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# Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech

Alberto Bernabe-Riefkohl\*

## I. INTRODUCTION

Although most litigation in this country does not attract media attention, there has always been great concern that too much publicity might lead to unfairness in the process of adjudicative procedures.<sup>1</sup>

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1. Author Eileen Tanielian, for example, has argued that because of media coverage “[w]hat was once envisioned to be a guarantee of impartiality for the defendant has evolved into a guarantee of prejudice . . . .” Eileen F. Tanielian, *Battle of the Privileges: First Amendment vs. Sixth Amendment*, 10 LOY. L.A. ENT. L. REV. 215, 215 (1990). In *Nebraska Press Ass’n v. Stuart*, the Court stated that the problems presented by excessive media coverage of criminal trials “are almost as old as the Republic,” and concluded that it would be “inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 547 (1976). The Court cited a letter from Thomas Jefferson, written in 1786, where he concluded that even though it is disturbing that a person could be arraigned in a newspaper, it was “an evil for which there is no remedy” because “liberty depends on freedom of the press.” *Id.* at 548 (quoting 9 PAPERS OF THOMAS JEFFERSON 239 (J. Boyd ed., 1954)).

In 1807, Aaron Burr complained that it would be difficult to find an impartial jury to serve in his treason trial because of the publicity surrounding the charges. *Id.* Since Burr was acquitted, “there was no occasion for appellate review [of] the problem of prejudicial pretrial publicity.” *Id.*; see also Robert E. 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, 3 (1989); J. EDWARD GERALD, *NEWS OF CRIME: COURTS & PRESS IN CONFLICT* 70-72 (1983).

Another famous example appeared in 1935, when almost one thousand reporters and photographers rallied to a small town in New Jersey to cover the trial of Bruno Hauptmann, who was accused of the kidnap-murder of Charles Lindbergh’s son. Sheldon Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 396 (1977). During this trial, the media disrupted the proceedings by taking pictures and movies in violation of a court order. *Id.* One newspaper conducted an informal poll and published that the defendant had been found guilty by the public. *Id.* The trial was described as “perhaps the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial.” Oscar Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 454 (1940); see also JOHN D. ZELEDNY, *COMMUNICATIONS LAW: LIBERTY,*

Indeed, the notoriety of the parties, the disturbing nature of a crime, the public interest in the topic of a civil lawsuit or the attempts by attorneys to use the media to their client's advantage<sup>2</sup> can attract media attention to a degree that may support the concern that fairness would be compromised.<sup>3</sup> For example, it has been argued that too much trial publicity could "threaten to undermine important evidentiary and procedural protections, . . . lead to unfair public condemnation of a targeted party," and lower confidence in the judicial system.<sup>4</sup>

On the other hand, there is no doubt that openness and availability of information regarding judicial proceedings of public importance are fundamental for the preservation of public confidence in the judicial system and for the protection of the constitutional guarantee of freedom of expression.<sup>5</sup> Besides, attorneys are often the best spokespersons, and

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RESTRAINTS AND THE MODERN MEDIA 244 (1993) (discussing the media frenzy surrounding the trial). It was in response to this trial that the ABA created the first committee to recommend ways to deal with the problem of high publicity during trials. Portman, *supra*, at 397.

2. Many attorneys believe an important skill for an advocate is to know how to work with the media. Attorney Robert Shapiro, for example, has written several articles on how to manipulate the press. See Robert Shapiro, *Using the Media to Your Advantage*, 17 THE CHAMPION 6, Jan.-Feb. 1993, reprinted in *Secrets of a Celebrity Lawyer*, COLUM. JOURNALISM REV., Sept.-Oct. 1994, at 25; Robert Shapiro, *Harnessing the Power of the Press*, LEGAL TIMES, June 27, 1994, at 22.

3. For example, a poll conducted by CBS News during the trial of O.J. Simpson concluded that 87% of the people polled thought the trial was getting too much publicity. *CBS News* (CBS television broadcast, July 6, 1994). Similarly, 86% of those polled by the *American Bar Association Journal* stated that the coverage had made them more aware of the fact that the media could affect the defendant's right to a fair trial. Don J. DeBenedictis, *The National Verdict*, A.B.A. J., Oct. 1994, at 52, 54.

4. Gabriel Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1322 (1996).

5. As explained by Professor Nathan Crystal,

[m]edia coverage of pending cases runs the risk that the impartiality of jurors or judges may be compromised or the testimony of witnesses influenced. Thus, if the integrity of the adversarial process were the only value involved in determining whether restrictions on media coverage of pending cases should be allowed, media coverage would be prohibited until the conclusion of the case. The integrity of the trial process, however, is not the only value at stake with regard to trial publicity. The risk to the adversarial process from trial publicity is in tension with constitutional rights of freedom of the press and free expression.

NATHAN CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 252 (1998). The ABA Model Rules also take this approach to the issue. The first paragraph of the comment to Rule 3.6 reads:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are

speaking to the media is often a “practical necessity” to protect their clients’ rights.<sup>6</sup>

The debate over the need to eliminate secrecy and to allow attorneys to freely talk about their ongoing cases has acquired new strength given recent developments in products liability litigation over accidents allegedly caused by defective tires.<sup>7</sup> One of the suggestions offered in the debate over the need to eliminate secrecy in litigation is the adoption of a new rule of professional conduct prohibiting attorneys from entering into agreements that would have the effect of preventing useful information from reaching the public.<sup>8</sup> In part, the proponents of this new rule would like to see attorneys be free to discuss their cases and provide information to the media. Nevertheless, the prevailing view is that a lawyer does not always enjoy the same rights as other citizens to speak or write about judicial matters.<sup>9</sup>

Moreover, when it comes to criminal cases, the prevailing view has been that the state should exercise control over attorneys’ attempts to reach the media.<sup>10</sup> Courts have used different methods to achieve this control, but one practice common to all states is the development of rules of professional conduct that specifically address the issue of trial publicity.<sup>11</sup> Although these rules date back to 1887,<sup>12</sup> most states have

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vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. para. 1 (1983) (amended 1999).

6. Ronald Rotunda, *Dealing with the Media: Ethical, Constitutional, and Practical Parameters*, 84 ILL. B.J. 614, 614 (1996). As an example, Rotunda discusses the incident in 1993 where attorneys for General Motors conducted a press conference to show the NBC claims of defects in GM trucks were false. *Id.* NBC was later forced to admit they had manufactured the story by altering the trucks. *Id.*

7. Frances Komoroske, *Should You Keep Settlements Secret?*, TRIAL, June 1999, at 55; Richard Zitrin, *The Fault Lies in the Ethics Rules*, NAT'L L.J., July 9, 2001, at A-25.

8. See Komoroske, *supra* note 7, at 59.

9. See CHARLES WOLFRAM, MODERN LEGAL ETHICS 632 (1986).

10. See *infra* notes 41-84 and accompanying text (discussing the Supreme Court's decision in favor of state control over attorney access to the press).

11. By 1994, all states except California had adopted one form or another of a professional conduct rule to regulate trial publicity. Gregg, *supra* note 4, at 1324. The California State Bar had explicitly rejected the adoption of such a rule in 1986. *Id.* However, after the murder trial of O.J. Simpson, “the California legislature passed a bill . . . instructing the California State Bar to reexamine its position” on trial publicity. *Id.* A year later the California Supreme Court adopted a rule substantially identical to ABA Model Rule 3.6. *Id.*; see also Douglas Mirell, *The Latest*

adopted some version of the ABA Models beginning with the ABA Canons of 1908.<sup>13</sup>

In 1991, the U.S. Supreme Court found that the trial publicity rule of the state of Nevada, which was based on an ABA Model Rule, was unconstitutional as interpreted and applied by the Supreme Court of that state.<sup>14</sup> In response to this case, the ABA amended its Model Rule on trial publicity, and several states followed the suggestions of the ABA, also amending their rules. Following this trend, the Illinois Supreme Court recently amended two rules of professional conduct.<sup>15</sup> Soon after these amendments were announced, however, state and federal prosecutors petitioned the court to reconsider its decision and stay the effect and enforcement of the new rules. The court denied the petition and the rules became effective in March, 2000.<sup>16</sup> A group of prosecutors then challenged the constitutionality of the new rules in federal court, but the court dismissed the complaint without resolving the constitutional question.<sup>17</sup> The court, however, did suggest that the rule could be interpreted in a way that would pass constitutional scrutiny.<sup>18</sup>

The rules that limit attorneys' contact with the media were enacted in an effort to protect both defendants and the state from the effects that too much publicity could have on a trial, while balancing an attorney's

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*Threat to Free Speech: California Proposed Bar Rules*, COMMUNICATIONS LAWYER, Summer 1995, at 13.

12. In 1887, Alabama promulgated the first official Code of Ethics in the United States. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1066 (1991) (plurality opinion). It warned attorneys to avoid newspaper discussion of legal matters. *Id.* (plurality opinion). It stated that "[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation . . . tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice." *Id.* (plurality opinion) (quoting HENRY DRINKER, LEGAL ETHICS 23, 356 (1953)).

13. MODEL CODE OF PROF'L RESPONSIBILITY (1908).

14. *Gentile*, 501 U.S. at 1048-51 (plurality opinion). Most professional regulation of trial publicity has been in response to judicial rulings. Professor Ronald Rotunda has stated that "[t]he history of legal ethics in these areas can be seen as a case where the ABA has steadily loosened the ethical restraints in response to court rulings holding that various restrictions violated the First Amendment. The ABA ethics rules have, in effect, been dragged kicking and screaming into the Twentieth Century." Rotunda, *supra* note 6, at 615.

15. On October 22, 1999, the Supreme Court of Illinois issued an order amending Rules 3.6 and 3.8 of the Illinois Code of Professional Conduct, effective December 1, 1999. See Complaint for Declaratory and Injunctive Relief app. D, at 2, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974) (Petition for Reconsideration and Stay Effect and Enforcement of Amended Rules of Professional Conduct).

16. *Id.*

17. *Devine*, 131 F. Supp. at 963.

18. *Id.* at 972.

right to free speech.<sup>19</sup> On the other hand, the rules also have to consider the right of the press to provide coverage of the judicial system, which is also constitutionally protected,<sup>20</sup> because press coverage is a valuable component of our democratic form of government.<sup>21</sup>

19. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. (1999); see *supra* note 5 (providing the first paragraph of the comment to Rule 3.6).

20. These rights are protected by the First Amendment to the Constitution, which reads in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

21. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (1987) (comparing Justice Holmes' "marketplace of ideas" justification for free speech with Justice Brandeis' "civic virtue" justification). There is not much record of the debates concerning the meaning of the First Amendment in the House and Senate. See, e.g., CONSTITUTION OF THE UNITED STATES: ANALYSIS & INTERPRETATION, S. DOC. NO. 92-82, at 936 (1973). Indeed, the material available to determine the intent of the framers is capable of divergent interpretations. Given the ambiguity of the historical research and the recent interpretations by the Supreme Court, it is now clear that, notwithstanding the language of the Amendment, its protections are not absolute. Partly for this reason, the Amendment has generated a vast amount of literature that tries to develop a theory of its basis and meaning.

Alexander Meiklejohn has been the most commonly cited proponent of the model that interprets the First Amendment as a method of protecting and encouraging self-government by the public. See also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 544 (differentiating the checking value with individual autonomy); Martin Redish, *Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982) (arguing that free speech enhances the individual's contribution to the social welfare and, thus, to his self-fulfillment); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (positing that the constitutional guarantee of free speech aids in the individual's development of autonomy and human development).

Another influential approach to the First Amendment has been the "marketplace of ideas" model. According to this model, the function of the First Amendment is to guarantee the competition of ideas. This model has been traced back to John Milton. See JOHN MILTON, *AREOPAGITICA* (AMS Press 1971). The notion of the competition of ideas was later developed by John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY* ch. 2 (Hackett Publishing Co. 1978) (1859). In *Abrams v. United States* Justice Oliver Wendell Holmes adopted this model and used it to argue his dissenting opinion. *Abrams v. United States*, 250 U.S. 616, 630 (1919); see generally RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT 2-14 (1994); Alberto Bernabe-Riefkohl, *Freedom of the Press and the Business of Journalism: The Myth of the Democratic Competition in the Marketplace of Ideas*, 67 REV. JUR. U.P.R. 447, 452 (1998).

A third model values the protection of free speech as a contribution to the fulfillment of an individual's personal liberty. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1991). Yet, the First Amendment is perhaps better understood as a combination of all of these ideas. See, e.g., THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 1 (1963) (arguing that the First Amendment protection of free speech is necessary (1) as a way to assure individual self-fulfillment, (2) as a means to attain the truth, (3) as a method of securing participation by the members of society in social and political decision-making, and (4) as a method to keep the balance between stability and change in society). In his concurring opinion in *Whitney v. California*, Justice Brandeis advocated freedom of speech as "indispensable to the discovery and spread of political truth" and as essential to a

The First Amendment's protection of speech serves to fulfill the values of freedom of expression, participation in democratic government, and self-realization.<sup>22</sup> Yet, proponents of rules that limit attorneys' freedom of speech argue that those types of rules provide a balance between the freedom of expression, freedom of the press, and the right to fair trials by regulating "to ensure fairness in adjudicative proceedings."<sup>23</sup> Opponents reply that these types of rules create a chilling effect and may suppress speech of particular social importance, particularly in cases where the defendant is claiming governmental misconduct.<sup>24</sup> Also, a defendant's lawyer is often his or her only spokesperson and the attorney's ability to speak out on behalf of the client is part of his or her professional duty.<sup>25</sup> In cases like these, denying the attorney the chance to access the media may result in substantial injustice for the client.<sup>26</sup>

Given the different roles that prosecutors play in the criminal justice system, some commentators have argued that the rules that limit extrajudicial speech should apply only to prosecutors, because

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stable government and to political change. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

22. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The Framers "gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of [the First Amendment]." *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

The Supreme Court has repeatedly recognized the function of the press in our society. As early as the 1930s the Court explained:

The newspapers, magazines and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

*Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936); *see also Stromberg v. California*, 283 U.S. 359, 369 (1931) (reversing the defendant's criminal conviction based on a vague statute which could be interpreted to restrict his right to participate in political discussion).

23. Lance Northcutt, *New Supreme Court Rules on Extrajudicial Statements*, CBA REC., Feb.-Mar. 2001, at 55, 58 (citing Mary Robinson, administrator of the Illinois Attorney Registration and Disciplinary Commission).

24. *Id.*; Gregg, *supra* note 4, at 1323.

25. Rotunda, *supra* note 6, at 614.

26. *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chi. Council of Lawyers*, 427 U.S. 912 (1976).

the defense requires access to pretrial publicity in order to counter adverse non-lawyer publicity about the accused, that is fomented by actions and statements of the police at the time of the report of the crime and the arrest of the accused and because the fair trial right implicated by the anti-comment rules should be waivable by the accused.<sup>27</sup>

Typically, it is assumed that information unfavorable to the defendant is provided to the press by the police or government agents investigating the crime, with or without the participation of the prosecution. Thus, it is argued, defense attorneys should be allowed access to the press in order to level the playing field.

