information inside the courtroom, often renders moot the imposition of a gag order. Furthermore, any adverse reaction to gag orders is likely to prompt a judicial review of gag orders and attorneys' extrajudicial speech. Judicial review of trial-participant gag orders, resulting from the abolishment of attorney no-comment rules, will lead to a more consistent standard by which to monitor lawyers' extrajudicial speech. Attorney no-comment rules have proven to be ineffective and ambiguous. A new approach is needed.

## VII. CONCLUSION

Attorney no-comment rules exist to prevent pretrial publicity from tainting a jury and affecting a defendant's right to a fair trial. The Supreme Court, however, in deciding *Gentile*, failed to reconcile these rules with the principles established by the Court in the series of access-to-information cases, which grant the public and media access to courtroom proceedings and the right to disseminate information discussed during such proceedings. The Court is unrealistic

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<sup>276</sup> See Robert F. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 334 (1984), noting that "many judges exhibit extraordinary degrees of intolerance every day in their courtrooms and virtually all of them exercise broad and abrupt powers of suppression in discharging their duties."

<sup>277</sup> See *id.* For an example of gag orders imposed in sensitive cases, see, e.g., *In re T.R.*, 556 N.E.2d 439 (Ohio 1990) (gag order upheld in child custody suit prone to media attention); *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988) (gag order imposed on trial participants in Wedtech investigation, which charged military contractor with fraudulently qualifying for federal contracts reserved for minority-owned companies); *Radio and Television News Ass'n v. United States Dist. Ct.*, 781 F.2d 1443 (9th Cir. 1986) (gag order upheld, prohibiting counsel from making extrajudicial statements to media about certain subjects in espionage case).

<sup>278</sup> Swartz, *supra* note 11, at 1432.



if it believes that it can prevent the prejudicial impact of such information by prohibiting lawyers from making extrajudicial comments, when access to this very same information through open-court proceedings is constitutionally protected. If protecting defendants' right to a fair trial cannot be achieved, and no other purpose can be shown to satisfy the stringent standard required to restrain free speech, then no-comment rules are but a meaningless limitation on speech that run contrary to constitutional doctrine. Such limitations are unconstitutional and should be abolished.

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