This Article will discuss the debate over rules of professional conduct that seek to limit attorneys' rights to make extrajudicial statements and the rules recently approved by the Illinois Supreme Court.<sup>28</sup> It will also discuss the arguments presented by Illinois prosecutors as part of their attack on the validity of the new rules.<sup>29</sup> Finally, the Article will offer some suggestions to clarify certain drafting problems in the rules and suggest how courts should interpret and apply the rules in the future.<sup>30</sup>

## II. REGULATION OF SPEECH BY ATTORNEYS AND TRIAL PUBLICITY

There is no doubt that prejudicial publicity can threaten a defendant's Sixth Amendment right to a fair trial by creating the possibility that the jury may reach a decision not based on the information provided at trial but on the publicity itself. Prejudicial publicity can also taint the reputation of trial participants who do not have the opportunity to respond to it. The Sixth Amendment's right to a fair trial is recognized as one of the "most fundamental of all freedoms,"<sup>31</sup> essential "to the preservation and enjoyment of all other rights."<sup>32</sup> It includes the

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27. Richard Hirst, *Silence Orders-Preserving Political Expression by Defendants and Their Lawyers*, 6 HARV. C.R.-C.L. L. REV. 595, 604, 606-08 (1976), cited in Charles Wolfram, *supra* note 9, at 635 n.5; see also Monroe Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys*, 29 STAN. L. REV. 607 (1977).

28. See *infra* Part III.

29. See *infra* Part IV.A.

30. See *infra* Part IV.B.

31. *Estes v. Texas*, 381 U.S. 532, 540 (1965). Chief Justice Rehnquist has stated: "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., dissenting as to Part III).

32. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., with Stewart and Marshall, JJ., concurring in judgment). Note also that the state also has a right to a fair trial and in maintaining public confidence in the integrity of the judicial system. *Cox v. Louisiana*, 379 U.S. 559, 565 (1965).



defendant's right to have his or her guilt determined solely on the basis of the evidence introduced at trial,<sup>33</sup> to have a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to confront the state's witnesses, and to have effective assistance of counsel.<sup>34</sup> Trial courts have a duty to protect these rights.<sup>35</sup>

The first attempt to control trial publicity through the use of professional standards occurred in 1887 when Alabama issued its first

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Ironically, the Supreme Court has consistently held that the best way to promote confidence in the system is by guaranteeing the openness of the proceedings because the guarantee of a public trial was created for the benefit of the defendant. In *In re Oliver*, for example, the Court held that a secret contempt trial violated the defendant's right to a public trial under the Fourteenth Amendment. *In re Oliver*, 333 U.S. 257, 272-73 (1948). The Court stated:

[The right to a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contempt review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

*Id.* at 270. In *Estes v. Texas*, the Court again recognized that the purpose of the requirement of a public trial exists to guarantee a fair trial for the accused. *Estes*, 381 U.S. at 538.

In *Richmond Newspapers v. Virginia*, Chief Justice Burger announced the judgment of the Court and wrote an opinion, joined by Justices White and Stevens, asserting that criminal trials are presumptively open to the public and the media, in part because the openness itself acts as an assurance of fairness for all concerned. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570, 573 (1980). In a separate concurring opinion, Justices Brennan and Marshall agreed and declared: "Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *Id.* at 593 (Brennan, J., concurring); *see also* *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1999) (noting that the judicial system plays a vital role in society and the public has a legitimate interest in its operations); *Press-Enter. Co. v. Superior Court (II)*, 478 U.S. 1, 7 (1986) ("The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.").

33. *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (citing *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). "The goal of the limits on lawyer conduct are to assure that the premises of the adversary process are satisfied—that the fact finder ultimately has an opportunity to decide the case based solely on the evidence that is admitted at trial." Kevin Cole & Fred Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1649 (1996). In his opinion in *Gentile v. State Bar of Nevada*, Chief Justice Rehnquist referred to "the theory upon which our criminal justice system is founded" and described it as follows: "The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding." *Gentile*, 501 U.S. at 1070 (plurality opinion).

34. U.S. CONST. amend. VI.

35. *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966) (holding that courts have to take an affirmative role in protecting the rights of defendants from undue interference by the press).

official code of ethics.<sup>36</sup> The Alabama Code warned lawyers against making extrajudicial statements concerning the merits of a case because such comments might prejudice the proceedings.<sup>37</sup> The most influential professional standards, however, were the ABA Canons of Professional Ethics, adopted in 1908.<sup>38</sup> Canon 20 reflected a very negative view of trial publicity. Although purely an aspiration and not enforced through the disciplinary process,<sup>39</sup> Canon 20 “generally condemned” any attempt to seek publicity for a pending or anticipated case and stated that, even in extreme circumstances, statements to the press by attorneys should be avoided.<sup>40</sup>

While most states adopted some version of the ABA Canons, most of the attention regarding pre-trial publicity revolved around the media and not the lawyers. Between 1959 and 1966, the Supreme Court, for the first time, reversed several criminal convictions because they had been reached under circumstances heavily influenced by media coverage.<sup>41</sup> In *Marshall v. United States*, for example, the Court reversed a conviction because seven of the twelve jurors were exposed to news accounts of evidence that was not admitted at trial.<sup>42</sup> The Court

36. *Gentile*, 501 U.S. at 1066 (plurality opinion) (quoting HENRY DRINKER, LEGAL ETHICS 356 (1953)).

37. *Id.* The Alabama rule stated “newspaper publications by an attorney as to the merits of pending or anticipated litigation . . . tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice.” *Id.*

38. The ABA Canons were actually based, in part, on the Alabama Code. The Canons were taken seriously by the courts as sources of law, but they were not generally adopted by jurisdictions or state bar associations. See GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.10 (3d ed. 2001).

39. Lawrence Hellman, *The Oklahoma Supreme Court's New Rules on Attorneys' Trial Publicity: Realism and Aspiration*, 51 OKLA. L. REV. 1, 20 (1998); see also Catherine Cupp Thiesen, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 KAN. L. REV. 837 (1996) (stating that the principal concern of the canons was not fair trials but professionalism among attorneys or “how to practice law like gentlemen”).

40. Canon 20 states in full:

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

ABA CANONS OF PROF'L ETHICS, CANON 20: NEWSPAPER DISCUSSION OF PENDING LITIGATION (2001).

41. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Marshall v. United States*, 360 U.S. 310 (1959) (reversing a conviction because of the effects of trial publicity for the first time).

42. *Marshall*, 360 U.S. at 312-13.

concluded that “prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution’s evidence.”<sup>43</sup>

Two years later, in *Irvin v. Dowd*,<sup>44</sup> the Court again reversed a murder conviction because of the pervasiveness of the pre-trial publicity. In this case, the defendant was accused of murder in a small rural community.<sup>45</sup> Between the time of the arrest and the time of the trial, ninety-five percent of the homes in the trial court’s county had access to numerous newspaper articles and editorials against the defendant.<sup>46</sup> The press reported that the defendant had confessed to the six murders and described him as “remorseless and without conscience.”<sup>47</sup> In addition, the press commented on his juvenile criminal convictions and published a story about his court-martial during the war.<sup>48</sup> Ninety percent of the jurors questioned in voir dire had formed an opinion as to the defendant’s guilt.<sup>49</sup> Eight of the twelve actual jurors had stated in voir dire that they thought the defendant was guilty.<sup>50</sup> Given these facts, although the jurors indicated that they could render an impartial verdict, the Court found a “pattern of deep and bitter prejudice” created by extensive media coverage and reversed the lower court.<sup>51</sup>

Similarly, in *Rideau v. Louisiana*, the Court reversed the defendant’s conviction because the trial court denied a change of venue after a television station aired a filmed confession three times, reaching a combined audience estimated at 106,000 viewers in a community of approximately 150,000 people.<sup>52</sup> The Court held that the refusal of the request for a change of venue was a denial of due process because the televised confession “in a very real sense *was* Rideau’s trial,”<sup>53</sup> and that “[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.”<sup>54</sup> Finally,

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43. *Id.*

44. *Irvin*, 366 U.S. at 717.

45. The community had approximately 30,000 inhabitants. *Id.* at 719.

46. *Id.* at 725.

47. *Id.* at 726.

48. *Id.* at 725.

49. *Id.* at 727.

50. *Id.*

51. *Id.* at 727, 729.

52. *Rideau v. Louisiana*, 373 U.S. 723, 724 (1963). The viewers each time the segment was aired was estimated at 24,000, 53,000, and 29,000 respectively. The 106,000 total in the text does not account for the possibility of repeat viewers.

53. *Id.* at 726.

54. *Id.*

in 1965, the Supreme Court reversed yet another conviction because of the effect of pretrial publicity. In *Estes v. Texas*, the Court held that the defendant had been deprived of due process of law after a pretrial hearing was televised live and later rebroadcast to approximately 100,000 viewers.<sup>55</sup> In addition, the court proceedings were disrupted by the presence of reporters, photographers, cameramen and their equipment.<sup>56</sup>

Through this line of decisions, the Supreme Court reacted to the particular circumstances of each case and attempted to provide a remedy for them. However, the Court did not explain or give guidance to trial courts on how to solve the future issues related to prejudicial publicity. The debate about freedom of the press and fair trials, however, continued to receive increased national attention in 1963, after the Report of the Warren Commission on the Assassination of President Kennedy (“the Warren Report”) criticized the news media for its role in creating the publicity surrounding the allegations against Lee Harvey Oswald.<sup>57</sup> In fact, the Warren Commission expressed doubts that Oswald could ever have received a fair trial<sup>58</sup> and concluded: “The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime.”<sup>59</sup>

Among other things, the Warren Report specifically recommended the creation of ethical standards regarding trial publicity to avoid interference with criminal investigations and the rights of defendants.<sup>60</sup> In response to this recommendation and the decisions of the Supreme

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55. *Estes v. Texas*, 381 U.S. 532, 550-52 (1965).

56. *Id.* at 551.

57. The report mentioned incriminating, but inadmissible, evidence published by the press which could have affected the fairness of the trial, such as alleged statements made by Oswald’s wife and Oswald’s refusal to take a lie detector test. THE WARREN COMMISSION, REPORT OF THE PRESIDENT’S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 238 (1964). The report concluded that the “[public’s] curiosity should not have been satisfied at the expense of the accused’s right to a trial by an impartial jury.” *Id.* at 240.

58. *Id.* at 239 (“The Commission agrees that Lee Harvey Oswald’s opportunity for a trial by 12 jurors free of preconception . . . would have been seriously jeopardized by the premature disclosure and weighing of the evidence against him.”).

59. *Id.* at 240.

60. *Id.* at 27. In his opinion in *Gentile*, Chief Justice Rehnquist cited a recommendation in the Warren Commission Report that reads: “[R]epresentatives of the bar, law enforcement associations, and the news media [should] work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.” *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1067 (1991) (plurality opinion) (citing Robert A. Ainsworth, An Address Before the Eight Circuit Judicial Conference on the Subject of Fair Trial-Free Press (1968), *reprinted in* Fair Trial-Free Press 45 F.R.D. 417 (1991)).

Court, the Judicial Conference of the United States conducted a study and suggested three areas of concern for trial courts: release of information to the press by attorneys, release of information by other trial participants, and the regulation of trial proceedings to protect jurors from prejudicial influences.<sup>61</sup> Likewise, the ABA appointed a committee to develop standards to regulate the criminal justice system.<sup>62</sup>

While the work of the ABA committee was ongoing, the Supreme Court provided guidelines on how to balance the interests of the press and the rights of a criminal defendant in *Sheppard v. Maxwell*.<sup>63</sup> In *Sheppard*, the Court reversed a conviction for murder, holding that the publicity surrounding the trial had deprived the defendant of his right to a fair trial.<sup>64</sup> Even before the defendant was arrested, the media published countless stories about him, which accentuated his alleged failure to cooperate with the investigation and called strongly for his arrest.<sup>65</sup> Many articles and editorials insinuated that Sheppard was guilty and discussed incriminating evidence that was never introduced at trial.<sup>66</sup> During the trial itself, the constant movement of reporters in the courtroom made it difficult for witnesses to be heard.<sup>67</sup>

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61. *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 401 (1968). Interestingly, the committee did not recommend any direct curb or restraint on publication by the press. *Id.* at 401-02.

62. The recommendations of this committee (usually referred to as the Reardon Committee because it was chaired by Justice Paul Reardon of the Massachusetts Supreme Court) were published as ABA Advisory Committee on Fair Trial and Free Press (1968). The recommendations were later adopted by the ABA as part of its *ABA Standards for Criminal Justice*. These recommendations were based on the conclusion that too much publicity about a trial can have a prejudicial effect on the fairness of the process. The report has been criticized, however, because it did not support this finding with any evidence from experiments, available at the time, about the effect of publicity on jurors, nor did the committee attempt to conduct its own experiments. It based its conclusions on the results of a questionnaire sent to attorneys and judges. See Benno C. Schmidt, Jr., *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 446-47 (1977).

63. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

64. *Id.* at 363.

65. *Id.* at 338-39. After an article demanded to know why there had been no public inquest, a three day inquest took place, and Sheppard's questioning was covered on both television and radio. *Id.* at 339. Apparently another article influenced the decision to arrest Sheppard, since he was arrested hours after the headline "Why Isn't Sam Sheppard in Jail?" was published. See *id.* at 341.

66. *Id.* at 340-41.

67. *Id.* at 344. Twenty people were assigned to a special table for media representatives in the courtroom. *Id.* at 343. The court also reserved four rows of seats behind the bar railing for television and radio reporters and for representatives of out-of-town newspapers and magazines. *Id.* The media used all available rooms in the building and a radio station was allowed to broadcast from a room adjacent to the room where the jury rested and deliberated. *Id.*

Furthermore, because of the defendant's proximity to reporters in the courtroom, it was almost impossible for him to speak privately with his attorney during the proceedings.<sup>68</sup> Despite these circumstances, the trial judge did not take steps to limit the effects of the publicity or the behavior of the press during the trial. The judge did not grant a continuance, change the venue of the trial, sequester the jury, insulate the jurors from reporters, or prevent reporters from disrupting the proceedings.<sup>69</sup>

In criticizing the trial court for allowing a "carnival atmosphere"<sup>70</sup> in the courtroom and for failing to control the flow of publicity, the Supreme Court ordered lower courts to take an affirmative role in protecting the rights of defendants from undue interference by the press:

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.<sup>71</sup>

The line of decisions that began with *Marshall* and culminated in *Sheppard* thus sent a clear message to trial courts that even in the absence of actual prejudice, pervasive pretrial publicity can affect a defendant's right to a fair trial and that courts have a duty to protect the defendant from the effects of prejudicial publicity. In *Sheppard*, the Court enumerated some ways in which courts could make sure that publicity does not affect the defendant's right to a fair trial.<sup>72</sup> For example, courts could regulate the conduct of reporters in the courtroom,<sup>73</sup> order a change of venue,<sup>74</sup> order a continuance of the trial,<sup>75</sup> isolate the witnesses,<sup>76</sup> and control the release of information to the media by law enforcement personnel and counsel.<sup>77</sup> However, the

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68. *Id.* at 344.

69. *Id.* at 354 n.9, 358-59.

70. *Id.* at 358.

71. *Id.* at 362.

72. *Id.* at 363.

73. *Id.* at 358.

74. *Id.* at 363.

75. *Id.*

76. *Id.* at 359.

77. *Id.* at 360-61. The Supreme Court has implied that a restraint on trial participants, which prevents information from reaching the media, is not the equivalent of a prior restraint on the media, which is presumed to be unconstitutional. See Mark R. Stabile, Note & Comment, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J.

Court emphasized that the remedy for prejudicial publicity is the implementation of measures to prevent prejudice at its inception,<sup>78</sup> including the creation of professional disciplinary measures.<sup>79</sup>

Given the clear mandate by the Supreme Court to lower courts, the committee appointed by the ABA to develop standards to regulate the criminal justice system adopted a new approach toward trial publicity rules. In contrast with the purely aspirational approach of the 1908 Canons, the committee sought ways to implement the Supreme Court's suggestions. The committee worked for four years and presented a draft to the ABA House of Delegates in 1968.<sup>80</sup> The standards contained a

337, 342-43 (1990) (arguing for a consistent standard for imposing gag orders); René L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1181-87 (1990) (arguing that there should be no distinction between prior restraints on the press and gag orders on trial participants).

78. *Sheppard*, 384 U.S. at 363. The effectiveness of these remedial measures has been questioned, however. See, e.g., Robert P. Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 561-74 (1977).

79. *Sheppard*, 384 U.S. at 363. The Court stated:

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 the defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

*Id.*

80. ABA STANDARDS FOR CRIMINAL JUSTICE (1978). Ten standards were approved in 1968, three in 1970, two in 1971, one in 1972, and the rest in 1973. 1 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE at xx, xxii (2d ed. 1980) [hereinafter ABA STANDARDS]. The introduction to the second edition of the standards explains that they are intended to be a balanced attempt "to walk the fine line between the protection of society and the protection of constitutional rights of the accused individual." 1 *id.* at xix (quoting Chief Justice Warren E. Burger in his 1974 introduction to the ABA Standards of Criminal Justice). The standards are not model codes nor rules for jurisdictions.

[T]hey are guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislature, courts, and practitioners to operate and keep it viable—all targeted toward achieving a criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future.

1 *id.* at xx. Jurisdictions are free to adopt the standards and choose to implement them in various ways, such as translating them into a code, rules of court or practice, or by encouraging judicial officers to look to the standards as authority in deciding appropriate cases. 1 *id.* at xix.

These standards, however, are not the first attempt by the ABA to solve the problems created by high publicity during trials. In 1936, in response to incidents during the trial of Bruno Hauptmann, the ABA formed a special committee to study the effects of publicity on trials. The committee eventually proposed sixteen recommendations, most of which were directed at limiting the amount of information given by trial participants. Portman, *supra* note 1, at 397; see also

chapter on the issue of “fair trial and free press,” which included sections on the conduct of attorneys and judges during trials.<sup>81</sup> Most of these standards were based on the remedial recommendations of the Supreme Court in *Sheppard*.<sup>82</sup> For example, the ABA recommended that in order to minimize the effect of publicity on the jurors that the public be excluded from pretrial hearings,<sup>83</sup> hearings that are outside the presence of the jury, continuances, changes of venue, control of the trial participants, and from the use of voir dire.<sup>84</sup> As to the conduct of attorneys in relation to trial publicity, Standard 1-1 provided:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.<sup>85</sup>

Following this lead, the ABA adopted a rule on the subject which it included in the new Model Code of Professional Responsibility of 1969. Moreover, in contrast with the old Canons, and as suggested by the Court in *Sheppard*, the rule on trial publicity was included as one of the “disciplinary rules,” the violation of which could be enforced through the disciplinary process.<sup>86</sup> The section was also a much more detailed attempt to regulate attorneys’ conduct as to trial publicity.<sup>87</sup> For

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*supra* note 1 (discussing the trial of Bruno Hauptmann). However, the committee did not make any recommendations regarding pretrial publicity generated by police or non-attorney law enforcement officers. Portman, *supra* note 1, at 398. The committee also failed to emphasize the duty and powers of the trial courts to protect the rights of defendants. *Id.*

81. See generally 2 ABA STANDARDS, *supra* note 80, §§ 8.1–8.61 (1st ed. & Supp. I 1982 & Supp. II 1986).

82. 2 *Id.* at §§ 8.4–8.5.

83. This exclusion would now be declared unconstitutional. In *Press-Enterprise Co. v. Superior Court (II)*, the Supreme Court decided that there is a qualified First Amendment right of access to pretrial proceedings. *Press-Enter. Co. v. Superior Court (II)*, 478 U.S. 1, 2 (1986).

84. 1 ABA STANDARDS, *supra* note 80, at 37-47.

85. ABA Advisory Comm. on Fair Trial and Free Press, Standards Relating to Fair Trial And Free Press, Standard 1-1 (1968), cited in Esther Berkowitz-Caballero, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 508 (1993); Gregg, *supra* note 4, at 1334.

86. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107 (1969) (amended 1981).

87. *Id.* The provision appeared in Disciplinary Rule 7-107, which 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 a public record.

(2) That the investigation is in progress.



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- (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 examinations or tests.
  - (5) The identity, testimony, or credibility of a prospective witness.
  - (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.
- (C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:
- (1) The name, age, residence, occupation, and family status of the accused.
  - (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
  - (3) A request for assistance in obtaining evidence.
  - (4) The identity of the victim of the crime.
  - (5) This 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 text of the charge.
  - (9) Quotations from or references to public records of the court in the case.
  - (10) The scheduling or result of any step in the judicial proceedings.
  - (11) That the accused denies the charges made against him.
- (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.
- (E) After the completion of a trial or 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 extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.
- (F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceeding and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

example, it establishes separate guidelines for civil cases, criminal cases, professional disciplinary proceedings, juvenile hearings, and administrative proceedings. For all of these types of cases, the rule essentially states that attorneys could be sanctioned for making comments about pending or imminent litigation if there is a “reasonable likelihood” that the comments would interfere with a fair trial or otherwise prejudice the administration of justice.<sup>88</sup> According to the rule, during the investigation and up to jury selection in a criminal trial, a lawyer can only make very limited factual statements.<sup>89</sup> Thus, beginning with jury selection in a criminal trial and in all stages of juvenile proceedings, civil trials, disciplinary proceedings, and administrative proceedings, a lawyer is banned from making any

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

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
- (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
- (4) His opinion as to the merits of the claims 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 or the refusal or failure of a party to submit to such.
- (4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
- (5) Any other matter reasonable 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 extra-judicial statement that he would be prohibited from making under DR 7-107.

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107 (1969) (amended 1981).

88. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(A)-(B), (C)-(H), (J) (1969) (amended 1981).

89. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(A)-(B) (1969) (amended 1981).

comment that is “reasonably likely to interfere with a fair” proceeding.<sup>90</sup>

This last portion of the rule was based on the “reasonable likelihood” standard mentioned by the Supreme Court in *Sheppard*.<sup>91</sup> Interestingly, in *Sheppard*, the Court used this standard to refer to circumstances in which lower courts should consider alternative methods to control their courtrooms. The Model Code, however, uses the same language as the basis for the discipline of certain speech.<sup>92</sup> The Code, thus, was suggesting that the state could punish attorneys for their speech based on a “reasonable likelihood” standard. This invited a constitutional challenge of the Model Code’s approach.

### III. JUDICIAL INTERPRETATION OF THE APPROACH OF THE ABA CODE

Although the ABA Code served as the model for rules adopted by all states, the section on trial publicity was not well received by the courts. “Practically every court that considered constitutional challenges” to the Code’s section on trial publicity ruled that it was overbroad.<sup>93</sup> For example, in *Hirschkop v. Snead*<sup>94</sup> the Fourth Circuit found the Code’s reasonable likelihood standard valid in the context of criminal jury trials but unconstitutional as applied to civil and administrative proceedings.<sup>95</sup> The court also found that even in the criminal trial context, the provision banning “any statements about ‘other matters that are likely to interfere with a fair trial’” was so vague that it created a trap for the unwary.<sup>96</sup> Likewise, in *In re Keller*<sup>97</sup> the Montana Supreme Court dismissed charges against the attorneys and found some sections of the Code’s provisions to be unconstitutional.<sup>98</sup> The court concluded that

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90. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-107(D) (1969) (amended 1981).

91. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

92. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-107(D) (1969) (amended 1981).

93. 1 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 665 (2d ed. Supp. 1994), cited in *Hellman*, *supra* note 39, at 20; see *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chi. Council of Lawyers*, 427 U.S. 912 (1976); *Markfield v. Ass’n of the Bar of New York*, 370 N.Y.S.2d 82, 85 (App. Div. 1975), *appeal dismissed*, 337 N.E.2d 612 (1975) (holding that disciplinary rules should be applied only when there is a clear and present danger that extrajudicial remarks will interfere with fair administration of justice).

94. *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979).

95. *Id.* at 374.

96. *Id.* at 371.

97. *In re Keller*, 693 P.2d 1211 (Mont. 1984).

98. *Id.* at 1214.

the provisions abridged free speech rights without creating a clear standard by which attorneys could gauge their conduct.<sup>99</sup>

The most influential decision on the subject was issued by the Court of Appeals for the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*.<sup>100</sup> In *Bauer*, the plaintiffs challenged Rule 1.07 of the Local Criminal Rules for the District Court for the Northern District of Illinois, which was nearly identical to Standard 1-1 and very similar to the ABA Code's DR 7-107's provision for criminal cases.<sup>101</sup> The District Court dismissed the challenge, but the Seventh Circuit Court of Appeals found the rules to be "constitutionally infirm" because they did not incorporate a "serious and imminent threat standard."<sup>102</sup> The court held that only statements that posed a "serious and imminent threat" of interference with the administration of justice could be subject to state regulation.<sup>103</sup> Thus, the rule violated the First Amendment because the standard used to restrict speech was vague and overbroad.<sup>104</sup> The court also concluded that the provisions of the rule could result in sanctions for even a trivial, totally innocuous statement, which would not be consistent with the First Amendment.<sup>105</sup>

In response to *Bauer*, the ABA again set out to revise its approach in the Standards Relating to the Administration of Criminal Justice and adopted a new Standard 8-1.1.<sup>106</sup> Eventually, the ABA changed the "reasonable likelihood" language to a "clear and present danger" standard, which was more traditionally associated with restrictions on speech.<sup>107</sup> However, despite the fact that the court's reasoning in *Bauer*

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99. *Id.*

100. *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chi. Council of Lawyers*, 427 U.S. 912 (1976).

101. *Chi. Council of Lawyers v. Bauer*, 371 F. Supp. 689, 690, 692 n.4 (N.D. Ill. 1974), *rev'd*, 522 F.2d 242 (7th Cir. 1975); *see also supra* note 85 and accompanying text (stating Standard 1-1).

102. *Chi. Council of Lawyers*, 522 F.2d at 251.

103. *Id.* at 249. The court also held that comments made during the period between completion of the trial and sentencing, by definition, could not be deemed to pose a serious and imminent threat and, therefore, the Code's regulation of comments "reasonably likely to affect the imposition of sentence" was invalid. *Id.* at 257.

104. *Id.* at 251. In fact, the court said, "[w]e do not believe that there can be a blanket prohibition on certain areas of comment . . . without any consideration of whether the particular statement posed a serious and imminent threat of interference with a fair trial." *Id.*

105. *Id.*

106. 1 ABA STANDARDS 2D, *supra* note 80, at § 8-1.1.

107. It is traditionally assumed that the "clear and present danger" formulation was created by Justice Oliver Wendell Holmes in his opinion in *Schenck v. United States*, where he wrote:

The most stringent protection of free speech would not protect a man falsely shouting fire in a theater . . . . The question in every case is whether the words used are used in

also supported a constitutional challenge to section DR 7-107 of the Code, the ABA left it unchanged.

*A. The Approach of the ABA Model Rules*

Just seven years after the Model Code was approved, the ABA created a commission to revise it. Eventually, in 1983, the ABA House of Delegates adopted a new code called the Model Rules of Professional Conduct. This new collection of regulations does not follow the format of the Model Code. In the ABA Model Rules the material is divided into "rules" and "comments." The "rules" explain the duties of attorneys in different contexts. Each rule is followed by a "comment," which explains the meaning of the rule and sometimes provides examples for its application. When preparing the Model Rules, the drafters included a new rule to regulate attorneys' conduct in relation to pre-trial publicity.<sup>108</sup> The first paragraph of the comment to the rule explains the ABA's concern for the integrity of the trial process on one hand and the value of free expression on the other:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right to free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.<sup>109</sup>

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such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Schenck v. United States, 249 U.S. 47, 52 (1919).

108. See MODEL RULES OF PROF'L CONDUCT R. 3.6 (1983) (amended 1999).

109. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. (1983) (amended 1999).

*B. Interpretation of the Supreme Court of the United States: Gentile v. State Bar of Nevada*

With this long history as a background, the Supreme Court first addressed the free speech rights of lawyers in the context of trial publicity in *Gentile v. State Bar of Nevada*.<sup>110</sup> In that case, the petitioner Dominic Gentile was an experienced Nevada criminal defense lawyer who held a press conference soon after his client was indicted.<sup>111</sup> During the press conference, he read a short statement and answered a few questions.<sup>112</sup> The client was the owner of a storage facility where a police safe deposit box was located.<sup>113</sup> He was indicted in connection with the theft of a large quantity of cocaine and traveler's checks from that deposit box.<sup>114</sup> At the time of the press conference, the client had been the subject of media attention for about a year.<sup>115</sup> The media had been generally favorable to the police and portrayed the client as a suspect in previous thefts and as uncooperative during the investigation.<sup>116</sup>

Gentile argued that the press conference was simply an attempt to respond to local press reports that were prejudicial to his client.<sup>117</sup> In fact, the night before the press conference, Gentile and two other lawyers studied the applicable rule on trial publicity to make sure his statements complied with it.<sup>118</sup> During the press conference, Gentile asserted that his client was innocent, that he was being used as a scapegoat by a corrupt police force, and that a certain police officer was the more likely suspect in the theft.<sup>119</sup> He also gave a description of his defense strategy.<sup>120</sup> The case proceeded to trial and the court did not have any problems impaneling a jury. Neither party requested a change of venue or a continuance. There was no claim of prejudice caused by publicity at any time.<sup>121</sup> At voir dire, none of the potential jurors

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110. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (plurality opinion).

111. *Id.* at 1033 (plurality opinion).

112. *Id.* at 1063-64 (plurality opinion).

113. *Id.* at 1039-40 (plurality opinion).

114. *Id.* at 1039-42 (plurality opinion).

115. *Id.* at 1039-41 (plurality opinion).

116. *Id.* (plurality opinion).

117. *Id.* at 1042-43 (plurality opinion).

118. *Id.* at 1044 (plurality opinion).

119. *Id.* at 1045-46 (plurality opinion).

120. *Id.* at 1045 (plurality opinion).

121. *Id.* at 1047 (plurality opinion).

recalled Gentile's press conference.<sup>122</sup> Gentile's client was eventually acquitted of all charges.<sup>123</sup>

Ten months after the press conference and four months after a jury acquitted Gentile's client, the State Bar of Nevada filed a complaint against Gentile for allegedly violating Nevada Supreme Court Rule 177, which was virtually identical to ABA Model Rule 3.6.<sup>124</sup> At the time, the rule in Nevada prohibited an attorney from making a statement if the lawyer "knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."<sup>125</sup> However, the rule goes on to list certain types of statements that attorneys could make "notwithstanding" the general ban.<sup>126</sup> Gentile argued that he made an effort to ensure that his statements fell within this "safe harbor" provision of the rule.<sup>127</sup> However, the southern Nevada disciplinary board held that Gentile knew or should have known that there was a substantial likelihood that his comments would materially prejudice the proceeding.<sup>128</sup> The Nevada Supreme Court later affirmed the board's decision, finding that Gentile had violated the rule and imposed a private reprimand, the lowest possible sanction.<sup>129</sup> As a result, Gentile appealed arguing that Nevada Rule 177 infringed upon his right to free speech and the Supreme Court of the United States reversed, in a complicated decision with two separate majority opinions.<sup>130</sup>

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122. *Id.* (plurality opinion).

123. *Id.* (plurality opinion).

124. As it read at the time, Nevada Rule 177(1) prohibited an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* at app. B, at 1060. Section (2) listed the types of statements that would ordinarily result in material prejudice and section (3) listed the types of statements that could be made "notwithstanding" the previous two sections. *See id.* at app. B, at 1061-62.

125. *Id.* at app. B, at 1060.

126. *Id.* at 1062 (plurality opinion).

127. *Id.* at 1048-49 (plurality opinion).

128. *Id.* at 1064-65 (plurality opinion).

129. *Gentile v. State Bar of Nev.*, 787 P.2d 386 (Nev. 1990).

130. Justice Kennedy announced the judgment of the Court and wrote the opinion of the Court as to the issue of the unconstitutionality of Nevada Rule 177 as interpreted and applied by the Nevada Supreme Court. *Gentile*, 501 U.S. at 1048-51 (plurality opinion). Justices Marshall, Blackmun and Stevens joined Kennedy's opinion in full. *Id.* at 1032 (plurality opinion). Chief Justice Rehnquist wrote the opinion of the Court as to the issue of the constitutionality of the "reasonable likelihood standard." *Id.* at 1062-76 (plurality opinion). Justices White, Scalia and Souter joined the Chief Justice's opinion in full. *Id.* at 1062 (plurality opinion). Justice O'Connor concurred with both opinions, providing the fifth vote. *Id.* at 1081-82 (O'Connor, J., concurring). She sided with Justice Kennedy on the issue of the interpretation and application of

The Supreme Court was split on two different issues. Justice Kennedy wrote an opinion reversing the sanctions and holding Nevada Rule 177 void for vagueness as interpreted and applied by the Nevada Supreme Court.<sup>131</sup> This opinion was joined by Justices Marshall, Blackmun, and Stevens<sup>132</sup> and Justice O'Connor concurred with the judgment.<sup>133</sup> The second issue in the case was whether the "substantial likelihood standard" was constitutional.<sup>134</sup> On this issue, Chief Justice Rehnquist wrote the opinion of the Court, in which Justices White, Scalia, and Souter joined,<sup>135</sup> and Justice O'Connor concurred.<sup>136</sup>

Justice Kennedy's opinion was based on the interpretation of what he considered to be conflicting messages in the text of the rule. He held that the use of the word "notwithstanding" in the safe harbor provision of the rule could mislead an attorney into thinking that he or she could issue comments of the type mentioned in the rule without fear of sanctions.<sup>137</sup> Given that Gentile's comments did fall within the language of the rule and that the Nevada Supreme Court found that he had violated the rule, Kennedy concluded that the application of the rule was invalid for vagueness.<sup>138</sup> As Gentile made an effort to comply with the rule but ultimately could not, Justice Kennedy concluded that the rule created "a trap for the wary as well as the unwary"<sup>139</sup> because it failed to give attorneys enough guidance as to when speech was protected.<sup>140</sup>

On the question of the appropriate constitutional standard, Chief Justice Rehnquist specifically rejected the claim that the state could only discipline an attorney if there was a "clear and present danger" that the attorney's statements would affect the fairness of the proceeding.<sup>141</sup> He concluded that the restraint on attorneys' speech was content neutral and narrowly tailored because it was applied only to speech that was

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the rule and with the Chief Justice on the issue of the applicable standard. *Id.* (O'Connor, J., concurring).

131. *Id.* at 1048-51 (plurality opinion).

132. *Id.* at 1032 (plurality opinion).

133. *Id.* at 1082 (O'Connor, J., concurring).

134. *Id.* at 1051-52 (plurality opinion).

135. *Id.* at 1062-76 (plurality opinion).

136. *Id.* at 1081-82 (O'Connor, J., concurring).

137. *Id.* at 1048 (plurality opinion).

138. *Id.* (plurality opinion).

139. *Id.* at 1051 (plurality opinion).

140. *Id.* at 1048 (plurality opinion).

141. *Id.* at 1074 (plurality opinion).



substantially likely to have a prejudicial effect.<sup>142</sup> According to the Chief Justice, the limitations on speech were narrowly aimed at two principal evils: comments that could influence the outcome of a trial and comments that could prejudice the jury venire.<sup>143</sup> Because he thought that voir dire may not be effective in filtering out all the effects of pretrial publicity, he concluded that unless speech is limited under the circumstances, both evils would result in the violation of fundamental rights under the Constitution.<sup>144</sup> Speaking for the Court, therefore, he held that states could impose sanctions on a lawyer for extrajudicial statements that had a “substantial likelihood of materially prejudicing [an adjudicative] proceeding.”<sup>145</sup>

*Gentile* has attracted much criticism over the years.<sup>146</sup> In the end, the Court’s opinion does not provide clear guidelines to help courts determine the constitutionality of the ability of a state to regulate in the area of trial publicity.<sup>147</sup> Taken together, the opinions in *Gentile* did not lead the Court to strike down the rule on its face. It only found the rule unconstitutional in its application. In fact, even Justice Kennedy declined to find the “substantial likelihood of material prejudice

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142. *Id.* at 1075-76 (plurality opinion). The Chief Justice found support for this view based upon two main arguments: first, that lawyers have special access to information and thus their comments are particularly likely to prejudice the proceedings, and second, that lawyers are “officers of the court” and subject to control by the courts. *Id.* at 1074 (plurality opinion). Rehnquist’s analysis is based on a balancing of the First Amendment rights of attorneys and the states’ interests, but his balancing does not start from an even balance because attorneys are “officers of the court” and, thus, a state may restrict their speech more than that of other citizens. *Id.* at 1074-75 (plurality opinion). According to the Chief Justice, a majority of state interests would weigh in favor of allowing restrictions on attorney speech by using a standard lower than the traditional one based on a “clear and present danger.” *Id.* (plurality opinion).

143. *Id.* at 1075 (plurality opinion).

144. *Id.* (plurality opinion).

145. *Id.* at 1076.

146. See, e.g., Berkowitz-Caballero, *supra* note 85, at 499; L. Cooper Campbell, *Gentile v. State Bar and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pretrial Publicity*, 6 GEO. J. LEGAL ETHICS 583 (1993); Cole & Zacharias, *supra* note 33, at 1672-75; Suzanne F. Day, *The Supreme Court’s Attack on Attorney’s Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1350-51 (1993) (describing *Gentile* as “a confusing melange of statements from two disagreeing opinions” and arguing that the decision leaves attorneys with little practical guidance concerning the possible range of their speech outside the courtroom); Don J. DeBenedictis, *Gentile’s Unanswered Questions*, A.B.A. J., Apr. 1993, at 28; Gregg, *supra* note 4; Julie Gannon Shoop, *To Speak or Not to Speak: Lawyers Test the Limits of Their Speech Rights*, TRIAL, Sept. 1993, at 12; see also Joel Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003, 1005 n.13, 1031-47 (1984) (supporting the fact that there continues to be much debate over the constitutionality of regulating trial publicity); Thiesen, *supra* note 39, at 848-52.

147. C. Thomas Vasaly, the first assistant director of the Minnesota Lawyers Professional Responsibility Board, was once cited as saying of *Gentile*: “One sort of understands it for about five minutes and then it fades away.” DeBenedictis, *supra* note 146, at 28.

standard” facially deficient because it could be interpreted in a manner “consistent with the First Amendment.”<sup>148</sup> Yet, it is difficult to understand how the rule can be consistent with the First Amendment if it can result in sanctions for protected speech. On the other hand, it has been argued that the disposal of the sanctions on grounds of vagueness should have ended the case, and that, therefore, the discussion of the broader constitutional issue was unnecessary.<sup>149</sup> Finally, it has been said that Chief Justice Rehnquist’s opinion may negatively affect criminal defense representation.<sup>150</sup> However, most of the commentary generated by *Gentile* has focused on whether the Court erred in recognizing the use of a “substantial likelihood” standard in a case that implicated First Amendment rights.<sup>151</sup>

### C. *Gentile’s Aftermath: Amendments to the Rules*

All criticism aside, two things were clear after *Gentile*. First, discipline imposed based on the “reasonable likelihood” standard of Model Rule 3.6 would not withstand constitutional attack. Second, although the standard would be considered facially constitutional, discipline based on it would be examined closely to determine if the rule was *applied* constitutionally. With these concerns in mind, and in response to the debate generated by *Gentile*, the ABA and those jurisdictions whose rules could be subject to the same analysis once again attempted to redraft the applicable rules to make sure they would pass constitutional scrutiny.<sup>152</sup>

During the process, two differing views or approaches to trial publicity rules emerged. Some states chose to use a strict standard along the lines of the “clear and present danger test.” Under this standard a lawyer may not be punished unless the challenged statement

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148. *Gentile*, 501 U.S. at 1038 (plurality opinion). Justice Kennedy stated: “Interpreted in a proper and narrow manner . . . the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm.” *Id.* at 1036 (plurality opinion).

149. Berkowitz-Caballero, *supra* note 85, at 521.

150. One commentator has noted that the opinion “raises fears that trial publicity rules will compromise the quality of criminal defense representation by discouraging lawyers from speaking publicly about their cases.” *Id.* at 499.

151. *See supra* note 146 (citing relevant articles).

152. During the drafting process the ABA Standing Committee on Professional Responsibility considered whether the new rule should (1) apply only in criminal cases, (2) apply only in jury trials, (3) apply only during trials, (4) have a safe harbor provision, (5) be directed at specific evils rather than at “prejudice,” (6) incorporate a clear and present danger standard, (7) require separate standards for prosecutors, (8) apply only to lawyers engaged in the case, and (9) allow attorneys a right of reply to publicity prejudicial to their client’s interests. Berkowitz-Caballero, *supra* note 85, at 538 n.256.

poses a serious and imminent threat of interference with the administration of justice.<sup>153</sup> In contrast, other states retained a lower threshold for discipline based on “reasonable likelihood of prejudice.” Under this approach the state could punish the lawyer for statements that have a reasonable likelihood of interference with the judicial process. Illinois adopted the first approach. The ABA adopted the second one.

In response to the holding in *Gentile*, the ABA modified Model Rule 3.6 in several ways. First, subsection (a) was amended to apply only to attorneys who participate or have participated in the litigation.<sup>154</sup> Second, the drafters eliminated the provisions that the Court determined were invalid for vagueness. For example, the words “notwithstanding” and “without elaboration” were eliminated from the text of the rule and the phrase “general nature of the claim or defense” was changed to “the claim, offense or defense involved.”<sup>155</sup> Third, the section of the rule that listed the types of statements that could result in discipline was moved from the text of the rule and placed in the comment.<sup>156</sup> Fourth, the rule recognized a new right to reply to prejudicial publicity in certain circumstances.<sup>157</sup> Fifth, a new paragraph was added to extend subsection (a) to lawyers “associated” with a lawyer who is or had been involved in the case.<sup>158</sup> Finally, the comment to the rule was amended to suggest that the nature of the proceeding should be taken into account in determining prejudice.<sup>159</sup> The ABA also modified Model Rule 3.8(g) to include a specific provision applicable to prosecutors.<sup>160</sup>

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153. *E.g.*, COLO. R.P.C. 3.6 (1997) (requiring substantial likelihood of materially prejudicing an adjudicative proceeding); D.C. BAR R. 3.6 (1991) (requiring serious and imminent threat to the impartiality of a judge or jury); ME. BAR R. 3.7(j) (1986) (requiring substantial danger of interference with the administration of justice); N.D. R.P.C. 3.6 (1998) (requiring serious and imminent threat of materially prejudicing an adjudicative proceeding); OR. CODE P.R. DR 7-107 (1988) (requiring serious and imminent threat to the fact finding process in an adjudicative proceeding); VA. SUP. CT. R. DR 7-106 (1994) (requiring clear and present danger of interfering with the fairness of the trial by a jury).

154. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (1983) (amended 1994).

155. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(1) (1983) (amended 1994). Under the original rule, the phrase “without elaboration” was used as a limitation on an attorney’s ability to speak. Thus, ironically, in an attempt to clarify the extent of the limits on speech, the drafters of the new rule eliminated one of the restrictions on speech.

156. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. para. 5 (1983) (amended 1994). The drafters also changed the language that describes the types of statements in the list from statements that “ordinarily” would be likely to violate the rule to statements that are “more likely than not” to do so. *Id.*

157. MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (1983) (amended 1994).

158. MODEL RULES OF PROF'L CONDUCT R. 3.6(d) (1983) (amended 1994).

159. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. para. 6 (1983) (amended 1994).

160. MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (1983) (amended 1994).

Although it took a bit more time to achieve, Illinois also amended its rules. In June 1998, the Illinois Supreme Court Committee on Professional Responsibility submitted proposed amendments to Rules 3.6, 3.8, and 4.2 of the Illinois Rules of Professional Conduct to the Illinois Supreme Court Rules Committee. The Rules Committee then scheduled a public hearing for the discussion of the amendments and requested written comments. The hearing was held in January 1999 and in October of that year, after considering the matters raised at the hearing and the submitted comments, the Supreme Court issued an order adopting the proposed amendments to Rules 3.6 and 3.8 and rejecting the amendment to Rule 4.2.<sup>161</sup> According to the order, the amendments were scheduled to become effective on December 1, 1999.<sup>162</sup>

These amendments were not well received by all. On November 22, 1999 a number of state and federal prosecutors filed an *ex parte* petition to reconsider the court's order.<sup>163</sup> Although the proceeding requested by the petition was apparently not recognized by any of the Rules of the court, it requested the Committee on Professional Responsibility to file a response.<sup>164</sup> The committee did so, and the court subsequently denied the petition without explanation in March 2000 and ordered that the rules immediately take effect.<sup>165</sup>

In contrast with the ABA amendments, Illinois did not adopt the "reasonable likelihood standard" discussed in *Gentile*. The provisions of Illinois Rule 3.6 apply only to statements that pose a "serious and imminent threat" to the fairness of a proceeding.<sup>166</sup> Otherwise, the

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161. Complaint for Declaratory and Injunctive Relief at 3, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

162. *Id.*

163. *Id.* app. D, at 1 (Petition for Reconsideration and Stay Effect and Enforcement of Amended Rules of Professional Conduct).

164. Reply Memorandum in Support of Motion to Dismiss Complaint or to Stay Proceedings at 1, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

165. Northcutt, *supra* note 23, at 55, 58. One issue before the court in *Devine* was whether this action by the court in this "proceeding" should be considered an "adjudication" so that it could be said that the Supreme Court construed the rules for purposes of abstention. Motion to Dismiss Complaint or to Stay Proceedings at 3, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

166. ILL. SUP. CT. R.P.C. 3.6(a) (2000). This section of the rule states:

A lawyer who is participating or has participated in the investigation or litigation of a matter 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 would pose a serious and imminent threat to the fairness of an adjudicative proceeding.

*Id.*

changes to the Illinois rules are similar to those approved by the ABA. First, the drafters limited Rule 3.6's applicability to statements "that a reasonable person would expect to be disseminated by means of public communication."<sup>167</sup> The rule was also limited to attorneys who participated in the case.<sup>168</sup> Second, section (b) of Rule 3.6 was amended to include a list of subjects that would pose a serious and imminent threat to the fairness of the proceeding.<sup>169</sup> Interestingly, this list is equivalent to the one *eliminated* by the ABA from Model Rule 3.6. Third, Illinois Rule 3.6(c) is now virtually identical to the safe harbor provision included in ABA Model Rule 3.6(b).<sup>170</sup> Fourth, Rule

167. *Id.*

168. *Id.*

169. ILL. SUP. CT. R.P.C. 3.6(b). This section reads:

(b) There are certain subjects which would pose a serious and imminent threat to the fairness of a proceeding, particularly when they refer to a civil matter triable to a jury, or a criminal matter. These subjects relate to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case, 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 failure to make a statement;
- (3) the performance or results of any examination or test or the failure of a person to submit to an examination or test, or the 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;
- (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a 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 unless proven guilty.

*Id.*

170. ILL. SUP. CT. R.P.C. 3.6(c) reads:

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

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved and;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case in addition to subparagraphs (1) through (6):
  - (i) the identity, residence, occupation, and family status of the accused,

3.6(d) recognizes a limited right to reply equivalent to the one in Model Rule 3.6(c).<sup>171</sup> Finally, in order to limit the rights of prosecutors, Illinois added two new sections to Rule 3.8.<sup>172</sup>

#### IV. EXTRAJUDICIAL PUBLICITY AND THE ROLE OF THE PROSECUTOR

Prosecutors have an important and distinct role in the American criminal justice system.<sup>173</sup> Prosecutors do not represent the victims of crime, the police or the government. They represent the people or the community. Interestingly, this includes *the accused*, which is why, as explained by the Supreme Court in *Berger v. United States*,<sup>174</sup> the

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- (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person,
  - (iii) the fact, time, and place of arrest, and
  - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

ILL. SUP. CT. R.P.C. 3.6(c).

171. ILL. SUP. CT. R.P.C. 3.6(d), which reads:

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

ILL. SUP. CT. R.P.C. 3.6(d).

172. ILL. SUP. CT. R.P.C. 3.8(c), (d), which reads:

(c) In addition to his or her obligations under Rule 3.6, a public prosecutor or other government lawyer in criminal litigation shall exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the public prosecutor or other government lawyer would be forbidden from making under Rule 3.6.

(d) The prosecutor in a criminal case shall refrain from making extrajudicial comments that would pose a serious and imminent threat of heightening public condemnation of the accused, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose

ILL. SUP. CT. R.P.C. 3.8(c), (d).

173. See, e.g., Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415 (1993); Terry D. Edwards, *Police Legal Advisors—Friend or Foe? Ethical Dilemmas in 42 U.S.C. Section 1983 Litigation*, 17 J. LEGAL PROF. 143 (1992); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995); Scott M. Matheson, Jr., *The Prosecutor, The Press and Free Speech*, 58 FORDHAM L. REV. 865 (1990); Jerry E. Norton, *Government Attorneys' Ethics in Transition*, 72 JUDICATURE 299 (1989); Donald J. Rose, *Prosecutorial Misconduct*, 6 GEO. J. LEGAL ETHICS 1067 (1993); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993) (discussing issues facing prosecutors).

174. *Berger v. United States*, 295 U.S. 78, 88 (1935).

prosecutor has the responsibility of a minister of justice and not simply that of an advocate.<sup>175</sup>

Because of their role, prosecutors also have much more public exposure and influence. There is no question that in a high profile case any extrajudicial statement by a prosecutor is likely to be widely disseminated. Indeed, it has been argued repeatedly that prosecutors traditionally have had much more access to the media than have defense lawyers.<sup>176</sup> Thus, some commentators have argued that prosecutors' statements are typically more likely to influence prospective jurors. For this reason, it has been argued that prosecutors are more likely to violate the rules on extrajudicial publicity more often than defense counsel.<sup>177</sup> Oddly, under the approach of the Model Code and the Model Rules before *Gentile* was decided, prosecutors had much more freedom to reach the media than defense attorneys.<sup>178</sup>

Assuming it is true that prosecutors have more of an opportunity to create unfairness in a proceeding by making extrajudicial statements and given that prosecutors are expected to work for justice, it is particularly important to regulate their conduct.<sup>179</sup> Although it is

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175. *Id.* Justice Sutherland stated:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Id.*

176. See *Gregg*, *supra* note 4, at 1327 n.18 (stating that the media gets most of its information about criminal cases from prosecutors); *Swift*, *supra* note 146, at 1005 n.13, 1031-47 (1984) (analyzing trial publicity cases and concluding that most potentially prejudicial statements came from prosecutors and police).

177. *CRYSTAL*, *supra* note 5, at 259 (“Public comment by prosecutors poses a greater risk of danger to the impartiality of decisionmakers than statements by defense counsel because the public is more likely to give credence to statements by public officials than by defense counsel.”); *WOLFRAM*, *supra* note 9, at 635 (stating that prosecutors statements are typically much more likely to influence prospective jurors); *Hellman*, *supra* note 39, at 45 (“[S]tatements by prosecutors or law enforcement officials associated with prosecutors are among the statements most likely to be prejudicial to the fairness of an adjudicatory proceeding.”).

178. See *supra* Part II (comparing the Model Code and the Model Rules).

179. This concern was well summarized by Justice Frankfurter in his dissenting opinion in *Stroble v. California*, almost forty years ago when he stated:

To have the prosecutor himself feed the press with evidence that no self restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead

essential that indictments be subject to public scrutiny,<sup>180</sup> it has been argued that “there is no legitimate reason for a prosecutor, as an agent of the government, to engage in pretrial publicity that heightens the public condemnation of the accused.”<sup>181</sup> For these reasons, some commentators have gone so far as to argue that trial publicity rules should apply *only* to prosecutors, because criminal defense lawyers, as opposed to prosecutors, require access to publicity in order to counter adverse publicity about the accused.<sup>182</sup>

The ABA rejected this view, but it did take a step to impose greater restrictions on prosecutors.<sup>183</sup> The ABA’s approach, explained in ABA Model Rule 3.8, focuses on the detriment an accused faces when extrajudicial statements are made:

In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.<sup>184</sup>

This approach was also followed by the Supreme Court of Illinois, which approved two new sections to Illinois Rule 3.8. Section 3.8(d) states that a prosecutor “shall refrain from making extrajudicial comments that would pose a serious and imminent threat of heightening public condemnation of the accused, except for statements that are necessary to inform the public of the nature and extent of the

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of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice.

Stroble v. California, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting). It is important, however, to make sure the rules used to limit speech by prosecutors are narrowly drawn and fairly applied. In a leading article on the subject published before the Supreme Court’s decision in *Gentile*, the author suggested that rules controlling prosecutor speech “should address the degree of harm, burden of proof, knowledge and intent of the speaker, timing of the speech, and identify the factfinder.” Matheson, *supra* note 173, at 931.

180. As Monroe Freedman has stated, “secret indictments are familiar weapons of tyrannous governments.” MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 230 (1990).

181. *Id.*

182. WOLFRAM, *supra* note 9, at 635 n.5.

183. In their report to the ABA House of Delegates, the ABA Ethics Committee and the ABA Criminal Justice section stated: “Because of a prosecutor’s special power and visibility, a prosecutor should use special care to avoid . . . publicity.” ABA ANN. MODEL RULES 382 (1999).

184. MODEL RULES OF PROF’L CONDUCT R. 3.8(g) cmt. para. 5 (1983) (amended 1994).



prosecutor's action and that serve a legitimate law enforcement purpose."<sup>185</sup> Section 3.8(c) states that

[i]n addition to his or her obligations under Rule 3.6, a public prosecutor or government lawyer in criminal litigation shall exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in the criminal case from making an extrajudicial statement that would be forbidden under Rule 3.6.<sup>186</sup>

However, not all prosecutors accepted these changes. Soon after the enactment of the new Illinois trial publicity rules a group of prosecutors challenged their constitutionality.

#### A. *The Challenge to the New Illinois Rules*

After a failed attempt to get the Illinois Supreme Court to stay the effect and enforcement of the new rules,<sup>187</sup> in October, 2001 ten State's Attorneys from ten different counties<sup>188</sup> in Illinois filed a complaint, *Devine v. Robinson* in Federal District Court.<sup>189</sup> The complaint requested declaratory and injunctive relief arguing that the new rules are overbroad and vague, and that they impose inconsistent restrictions on speech by prosecutors.<sup>190</sup> They argued that the rules chill speech and impede the prosecutors' function of public disclosure and education.<sup>191</sup> According to this argument, prosecutors are required by the inherent duties of their office to "routinely and regularly provide public information respecting investigations, prosecutions and the justice system while respecting and protecting the rights of the public and accused parties to the fair administration of justice."<sup>192</sup> Thus, the

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185. ILL. SUP. CT. R.P.C. 3.8(e) (2000).

186. ILL. SUP. CT. R.P.C. 3.8(c) (2000); *see also supra* note 169 (listing factors that could be potential threats to the fairness of a proceeding).

187. *See supra* notes 163-65 and accompanying text (explaining opposition to the amendments).

188. The action was brought by State's Attorneys in the counties of Cook, Morgan, DuPage, Macon, Madison, St. Clair, Winnebago, Peoria, Champaign, and Lake. Complaint for Declaratory and Injunctive Relief at 1, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

189. *Id.*

190. *Id.* The defendant in the case was Mary Robinson as Administrator of the Illinois Attorney Registration and Disciplinary Commission (ARDC). The ARDC is the agency with authority to investigate and prosecute attorneys for professional misconduct in Illinois. The plaintiffs sought an injunction to prevent Robinson, and the ARDC, from enforcing the new rules. *Devine*, 131 F. Supp. 2d at 963.

191. Complaint for Declaratory and Injunctive Relief at 2, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974); Motion to Dismiss Complaint or to Stay Proceedings at 2, *Devine* (No. 00-CV-4974).

192. Complaint for Declaratory and Injunctive Relief at 2, *Devine* (No. 00-CV-4974).

plaintiffs argued that the rules prohibit communications which are constitutionally protected and which they must make in their roles as prosecutors.

Additionally, the prosecutors argued that amended Rule 3.6 is impermissibly vague and overbroad. They argued that the rule suffers from the same shortcomings as the Nevada Rule of Professional Conduct which was struck down by the United States Supreme Court in *Gentile* because it fails to give sufficient guidance to attorneys regarding what type of statements could and could not be made.<sup>193</sup> The plaintiffs then argued that, even if amended Rule 3.6 was not void for vagueness, it is unconstitutionally overbroad because it fails to take into account the timing of an attorney's public statement when determining its propriety.<sup>194</sup> Also, the prosecutors argued that the right to reply provision contained in Rule 3.6(d) is unconstitutional because it would have a chilling effect on free speech.<sup>195</sup> Their position was that under this provision, even if the threat of punishment were by itself insufficient to silence an attorney, the fear of providing an opponent with a right to respond would certainly serve to eliminate the desire to make any public statement.<sup>196</sup> Therefore, because attorneys would likely avoid making any public statements, the public's right to learn about the workings of the justice system would be severely hindered in both civil and criminal cases.<sup>197</sup>

Finally, the petitioners attacked the constitutionality of Rule 3.8(c), which requires prosecutors to exercise reasonable care to prevent other persons assisting prosecutors from making statements that the prosecutors would be forbidden from making under Rule 3.6.<sup>198</sup> They argued the rule was not valid, first, because it fails to specify which prosecutor is responsible for ensuring compliance with this rule.<sup>199</sup>

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193. *Id.* at 5 (arguing rule 3.6(b) forces attorneys to guess at the rule's meaning).

194. *Id.* (arguing rule 3.6(b) is overbroad because it prohibits speech based on mere content and without reference to its timing notwithstanding references in the rule to the need for "serious and imminent" threats to the fairness of the adjudications).

195. *Id.* (arguing that rule 3.6(d) "compounds the chilling effects of Rule 3.6 because any public commentary may potentially yield 'adverse publicity' which will unilaterally free one's adversary from the Rule").

196. *Id.* at app. D, at 4.

197. *Id.* at 2 (arguing prosecutors are "required by the inherent duties of their office to routinely and regularly provide public information respecting investigations, prosecutions and the justice system while respecting and protecting the rights of the public and accused parties to the fair administration of justice").

198. *Id.* at 7.

199. *Id.* at 6-7 (arguing rule 3.8(c) is void for vagueness because prosecutors must guess which prosecutors are responsible for instructing third parties). In the Petition for Reconsideration filed with the Supreme Court, the plaintiffs argued this point stating that:

Second, the petitioners asserted that Rule 3.8(c) is unconstitutional because it requires governmental agencies to suppress the speech of others by threatening the attorneys with punishment, particularly when the prosecutors do not have supervisory authority over the third parties.<sup>200</sup> Lastly, the petitioners asserted that the prohibition contained in Rule 3.8(e)<sup>201</sup> is impermissibly vague because it fails to give clear guidance as to what types of statements are permitted and is apparently inconsistent with amended Rule 3.6(c).<sup>202</sup>

In response to the complaint, Mary Robinson, the Administrator of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois filed a motion to dismiss. She argued that the federal court should abstain from getting involved until the Supreme Court of the state gives an interpretation of the rules.<sup>203</sup> Secondly, she argued that the plaintiffs had failed to make a sufficient showing of a case or controversy because the complaint did not show that the prosecutors had suffered any actual or threatened injury as a result of the

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Because this new provision does not identify which attorney is subject to discipline if a violation occurs, it is apparently up to the discretion of the ARDC to target the elected/appointed official who heads the prosecutorial agency, the First Assistant who runs the office on a day-to-day basis, the supervisor in charge of the unit responsible for approving or rejecting criminal charges, the attorney assigned to try the case at some future date or the junior attorney assigned to determine whether or not there is sufficient evidence to support a charge in a particular case. Or perhaps, the ARDC will institute disciplinary proceedings against all of them.

*Id.* at app. D, at 4-5 (Petition for Reconsideration and Stay Effect and Enforcement of Amended Rules of Professional Conduct 3.6 & 3.8).

200. *Id.* at 6 (“Rule 3.8(c) improperly uses prosecutors as proxies to extend the Supreme Court’s regulation of attorney conduct to the police officers, victims, witnesses medical personnel and others “associated” persons who are not proper subjects for the Supreme Court’s regulation.”).

201. Section (e) states that prosecutors,

shall refrain from making extrajudicial comments that would pose a serious and imminent threat of heightening public condemnation of the accused, except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose.

ILL. SUP. CT. R.P.C. 3.8(e) (2000).

202. Complaint for Declaratory and Injunctive Relief at 7, *Devine* (No. 00-CV-4974) (arguing Rule 3.8(d) “flatly contradicts” some provisions of Rule 3.6(c)).

203. The defendant claimed the fact that the Supreme Court denied the petition for reconsideration did not mean the court “considered” or “interpreted” the rules. Robinson based the argument on *International College of Surgeons v. City of Chicago*, 153 F.3d 356, 365 (7th Cir. 1998) where, citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), the Court of Appeals for the Seventh Circuit held that abstention is appropriate when (1) there is a substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court’s clarification of state law might obviate the need for a federal constitutional ruling. Motion to Dismiss Complaint or to Stay Proceedings at 4, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

amendments to the rules of professional conduct.<sup>204</sup> She pointed out, for example, that, although the plaintiffs argued that the new rules resulted in a chilling effect on speech, the plaintiffs had not changed their practice of making public communications about pending cases.<sup>205</sup> She also defended Rule 3.8(c), arguing that prosecutors must have an ethical obligation to take reasonable steps to protect the process from prejudicial publicity they may be able to forestall and that it is not different from generally recognized duties of “supervision” as those recognized in other rules of professional conduct such as Rule 5.3.<sup>206</sup>

The district court reviewed the arguments and granted the motion to dismiss on the grounds that the plaintiffs failed to allege a justiciable case or controversy.<sup>207</sup> The court found that the plaintiffs failed to identify what type of comments they wished to issue that would have subjected them to prosecution under the rules.<sup>208</sup> Also, the court noted that the plaintiffs did not allege any facts suggesting that a prosecution was imminent under any interpretation of the rules.<sup>209</sup> Thus, the court concluded that the alleged injury may never materialize and the complaint did not present a case or controversy.<sup>210</sup>

In reaching its result, the court evaluated the plaintiffs’ arguments, and although it declined to actually decide whether the rules are constitutional,<sup>211</sup> it concluded that the rules could be “fairly interpreted

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204. Motion to Dismiss Complaint or to Stay Proceedings at 3, *Devine* (No. 00-CV-4974).

205. *Id.*

206. *Id.* at 8. Rule 5.3 of the Model Rules of Professional Conduct states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

....

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

MODEL RULES OF PROF’L CONDUCT R. 5.3 (1983) (amended 1999).

207. *Devine v. Robinson*, 131 F. Supp. 2d 963, 973 (N.D. Ill. 2001).

208. *Id.* at 969.

209. *Id.* at 972.

210. *Id.* at 973.

211. *Id.* at 972.

in a manner that complies with the First Amendment.”<sup>212</sup> First, the court concluded that Rule 3.6(b) could be interpreted “as an illustrative list of the kinds of subjects that are prohibited under subparagraph (a)” and that once so interpreted there would not be any contradictions with the provisions of the safe harbor section.<sup>213</sup> Second, the court found that Rule 3.8(c) was not vague because it does not have to “spell out a prosecutor’s obligations to every conceivable person in every conceivable situation in order to avoid a vagueness challenge.”<sup>214</sup> The court analogized the provisions of the rule to the Illinois Rules of Professional Conduct that describe an attorney’s supervisory duties such as Rules 5.1 and 5.3.<sup>215</sup> Third, the court rejected the argument that Rule 3.8(d) contradicts the safe harbor provision of Rule 3.6 because “each part or section should be construed in connection with every other part of [sic] section so as to produce a harmonious whole.”<sup>216</sup> Finally, the court found that the rule could be read to be limited in scope, thus defeating the plaintiff’s claim that the rule is overbroad.<sup>217</sup>

Obviously, the court in *Devine* was attempting to avoid deciding the constitutional question; thus, its review of the arguments was not detailed. The court’s “fair interpretation” of the rule, however, leaves too many questions unanswered.

### *B. The New Illinois Rules: Interpretation and Suggestions*

Neither the ABA nor any of the states seem to be considering the elimination of the professional conduct rules that attempt to minimize the dangers of trial publicity. However, given the debate regarding the constitutionality of these types of rules, the first question that needs to be addressed is whether it is a good idea to continue to approach the problem of extrajudicial speech through professional regulation.

There is no question that states have a substantial interest in making sure trials are fair, and that attorneys have an obligation to make sure they do not cause prejudice to the administration of justice. States also have an interest in protecting public confidence in the judicial system, protecting the integrity of the process, making sure decisions are based on the arguments and facts at trial, and in ensuring that attorneys do not create administrative costs by forcing changes in venue, extensive voir

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212. *Id.* at 969.

213. *Id.* at 970.

214. *Id.*

215. *Id.* at 971.

216. *Id.*

217. *Id.* at 972.

dire, sequestration or other actions by courts to counter the effects of their speech. Yet, the question remains whether these interests weigh in favor of allowing restrictions on attorney speech.

This balancing may depend on whether the state interests are so threatened by attorney speech that the regulation chosen to advance those interests is justified. The fundamental rationale for the rules is that extrajudicial trial publicity, specifically attorney speech, can be especially prejudicial in adjudicative proceedings. Yet, the evidence suggesting that attorney speech can have this effect is conflicting, at best. For instance, the Supreme Court has overturned only a few cases because of the effect of publicity and in none of them was attorney speech an issue.<sup>218</sup> In his opinion in *Gentile*, Chief Justice Rehnquist found the “threat of prejudice” in the fact that the public may find statements by attorneys more influential, authoritative or credible.<sup>219</sup> However, he provided no actual proof that the public finds lawyers more credible than other sources. Moreover, the Court has held already that the First Amendment does not permit suppression of speech because of its persuasive power.<sup>220</sup> In fact, the opposite may be true. Maybe the public knows to be skeptical of attorneys because the attorneys are trying to represent the best interests of their clients.<sup>221</sup> In addition, Justice Kennedy responded to Chief Justice Rehnquist’s argument by pointing out that the parties arguing to uphold the rule in *Gentile* did not present “a single example where a defense attorney has

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218. See *supra* notes 41-59 and accompanying text (discussing the impact of pretrial publicity in several Supreme Court cases).

219. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (plurality opinion). Interestingly, the Chief Justice does not mention that this same rationale to justify limiting speech by attorneys had been rejected in *Chicago Council of Lawyers v. Bauer*. Chi. Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied *sub nom.* Cunningham v. Chi. Council of Lawyers, 427 U.S. 912 (1976); see also *infra* note 254 and accompanying text (discussing rejection of argument in *Chicago Council of Lawyers*).

220. In his opinion in *Gentile*, Justice Kennedy stated:

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

*Gentile*, 501 U.S. at 1056-57 (plurality opinion).

221. Thiesen, *supra* note 39, at 859 (suggesting there is no proof the public finds lawyers more credible than other sources).

managed by public statements to prejudice the prosecution of the State's case."<sup>222</sup>

In fact, the evidence on the affect of pretrial publicity on potential jurors is, at best, inconclusive. Some studies have shown that jurors are affected by pretrial publicity and that some of the traditional remedies, such as instructions by the court, are not effective in eliminating this result. For example, the juror studies performed by the "Free Press—Fair Trial Project" in the early 1970s concluded that exposure to prejudicial pretrial publicity would double the chance of a guilty verdict.<sup>223</sup> However, the use of voir dire did help in controlling juror prejudice. Without voir dire, seventy-eight percent of the jurors who were exposed to prejudicial publicity voted for a guilty verdict.<sup>224</sup> After jury selection with voir dire, sixty percent of the jurors voted for a guilty verdict.<sup>225</sup>

The studies that claim to find clear evidence of prejudicial effect, however, have been criticized as inconclusive and ineffective in determining the relationship between news coverage and jury influence.<sup>226</sup> One researcher, for example, noted that most jury studies do not use real jurors as subjects, that the setting of the studies is not a real trial and that the findings of the effect of publicity on jurors are inaccurate because certain types of people are more predisposed to

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222. *Gentile*, 501 U.S. at 1055 (plurality opinion). Justice Kennedy also discussed the decision in *Mu'Min v. Virginia*, concluding that it is difficult to imagine that there are statements that could be made by an attorney that are so inflammatory that they would cause the need to incur the costs the Chief Justice claimed justified the regulation. *Id.* at 1039 (plurality opinion) (citing *Mu'Min v. Virginia*, 500 U.S. 415 (1991)). In *Mu'Min*, the Court held that the Constitution did not require a more extensive voir dire to ensure a fair trial despite widespread publicity of facts and allegations that would be inadmissible at trial. *Mu'Min*, 500 U.S. at 431-32. In any case, such costs are rarely a problem since only a very small percentage of all criminal cases actually receive significant media attention. Thiesen, *supra* note 39, at 859, 861 (citing a 1970 study in the District of Columbia which concluded that only about 2% of all cases received enough publicity to even create the possibility of prejudice); see also Matheson, *supra* note 173, at 866-67 n.3 (citing studies that found that of the crimes reported to police, the *Chicago Tribune* reported on only .65 of 1%, Houston dailies published stories on no more than .75 of 1%, Detroit newspapers reported 1.9% and Atlanta papers reported 3.19%).

223. Alice M. Padawer-Singer & Allen H. Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts*, in *THE JURY SYSTEM IN AMERICA* 125, 135 (1975).

224. Alice M. Padawer-Singer et al., *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 *JUDICATURE* 386, 389 (1974).

225. *Id.*

226. Robb M. Jones, *The Latest Empirical Studies on Pretrial Publicity, Jury Bias, and Judicial Remedies—Not Enough to Overcome the First Amendment Right of Access to Pretrial Hearings*, 40 *AM. U. L. REV.* 841, 844 (1991).

influence from outside sources.<sup>227</sup> Jury studies cannot use real criminal proceedings and therefore cannot produce the sense of responsibility that real jurors might feel.<sup>228</sup> Also, the experimental exposure is not diffused through competition with other messages experienced in real life, such as television, radio, and newspapers.<sup>229</sup> Finally, many studies have relied on survey methodology which does not clearly link pretrial publicity and jury decision-making.<sup>230</sup>

Moreover, many studies have concluded that pretrial publicity does not have as much prejudicial effect on jurors and that there is little correlation between guilty verdicts and prejudicial publicity.<sup>231</sup> Based on a study conducted at the University of Minnesota, for example, researchers concluded that even though pretrial publicity does affect the subjects' initial judgments, the evidence suggested that the problems created by pretrial publicity are diminished by the trial itself.<sup>232</sup> The study results demonstrated that "different pretrial publicity manipulations produced effects of different magnitude."<sup>233</sup> The largest effects were found to be when the negative pretrial publicity involved the defendant's character.<sup>234</sup> This type of pretrial publicity made subjects more likely to say that the defendant was guilty prior to trial.<sup>235</sup> However, while the pretrial publicity may have had significant effects upon the subjects' pretrial judgments, the trial itself diminished greatly

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227. Rita J. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515, 517, 520 (1977).

228. Schmidt, *supra* note 62, at 448.

229. *Id.*

230. Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW & HUM. BEHAV. 453, 455 (1994).

231. F. Gerald Klein & Paul H. Jess, *Prejudicial Publicity: Its Effects on Law School Mock Juries*, 43 JOURNALISM Q. 113 (1966), cited in Scott A. Hagan, *KUTV v. Wilkinson: Another Episode in the Fair Trial/Free Press Saga*, UTAH L. REV. 739, 752-53 (1985); Simon, *supra* note 227, at 528 & n.60; see also Robert Dreschel, *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, 14-15 (1989) (discussing these studies); FREEDMAN, *supra* note 180, at 230 (arguing that the notion that a defendant can deprive the government of a fair trial through the news media is, at best, remote); Jones, *supra* note 226, at 844; John Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1977) (using surveys of actual jurors to conclude that publicity had almost no impact on the jury); Otto et al., *supra* note 230, at 453-56. The Report of the ABA Advisory Committee on Fair Trial and Free Press (the Reardon Report) states: "There are no determinative empirical data that will supply ready answers to the questions of whether jurors can put aside preconceived opinions, and abide by judges' instructions to decide only on the evidence of record." Schmidt, *supra* note 62, at 445 n.71 (quoting the Reardon Report).

232. Otto et al., *supra* note 230, at 464-66.

233. *Id.* at 464.

234. *Id.*

235. *Id.*



any effect of the pretrial publicity.<sup>236</sup> Of the five pretrial publicity manipulations, not a single one had “significant direct effects on subjects’ post trial verdicts.”<sup>237</sup>

At least two other studies have found that the proportion of jurors voting for a guilty verdict was virtually the same whether they had been exposed to pretrial publicity or not, if they were instructed by a judge to disregard the information.<sup>238</sup> An additional study showed that although the experimental jurors were influenced by the publicity to which they were exposed, most of them changed their minds after the trial process and voted for not guilty verdicts.<sup>239</sup> The researcher interpreted this result to mean that the jurors took the judge’s instructions seriously and were able to put the prejudicial material out of their minds.<sup>240</sup> Using surveys of actual jurors, another author has concluded that “newspaper publicity, or any other assertions of the facts of a case made outside of court, have virtually no impact upon the jury trying the case.”<sup>241</sup> Finally, one researcher has summarized the evidence on this issue as follows:

Experiments to date indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning and greater detachment.<sup>242</sup>

Thus it can be concluded that empirical studies have not revealed a strong connection between trial publicity and a threat to fair trials.<sup>243</sup> In fact, in *Gentile*, it was assumed that the extrajudicial comments had no effect on the jurors. Not a single juror indicated any recollection of *Gentile*’s press conference, there was no problem empaneling a jury and neither party felt the need to request a continuance or change of

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236. *Id.* at 465.

237. *Id.*

238. Simon, *supra* note 227, at 522-23.

239. *Id.*

240. *Id.* at 523.

241. Kaplan, *supra* note 231, at 623.

242. Simon, *supra* note 227, at 528.

243. Gregg, *supra* note 4, at 1364-66 (finding that prejudicial effect of publicity is substantially weakened by presentation of evidence at trial); Simon, *supra* note 227, at 528 (concluding that studies to date show that, for the most part, jurors are able to put aside extrajudicial information and base their decision on the evidence presented at trial); *see also* Dreschel, *supra* note 231; Martin F. Kaplan, *Cognitive Processes in the Individual Juror*, in *THE PSYCHOLOGY OF THE COURTROOM* 197, 208-09 (1982); Swift, *supra* note 146, at 1031-49 (arguing that research reveals no instances in which criminal defense attorneys have been found to have prejudiced an adjudication through their extrajudicial statements).

venue.<sup>244</sup> Contrary to what Chief Justice Rehnquist argued in his opinion in *Gentile*, it can be said that potential jurors rarely remember the details of pretrial publicity by the day of the trial, and that even if they do, they view what they read in the press and see on television with healthy skepticism.<sup>245</sup> It can also be argued that the public knows attorneys' roles when representing their clients and, thus, may actually find their statements *less* reliable since they are perceived to be made in the interests of the client.

Given that there is no conclusive evidence that extrajudicial statements can cause prejudice, the application of the professional responsibility rules that attempt to limit the effect of those statements becomes problematic. Although the rules are directed to prohibit statements that lawyers know or should know could be prejudicial, there is little evidence that any statements are indeed prejudicial, thus making the rules depend on speculation. Attorneys attempting to comply with the rules would never, almost by definition, be able to know the effect of the statements. Always in doubt as to whether their conduct would be a violation of the rule, the result might be a chilling effect on presumptively protected speech.

Moreover, when determining whether to approach the possible problems created by extrajudicial speech, there is a strong argument that suggests that the balancing should favor the attorney's right to speak. The argument has three elements: the rules seek to preserve fairness in the process at the expense of the attorney's ethical obligation to zealously represent their clients, the rules affect the attorney's first amendment rights of expression, and the rules interfere with the public's right to be informed about matters of public concern.

Attorneys, by virtue of their involvement in a case and their training as advocates, are frequently the most appropriate persons to speak publicly on behalf of a client.<sup>246</sup> In his opinion in *Gentile*, for example, Justice Kennedy argued that:

An attorney's duties do not begin inside the courtroom door . . . . [A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment . . . including an

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244. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1047 (1991) (plurality opinion). Justice Kennedy concluded that the "[p]etitioner's judgment that no likelihood of material prejudice would result from his comments was vindicated by events at trial." *Id.* (plurality opinion).

245. RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 399 (1995).

246. *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chi. Council of Lawyers*, 427 U.S. 912 (1976).

attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.<sup>247</sup>

Ethics professor Monroe Freedman has also advanced the same view as follows:

The First Amendment right to freedom of speech is never more important to an individual than when he or she is the accused in a criminal prosecution. The prosecutor is privileged to publish to the world . . . what in most other circumstances would be grounds for a libel action. . . . There can be no more pressing occasion, therefore, for immediate, effective public rebuttal.<sup>248</sup>

Other commentators have added that by speaking out on behalf of clients, attorneys strengthen the attorney client relationship and the client's confidence in the representation, thus improving the attorney's ability to put forth a better defense.<sup>249</sup>

Second, restrictions on speech may end up limiting or eliminating more speech than needed. Allowing extrajudicial speech provides access to important information and facilitates public scrutiny of the judicial process.<sup>250</sup> Given the lack of evidence on the prejudicial effect of extrajudicial speech by attorneys, the rules may discourage speech that would not threaten state interests significantly and which could be socially and politically valuable. Indeed, the Supreme Court has repeatedly stated that public scrutiny of the judicial process is an effective restraint on the possible abuse of judicial power which enhances the quality and integrity of the system.<sup>251</sup> Dominic Gentile's

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247. *Gentile*, 501 U.S. at 1043 (plurality opinion).

248. FREEDMAN, *supra* note 180, at 228.

249. Cole & Zacharias, *supra* note 33, at 1648.

250. See *Landmark Communications v. Virginia*, 435 U.S. 829, 839 (1978) (stating that the operations of the courts and the judicial conduct of judges are matters of utmost public concern); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government."); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (stating that the press guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism); see also *supra* notes 21-22, 32 (discussing different interpretations of the First Amendment and its role in the discussion of government affairs).

251. For example, in *In re Oliver*, the Court recognized that while the right to a public trial is guaranteed to the accused, publicity also provides various benefits to the public, including the fact that through public trials the public learns about the government. *In re Oliver*, 333 U.S. 257, 270-71 (1948). The Court stated: "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Id.* at 271. In *Sheppard v. Maxwell*, the Court stated: "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive

comments, for example, alerted the public about the possibility of a corrupt police force.<sup>252</sup> Justice Kennedy emphasized this view in his opinion in *Gentile* when he stated:

[O]ne central point must dominate the analysis: this case involves classic political speech. The State Bar of Nevada reprimanded petitioner for his assertion, supported by a brief sketch of his client's defense, that the State sought the indictment and conviction of an innocent man as a "scapegoat" and had not "been honest enough to indict the people who did it; the police department, crooked cops." . . . At issue here is the constitutionality of a ban on political speech critical of the government and its officials.<sup>253</sup>

Likewise, in civil cases, extrajudicial speech may be needed to disseminate important information about class actions or dangerous products. Foreshadowing the argument against secrecy in civil litigation, for example, the court in *Chicago Council of Lawyers v. Bauer* stated:

Attorneys' statements are often the source of prejudicial publicity, especially since their views and comments are usually accepted by the public on the basis that they come from a wellspring of reliable information. Restricting such comment can be a significant aid in controlling publicity which may affect the fairness of a trial. . . . Yet, there are important countervailing factors. Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinions. . . . And despite our primary focus on prejudicial statements, *we must keep in mind that there are important areas of public concern connected with current litigation.* We can note that lawyers involved in investigations or

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public scrutiny and criticism." *Sheppard*, 384 U.S. at 350. In *Cox Broadcasting v. Cohn*, the Court stated:

Great responsibility is . . . placed upon the news media to report fully and accurately the proceedings of government, . . . and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

*Cox Broad. v. Cohn*, 420 U.S. 469, 491-92 (1975); *see also* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (discussing that access to criminal trials is significant in the functioning of the judicial process and the government as a whole).

252. *Gentile*, 501 U.S. at 1034 (plurality opinion).

253. *Id.* (plurality opinion).

trials often are in a position to act as a check on government by exposing abuses or urging action.<sup>254</sup>

Given these arguments and the fact that there is really no bright-line rule for determining when an extrajudicial statement is proper, any determination of the issue will necessarily involve an after the fact balancing of First Amendment interests, the duties of diligence and zealous advocacy, and the preservation of our system of justice and fairness of trials. This being the case, it is worth considering whether a better approach would be to allow courts to issue case by case orders "capable of being molded to the circumstances" which would be "more likely to be effective in serving the state's interest in delivering fair trials without unnecessarily suppressing . . . speech . . . or limiting the public's ability to be informed about matters of legitimate interest."<sup>255</sup>

One possible alternative is to eliminate the rule altogether and emphasize the courts' inherent power to regulate the conduct of attorneys who practice before them. This way judges could consider the specific facts and circumstances of each particular case and issue narrowly tailored guidelines giving attorneys a fair warning as to what would be allowed.<sup>256</sup> Obviously, the disadvantage of this approach is that attorneys would not have the guidelines available before they made the statements. Also, forcing attorneys to seek permission before speaking in every case could be interpreted as a form of pre-publication review which is a classic example of an unconstitutional system of prior restraints.<sup>257</sup>

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254. *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chi. Council of Lawyers*, 427 U.S. 912 (1976) (emphasis added) (citation omitted).

255. Hellman, *supra* note 39, at 28.

256. Ronald Rotunda, *Can You Say That?*, TRIAL, Dec. 1994, at 20.

257. The Supreme Court has defined a prior restraint as any prohibition on speech issued in advance of publication. *Near v. Minnesota*, 283 U.S. 697, 721 (1931). According to the prior restraint doctrine, "the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination." MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 127 (1984). Originally, the phrase "prior restraint" was used to describe an administrative licensing system which allowed the state to determine what could be published in advance. Through the analysis of the Supreme Court, however, the prior restraints doctrine has been extended to statutes that allow suppression of speech, to injunctions issued by courts after full hearings and to temporary restraining orders. *See, e.g., Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (banning publication of information implicating the accused in a criminal trial); *Near*, 283 U.S. at 721 (finding a statute that allowed suppression of a newspaper after a hearing in court unconstitutional). The doctrine is not related to the substance of the speech but to the effect that the government's method of regulation will have on speech. In *Chicago Council of Lawyers v. Bauer*, the court suggested that prior restraints are defined by four elements: (1) a governmental order that restrains specified expression; (2) the order must be obeyed until reversed; (3) the

Evidently, the Supreme Court of Illinois has already decided that this will not be the approach taken in this state. It is very unlikely that the court will dispose of the new rules at this point. However, the court should consider some suggestions that will help clarify certain aspects of the rules and prevent further attacks on their constitutional validity.

### 1. Should the Rule Have a List of Statements that are Categorically “Impermissible”?

When the ABA redrafted Model Rule 3.6 in response to *Gentile*, it did it in order to eliminate the list of types of statements that were “more likely than not” to cause prejudice to an adjudicative proceeding from the text of the rule and placed it in the comment.<sup>258</sup> The new Illinois Rule 3.6, on the other hand, still contains a similar list in its subsection (b) and, despite the interpretation in *Devine*, the items on the list are most likely categorically impermissible.<sup>259</sup> This subsection will most likely give rise to problems in the interpretation and application of the rule in the future.

First of all, it is not completely clear how the section should be interpreted. The defendant in *Devine* argued that section (b) only meant to “caution[] attorneys as to certain topics *which may lead to* a ‘serious and imminent threat’ to the fairness of an adjudicative proceeding.”<sup>260</sup> The court in *Devine* adopted this view and suggested that the rule could be interpreted “as an illustrative list of the kinds of subjects that are prohibited under subparagraph (a).”<sup>261</sup> This interpretation of the rule would, of course, solve some of the issues; but there are problems with this suggestion. First of all, this interpretation is contrary to the letter of

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violation of the order may be punished as contempt; and (4) the proceedings conducted for its violation do not include all the safeguards of a criminal trial, including the fact that the violator cannot argue the constitutionality of the order as a defense to its violation. *Chi. Council of Lawyers*, 522 F.2d at 248. The court, however, rejected the argument that the trial publicity rule at issue in that case, which was based on the ABA Model Code DR 7-107, operated as a prior restraint on speech. *Id.* at 248-49.

258. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. para. 5 (1983) (amended 1994).

259. See *supra* note 169 (providing the text of Illinois Rule of Professional Conduct 3.6(b)).

260. Motion to Dismiss Complaint or to Stay Proceedings at 7, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974). In support of this view, the defendant cited an explanatory memo submitted by the Committee on Professional Responsibility with the amendments to the rules. The defendant then urged that the Illinois Supreme Court interpret the rule following this “intent.” *Id.*; see also Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion to Dismiss at 9, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

261. *Devine*, 131 F. Supp. 2d at 970.

the rule. Simply stated, this is not what the rule says.<sup>262</sup> Therefore, there is no guarantee that the disciplinary board or the courts will interpret the rule this way every time. Since the Illinois rules do not have comments to provide guidelines in determining when to file for a violation of the rule, there is nothing written stating that this interpretation is the official policy of the state.

If this is the real meaning of the rule, then section (b) is merely an advisory provision that merely suggests what could be a problem. This brings up the more general question of whether this is something that belongs in the text of the rule itself. The ABA eliminated the equivalent section from Model Rule 3.6 precisely because it thought it was better to place such guidance in the comment to the rules rather than in the rule itself. In its report explaining the 1994 amendments to the rules, the ABA drafters stated:

[T]he Committee believes that the black letter text of the Rule should be reserved for clear standards, deviation from which may result in discipline. . . . This list of statements [in Rule 3.6(b)] likely to be prejudicial is more appropriately located in the commentary to the Rule, where it will serve as guidance to practitioners in deciding whether to speak or what to say. The changes we propose, requiring the application of reasoned judgment to specific facts in each circumstance, will more likely result in an appropriate balance between First Amendment rights and the need for fairness in adjudicative proceedings.<sup>263</sup>

In contrast, the drafters of the Illinois rule did not state in the “explanatory notes” that were issued with the proposed amendments why it would be a good idea to keep the list as part of the rules. The obvious reason is a practical one: the Illinois rules do not have comments. Thus, unless the rules are changed to include comments, the question really is whether to keep the section in the rule or to drop it altogether. Evidently, the Illinois Supreme Court thought that keeping the section is the better alternative. However, in doing this, the rule keeps the possible contradictions with the safe harbor and is open to criticism and constitutional attacks. The court ought to reconsider this decision in light of the constitutional analysis related to the vagueness of the Nevada Rule provided by the Supreme Court in *Gentile*.

The second reason that the ABA decided to move the list of types of impermissible statements to the comments was to eliminate the

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262. The rule states it is a list of “subjects that would pose a serious and imminent threat” to a proceeding. ILL. SUP. CT. R.P.C. 3.6(b) (2000).

263. ABA REPORT EXPLAINING 1994 AMENDMENTS, quoted in Hellman, *supra* note 39, at 34.

vagueness in the rule criticized by the Court in *Gentile*.<sup>264</sup> Writing for the Court on that issue, Justice Kennedy invalidated the old rule because of the vagueness that resulted from having a list of probably impermissible statements and a safe harbor within the same rule.<sup>265</sup> Kennedy found that the combination of these two sections created confusion for lawyers trying to determine what conduct could violate the rule. Arguably, a statement permitted under the safe harbor provision could be banned under the section of impermissible statements.<sup>266</sup> For example, a lawyer alleging that a prosecution witness would lie to negotiate a plea bargain for himself or herself can argue that the statement is permitted because it is a statement about the general nature of the defense, while the state could argue that it is impermissible because it is expressing an opinion of a witness' credibility. Also, section (b)(1) says an attorney may not refer to a party's criminal record,<sup>267</sup> while section (b)(2) says an attorney may refer to any matter "contained in the public record,"<sup>268</sup> which would include the defendant's criminal record.

On the other hand, it can be argued that the Illinois rule is different than the one at issue in *Gentile* because section (b) is categorical and the safe harbor and reply provisions do not say they operate as exceptions to what is stated in section (b). Both section (c) and section (d) of the rule begin with the phrase "[n]otwithstanding paragraph (a)."<sup>269</sup> Both then proceed to state the types of statements that an attorney can make without violating the rule.<sup>270</sup> Since neither states that these statements can be made notwithstanding paragraph (b), it could be argued that a statement that could be classified under sections (c) or (d) *would* violate the rule if it could *also* be classified under section (b). Under this interpretation, an attorney would first have to look at section (b) and

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264. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991) (plurality opinion); *see also supra* Part III.B (discussing the Court's analysis in *Gentile*).

265. *Gentile*, 501 U.S. at 1048 (plurality opinion).

266. Justice Kennedy concluded: "Given [the rule's] grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide 'fair notice to those to whom [it] is directed.'" *Id.* (plurality opinion) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)). Likewise, analyzing the ABA Model Rules 1994 amendments, Professors Hazard and Hodes have argued that it is possible for a statement which would otherwise have been proscribed under section (a) will be permissible under section (b). They concluded this is the product of "unfortunate" draftsmanship. 1 HAZARD & HODES, *supra* note 93, at 675, *cited in* Hellman, *supra* note 39, at 36.

267. MODEL RULES OF PROF'L CONDUCT R. 3.6(b), (c) (1983) (amended 1994).

268. MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(2) (1983) (amended 1994).

269. ILL. SUP. CT. R.P.C. 3.6(c), (d) (2000).

270. *Id.*



determine whether the statement would classify as one of the prohibited types of statements. If so, the statement would be a violation of the rule even if the attorney could argue that it was covered by the safe harbor provision.

If interpreted this way, which was not suggested by the defendant in *Devine*, the rule creates less confusion than the one in *Gentile*. Yet, it is still not clear whether the fact that a statement could be interpreted to classify under both the list of impermissible statements and the safe harbor at the same time makes the rule constitutionally infirm. If, on the other hand, the drafters were to eliminate the section on impermissible statements, an attorney could look at the safe harbor and determine which types of statements are acceptable before acting accordingly.<sup>271</sup>

Thus, a rule with both a section on impermissible statements and a safe harbor can create confusion. The ABA concluded that these two provisions could not stand together and moved the prohibitions to the comment where they are intended only to provide guidance.<sup>272</sup> If the Illinois drafters are not willing to do this, at the very least, they need to include clearer language indicating the relationship between the different sections of the rule.

A second problem with Illinois Rule 3.6(b) is that, because it is an attempt to make a list of types of statements that are conclusively prejudicial at any time, it does not allow an analysis based on the timing of the statement.<sup>273</sup> This result could also make the rule overbroad because it punishes speech which is harmful as well as speech which is harmless. Commenting on the chilling effect these enumerative lists have, one author has suggested that courts may be overly reliant on the list instead of the underlying determination of the effect of the speech:

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271. Gregg, *supra* note 4, at 1380 (commenting on California Rule 5-120, the author suggests that if the list of impermissible statements is moved to the comments, the debate will center less on whether the statement fits into a presumptively prejudicial category and more on whether it is permitted under the delineated exceptions).

272. ABA REPORT EXPLAINING 1994 AMENDMENTS, *cited in* Hellman, *supra* note 39, at 34.

273. In his opinion in *Gentile*, Justice Kennedy stated that the application of a constitutional standard to determine if a statement could lead to sanctions "requires an assessment of proximity and degree of harm." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1037 (1991) (plurality opinion). He made a distinction between statements made on the eve of voir dire, which might cause difficulties in securing a jury, and statements made six months prior to trial, which, like the ones involved in *Gentile*, had no effect on the proceedings, their "content fading from memory long before the trial date." *Id.* at 1044 (plurality opinion). For the argument by the prosecutors on this issue in the *Devine* litigation, see Complaint for Declaratory and Injunctive Relief app. D, at 9, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974) (Suggestions in Support of Petition for Reconsideration and Stay of Effect and Enforcement of Amended Rules of Professional Conduct 3.6 & 3.8).

Categorical lists of presumptively prejudicial statements may chill lawyers from making statements forbidden under their provisions, even when those statements might be justified under the circumstances. Furthermore, courts and disciplinary boards may be overly influenced by the categorical clarity of the list, and invoke it to automatically punish apparently violative statements without determining whether the statements actually had a substantial likelihood of materially prejudicing an adjudicative proceeding.<sup>274</sup>

If the interpretation of Illinois Rule 3.6(b) in the end requires a case by case determination of what statements are impermissible, it is essential that courts consider the timing of the statement to determine its prejudicial effect. In *Gentile*, Justice Kennedy made this point clear when he wrote:

A statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process. As [it] turned out in the case here, exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date.

. . . . Given the size of the community from which any potential jury venire would be drawn and the length of time before trial, only the most damaging of information could give rise to any likelihood of prejudice.<sup>275</sup>

The rule in Illinois does not make a distinction on the effect of the statement based on its timing as the ABA Model Code did. However, the timing question is part of the analysis needed to determine if the attorney “should have known” that the statement could have a prejudicial effect on the proceeding. Obviously, the closer to the time of a trial, the more likely it is that an attorney would know that the questionable statement might have an effect on the proceeding. The problem is that, as discussed above, there are doubts that an attorney can ever “know.” If the object of the rule is to create a categorical list of statements or circumstances during which statements are impermissible, it would be better to create a clear distinction taking into account the timing of the speech. Although the rule is not unconstitutional for this reason, it is certainly less precise than it could be.<sup>276</sup>

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274. Gregg, *supra* note 4, at 1380.

275. *Gentile*, 501 U.S. at 1044 (plurality opinion).

276. The prosecutors who asked the Illinois Supreme Court to reconsider the adoption of the amendments suggested that the rule be clarified to apply to only a specific time. They suggested that the rule apply only “when the case is in trial posture” by which they meant when a trial date has been set, subpoenas have been issued, exhibits are prepared, etc. Complaint for Declaratory

## 2. Should the Rule Contain a Safe Harbor Provision?

Illinois Rule 3.6(c) recognizes certain types of information that attorneys can provide notwithstanding the general limits on extrajudicial speech expressed in section (a) of the rule.<sup>277</sup> However, section (c) is not a complete safe harbor because it does *not* say these statements can be issued notwithstanding section (b) which, as discussed above, contains the list of types of statements that would violate the rule.<sup>278</sup> In other words, section (c) recognizes statements that can be issued as long as they are not included in section (b). In contrast, former Rule 3.6(c) *was* a safe harbor against both (a) and (b).<sup>279</sup> While writing the new rule, the drafters in Illinois specifically deleted the qualification of paragraph (b), striking “and Rule 3.6(b)” from 3.6(c).<sup>280</sup>

In *Devine*, the defendant was forced to concede that the language of section (c) is reasonable and clear *if* “it is understood that paragraph (b) is not intended to, and does not, establish a set of absolute prohibitions that might otherwise appear to conflict with paragraph (c).”<sup>281</sup> The problem is that section (b) can *only* be read to create an absolute prohibition. Thus, it is fair to conclude that the amendment reduces the scope of the safe harbor. If this was *not* the intended result of the drafting process, it should be corrected. If it was, it results in the debate discussed above on the possible conflicts between section (c) and section (b).<sup>282</sup>

Furthermore, Illinois Rule 3.6(c) includes a common category of information that has been severely criticized. The purpose of the safe harbor provision is to give an attorney some guidance as to what types of statements the attorney can make without violating the rule. For instance, section (c)(2) states that an attorney may provide “information

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and Injunctive Relief app. D, at 11, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974) (Suggestions in Support of Petition for Reconsideration and Stay of Effect and Enforcement of Amended Rules of Professional Conduct 3.6 & 3.8). Perhaps the emphasis on prejudicial *pretrial* publicity has been misplaced. Thus, the District of Columbia rule is limited to cases currently in trial, when curing the prejudice can be far more difficult. ZITRIN & LANGFORD, *supra* note 245, at 399.

277. ILL. SUP. CT. R.P.C. 3.6(a), (c).

278. *See supra* Part III.C (discussing amendments to the rules).

279. The old rule began with the phrase “[n]otwithstanding Rules 3.6(a) and 3.6(b) . . . .” Plaintiffs Memorandum of Law in Opposition to Defendant’s Motion to Dismiss app. B, at 10, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

280. ILL. SUP. CT. R.P.C. 3.6(b), (c).

281. Defendant’s Motion to Dismiss Complaint or to Stay Proceedings at 7, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

282. *See supra* notes 276-81 and accompanying text (discussing Rule 3.6(b), (c)).

contained in a public record.”<sup>283</sup> Aside from being in conflict with section 3.6(b)(1), as discussed above, this provision creates a loophole which could defeat the purpose of the rule in the first place. Prosecutors who wish to provide information to the media can simply include as much information as they want in the indictment. The prosecution may tell a story by describing the alleged crime, the parties involved, what unindicted conspirators might have said or done, and so forth.<sup>284</sup> As explained by Professor Monroe Freedman:

The biggest loophole that the rules provide for the prosecutor is the permission to state information that is contained in the public record. To take advantage of that rule, prosecutors who want to conduct press conferences have developed the art of the “speaking indictment”—that is, an indictment that effectively places “in the public record” (the indictment) everything that the prosecutor would want to say in pretrial publicity in glorification of the case and in condemnation of the defendant.<sup>285</sup>

Likewise, “defense counsel may file pleadings and other papers with the court that tell the story from the defendant’s perspective.”<sup>286</sup> These allegations and explanations become part of the public record that an attorney may reveal without violating the rules intended to limit extrajudicial statements.<sup>287</sup> To fix this “loophole” and to prevent abuses related to the “speaking indictment” the language of the rule could be changed to limit the use of the public record further.<sup>288</sup>

### 3. Should the Rule Define the Type of Proceedings to Which it Applies?

The comment to ABA Model Rule 3.6 explains that the nature of the proceeding involved in a case is an important factor to consider in

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283. ILL. SUP. CT. R.P.C. 3.6(c)(2).

284. See Robert Hardaway & Douglas Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 80 (1996).

285. FREEDMAN, *supra* note 180, at 233; see also Gregg, *supra* note 4, at 1379; 1 HAZARD & HODES, *supra* note 93, at 675, cited in Hellman, *supra* note 39, at 36.

286. Hardaway & Tumminello, *supra* note 284, at 80.

287. Professors Hodes and Hazard have argued that the safe harbor in the ABA Model Rules allows the disclosure of too much information. They object to the fact that Model Rule 3.6(b)(1) would allow a defendant’s attorney to leak information about a possible insanity defense, that section (b)(2) would allow a prosecutor to read details from an indictment at a news conference, and that section (b)(7) would allow disclosure of personal information which may be a needless invasion of privacy. 1 HAZARD & HODES, *supra* note 93, at 675, cited in Hellman, *supra* note 39, at 36.

288. For example, the comment to the rule in the District of Columbia uses the phrase “technicalities of the indictment.” FREEDMAN, *supra* note 180, at 235.

determining if there is a violation to the rule.<sup>289</sup> The Illinois rules do not have a similar provision. The only mention of a distinction in the effect of a statement appears as part of Rule 3.6(b), but, as discussed above, that section is a categorical rule so the distinction in reality does not make a difference.<sup>290</sup> However, the nature of the proceeding might be an important factor in determining whether an attorney “should have known” that a statement would pose a threat to the proceeding. Thus, it is important for the courts to interpret the application of the rule along the lines of the ABA Model Rule’s comment.

#### 4. The Regulation of Prosecutors’ Extrajudicial Statements

In response to *Gentile*, both the ABA and, more recently, the Illinois Supreme Court amended Rule 3.8, which prescribes some specific duties of prosecutors.<sup>291</sup> The amendments included the addition of a clause to Rule 3.8 that forbids prosecutors from making unnecessary prejudicial statements.<sup>292</sup> Perhaps based on the notion that most extrajudicial comments in criminal cases come from prosecutors, Model Rule 3.8 attempts to restrain prosecutors from making comments that will increase the possibility of defense lawyers trying to reply for their clients in the media.<sup>293</sup> In the comment to Model Rule 3.8, the drafters indicate that the purpose of the rule is to protect the accused from “public condemnation.”<sup>294</sup> The comment concludes that “[n]othing in

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289. The comment to Model Rule 3.6 states:

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

MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. para. 6 (1983) (amended 1994).

290. The first paragraph of section (b) reads: “There are certain subjects which would pose a serious and imminent threat to the fairness of a proceeding, particularly when they refer to a civil matter triable to a jury, or a criminal matter . . .” ILL. SUP. CT. R.P.C. 3.6(b).

291. MODEL RULES OF PROF’L CONDUCT R. 3.8(e), (g) (1983) (amended 1994); ILL. SUP. CT. R.P.C. 3.8(c), (d) (2000).

292. MODEL RULES OF PROF’L CONDUCT R. 3.8(g) (1983) (amended 1994); ILL. SUP. CT. R.P.C. 3.8(d) (2000).

293. Gregg, *supra* note 4, at 1385 (“One of the major complaints of defense lawyers is that their clients are being tried in the media, often fueled by prosecutors’ statements and leaks. With this Rule, the ABA hopes to reduce the incidence of trial by the press . . .”).

294. The comment reads:

Paragraph (g) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the

this Comment is intended to restrict the statement which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).<sup>295</sup> This provision is particularly important because it explains the relationship between the special responsibilities of prosecutors and the general rule on extrajudicial speech that applies to all attorneys. This explanation is missing in the Illinois rules. From the text of the Illinois rules it is not at all clear how prosecutors should interpret their duties. On the one hand, Rule 3.8(d) says they should refrain from making comments that would “pose a serious and imminent threat of heightening public condemnation of the accused,”<sup>296</sup> while on the other Rule 3.6(c) would allow them to read the indictment, state the offense involved, reveal the identity, residence, occupation and other personal information of the accused.<sup>297</sup> To some degree, all of these statements do pose a danger of heightening public condemnation of the accused. If the Illinois rules are interpreted as suggested by the ABA comment, however, the prosecutor would not violate the rules with this disclosure. If, however, Rule 3.8(d) is interpreted on its own, as written, the prosecutor could be in violation of the rule. The result is confusion on the part of the prosecutor as to what conduct would violate the rules, which opens the rule to vagueness attacks as discussed by Justice Kennedy in his majority opinion in *Gentile*.

A second method to regulate prosecutors’ extrajudicial speech in both the Model Rules and the Illinois rules is the recognition of a duty to exercise due care to see that other people involved in the preparation of the case do not make statements for which the prosecutors themselves could be disciplined.<sup>298</sup> In *Devine*, the prosecutors argued that the rule was unconstitutional because it requires state agents to suppress the speech of others by threatening the prosecutors with punishment and

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announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. para. 5 (1983) (amended 1994).

295. *Id.*

296. ILL. SUP. CT. R.P.C. 3.8(d).

297. ILL. SUP. CT. R.P.C. 3.6(c).

298. MODEL RULES OF PROF’L CONDUCT R. 3.8(e) (1983) (amended 1994); ILL. SUP. CT. R.P.C. 3.8(d).

that the rule was essentially unenforceable because the prosecutors did not have any control over those "other people."<sup>299</sup>

Again, the rule seems to be based on the notion that most of the information in criminal cases is provided by the prosecutorial "teams," including members of the prosecutors' office, the police department, investigators and so on. The rule takes notice of the practice of assembling these teams to work on cases<sup>300</sup> and attempts to prevent the attorneys in the team from using non-lawyers as mouthpieces and, thus, avoid compliance with the regulation. Arguably the duty of the prosecutors in this respect is not that different than the duty recognized on all lawyers to supervise the work of non-lawyer assistants, such as Model Rule 5.3 and Illinois Rule 5.3.<sup>301</sup>

However, there is a significant difference between the duties described by those rules and the duties imposed on the prosecutors by Rule 3.8. The rules that refer to an attorney's supervisory responsibilities are limited to circumstances in which the attorney actually has direct supervisory authority. While both Rule 5.3 and Rule 3.8 are based on a duty to take reasonable measures to make sure that the non-lawyer assistant's conduct is compatible with lawyer's ethical standards, Rule 3.8 extends that duty to people over whom there is no supervisory relationship. Thus, the application of the standard created by this rule, and its effectiveness as a method to limit speech, will necessarily be subject to a case-specific determination as to the prosecutor's relationship with the speaker. A recently approved amendment to the comment to Model Rule 3.8(e) added a new paragraph that states:

Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) [currently section (e)] reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f)

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299. Complaint for Declaratory and Injunctive Relief at 6, 8, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001) (No. 00-CV-4974).

300. *United States v. Boyd*, 833 F. Supp. 1277, 1353 (N.D. Ill. 1993), *aff'd*, 55 F.3d 239 (7th Cir. 1995). The court in *Boyd* discussed who is a member of a "prosecution team" for purposes of a violation of the duty to disclose information to defense counsel and found that "[i]t is well settled that information possessed by any member of the United States Attorneys' Office will be attributed . . . to the 'prosecution.' . . . Likewise, it is also clear that the 'prosecution' includes police officers, federal agents and other investigatory personnel . . ." *Id.*

301. MODEL RULES OF PROF'L CONDUCT R. 5.3 (1983) (amended 1994); ILL. SUP. CT. R.P.C. 5.3; *see also supra* note 299 and accompanying text (discussing the constitutionality of preventing lawyers from assisting nonlawyers in making statements).

requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.<sup>302</sup>

In conclusion, it is important to define and limit the “other people” the prosecutor has to worry about under Illinois Rule 3.8. The rule must be limited to those who work with the prosecution team and upon whom the prosecutor has some sort of *supervisory* relationship. A broader scope might impose a duty on the prosecutor, which cannot be met and which might result in unfairness to prosecutors or in chilled speech. Also, because the standard used to evaluate the prosecutor’s conduct is that of reasonable care, disciplinary boards and courts must make a case by case determination based on many factors and following the new ABA comment’s approach that essentially warns not to impose more of a duty on the prosecutor than is warranted under the circumstances.

Thus, for the rule to be fairly applied, the conduct must be judged according to the reasonableness of the efforts under the circumstances, taking into account the relationship between the prosecutor and the other people involved and the context in which the statements are made. The conduct should not be evaluated based on the sole fact that a statement was made and certainly not based on the content of the statement.

On the other hand, if all a prosecutor is required to do to meet the standard of care is to issue some cautions to law enforcement personnel, the effect of the rule as a limit on prejudicial speech will be extremely limited. Perhaps it would be a good idea to consider re-drafting the duty of the prosecutor and actually copying the language in Rule 5.3 which is more specific in how it makes a lawyer responsible for a non-lawyer’s conduct.

## V. CONCLUSION

As the comment to Model Rule 3.6 states, it is difficult to achieve a balance between protecting the right to a fair trial and safeguarding the right to free expression.<sup>303</sup> After *Gentile*, commentators argued that the

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302. ABA Comm. on Evaluations of the Rules of Prof’l Conduct, *Report with Recommendation to the House of Delegates*, Rule 3.8 draft (2001) (explaining proposed changes to Rule 3.8), available at <http://www.abanet.org/cpr/e2k-rule38.html>.

303. MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. para. 1 (1983) (amended 1994).



application of the rules on extrajudicial speech would be uneven since prosecutors had more access to the media, the rules were enforced less against them and they would be entirely free from blame when their agents did the talking.<sup>304</sup> The recent amendments to Illinois Rules of Professional Conduct 3.6 and 3.8 are an attempt to regulate this balance. However, instead of expanding the freedom of expression for criminal defense attorneys, the new rules seek to limit the prosecutors to the same level.

While the rules may be effective in reminding lawyers of their ethical obligation to avoid prejudicing adjudications, it remains to be seen how balanced they will turn out to be. Some argue that the end result is that lawyers lose free speech rights, criminal defendants lose an advocate and the public loses a source of important information concerning the judicial system. Others, however, argue that the rules present the best alternative to the growing problems created by high profile cases.

This Article has argued that the issues raised by the attempt to regulate conduct in this area raises doubts about whether the state should even attempt to regulate it at all. For example, it has been argued that extensive regulation of trial publicity is constitutionally suspect because it discourages speech whose harm cannot be demonstrated and often can be characterized as political speech.

On the other hand protecting the right to a fair trial is a goal important enough to justify some regulation within the limits of the Constitution. If the state must regulate attorneys' speech, the adoption of a clear and present danger test as the baseline for determining the propriety of an attorney's disclosure of information, as the Illinois Rules have done, is certainly the best approach. At least one commentator has concluded that in the end, under the serious and imminent standard, it will be a rare case in which comments by a lawyer will be chilled, particularly in view of the cases in which juries have been found to have been impartial despite pervasive publicity.<sup>305</sup>

A closer look at the rules themselves, nevertheless, suggests the need for further debate as to their application and interpretation. This Article has suggested some ideas that need to be developed in that debate and has offered some suggestions on how to interpret the rules and how to correct drafting problems.

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304. See, e.g., Berkowitz-Caballero, *supra* note 85, at 532-34.

305. FREEDMAN, *supra* note 180, at 235 (commenting on the rule applicable in the District of Columbia).