



Summer 2005

## **Twohig v. Blackmer: New Mexico's Broad Protection for Trial Participant Speech and the Hurdles to Cross before Imposing Gag Orders**

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### **Recommended Citation**

Denise M. Chanez, *Twohig v. Blackmer: New Mexico's Broad Protection for Trial Participant Speech and the Hurdles to Cross before Imposing Gag Orders*, 35 N.M. L. Rev. 587 (2005).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol35/iss3/7>

# TWOHIG V. BLACKMER: NEW MEXICO'S BROAD PROTECTION FOR TRIAL PARTICIPANT SPEECH AND THE HURDLES TO CROSS BEFORE IMPOSING GAG ORDERS

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## I. INTRODUCTION

In recent years, high profile cases like the O.J. Simpson murder trial,<sup>1</sup> the Kobe Bryant rape case,<sup>2</sup> the Scott Peterson murder trial,<sup>3</sup> and the Michael Jackson child molestation case<sup>4</sup> have generated extensive media coverage of criminal proceedings.<sup>5</sup> Courts have had to adjust to the amplified publicity associated with these high profile cases by taking steps to ensure a fair trial for the defendant in each case.<sup>6</sup> As a result, courts have turned to gag orders directed at trial participants in an effort to control pretrial publicity.<sup>7</sup> While gag orders directed at the media are almost never upheld,<sup>8</sup> courts consider it less offensive to impose restrictions on trial participant speech.<sup>9</sup>

New Mexico is not immune from trial publicity in high profile cases. In one of the most publicized cases in New Mexico history, Gordon House was prosecuted three times on vehicular homicide charges for driving drunk and killing a mother and her three daughters on Christmas Eve in 1992.<sup>10</sup> Each trial resulted in extensive media coverage.<sup>11</sup> In an effort to control the publicity for House's third trial on

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\* Class of 2006, University of New Mexico School of Law. I would like to thank Professor Norman Bay for his tremendous guidance and support. Also, special thanks to Amanda Sanchez and Kelly Waterfall for their contributions to this Note.

1. See Alan Abrahamson, *News Groups Seek to Lift Simpson Trial Gag Order*, L.A. TIMES, Aug. 31, 1996.

2. See Associated Press, *Judge Loosens Gag Order in Bryant Case*, Aug. 19, 2004, available at <http://www.firstamendmentcenter.org/news.aspx?id=13882> (last visited Apr. 8, 2005).

3. See Henry K. Lee, *Judge Issues Gag Order in Peterson Murder Case*, S.F. CHRON., June 13, 2003.

4. See William Overend, *After Late Arrival, Jackson Pleads Not Guilty to Charges*, L.A. TIMES, Jan. 17, 2004.

5. See generally Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L. REV. 311 (1997) (discussing the effect of increasing media coverage on high profile cases).

6. See *Sheppard v. Maxwell*, 384 U.S. 333, 357–58 (1966) (holding that the trial court is responsible for controlling trial publicity).

7. Chemerinsky, *supra* note 5, at 311.

8. *Id.* at 328 (arguing that “from a practical perspective,” the U.S. Supreme Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), created an “absolute ban” on prior restraints on the media).

9. Ashley Gauthier, *Gag Orders and the Effect on Newsgathering*, Reporter's Committee for Freedom of the Press, available at <http://rcfp.org/secretjustice/gagorders/effect.html> (last visited Apr. 27, 2005). Trial participant speech is speech by those “participat[ing] in the litigation,” as opposed to the media, who are considered “strangers to it.” *United States v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000); *accord, e.g.*, *Gentile v. State Bar*, 501 U.S. 1030, 1072–73 (1991); *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1512–13 & n.16 (11th Cir. 1991). Trial participants include attorneys involved in the litigation, the accused, witnesses, and court staff. See *Brown*, 218 F.3d at 425.

10. See *State v. House*, 1999-NMSC-014, ¶¶ 1–21, 978 P.2d 967, 972–75. Another example of heavy trial publicity in New Mexico stems from a riot at the state penitentiary in Santa Fe in February 1980. *State ex rel. N.M. Press Ass'n v. Kaufman*, 98 N.M. 261, 266, 648 P.2d 300, 305 (1982). The case drew both local and national pretrial publicity, and at least one of the criminal trials arising out of the riot resulted in a gag order. *Id.* The New Mexico Supreme Court struck down the gag order in *Kaufman*. *Id.* at 306; see *infra* text accompanying notes 144–153.

11. *Twohig v. Blackmer*, 1996-NMSC-023, ¶ 2, 918 P.2d 332, 333. The first two trials resulted in mistrials on vehicular homicide charges. *Id.* ¶¶ 7–8, 918 P.2d at 334.

vehicular homicide charges, District Judge James F. Blackmer issued a gag order prohibiting all participants in the case from talking to the news media.<sup>12</sup> The New Mexico Supreme Court struck down the gag order in *Twohig v. Blackmer*,<sup>13</sup> and in doing so provided broad protection for trial participant speech in New Mexico.<sup>14</sup>

This Note emphasizes that the New Mexico Supreme Court's decision in *Twohig* created a high burden that must be overcome before a judge may impose a gag order on trial participants.<sup>15</sup> This Note also contends that the court in *Twohig* properly characterized the gag order as a prior restraint, thus raising the burden that must be met before placing a gag order on trial participants.<sup>16</sup> In addition, this Note discusses the different standards for regulating attorney speech in pending cases, concluding that the "clear and present danger" standard is more appropriate than the "reasonable likelihood of substantial prejudice" standard when addressing free speech rights.<sup>17</sup> This Note concludes by questioning the necessity of placing gag orders on defense attorneys and raises the question of whether New Mexico's free speech provision provides greater protection than does the U.S. Constitution.<sup>18</sup>

## II. BACKGROUND

In dealing with cases involving trial publicity, the U.S. Supreme Court has adhered to the "principle that justice cannot survive behind walls of silence."<sup>19</sup> The Court has described the press as "the handmaiden of effective judicial administration...guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."<sup>20</sup> While the Court has recognized the importance of the media's role in the judicial system, the competing interests of the right to free speech, embodied in the First Amendment,<sup>21</sup> and the right to a fair trial, secured by the Sixth Amendment,<sup>22</sup> create tension when the news media covers court proceedings.<sup>23</sup> Gag orders,<sup>24</sup> an example

12. *Id.* ¶ 10, 918 P.2d at 335.

13. 1996-NMSC-023, 918 P.2d 332.

14. *Id.* ¶ 1, 918 P.2d at 333.

15. *See infra* Part V.

16. *See infra* Part V.A.

17. *See infra* Parts II.E, V.B.

18. *See infra* Part VI.A-B.

19. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966).

20. *Id.* at 350.

21. U.S. CONST. amend. I ("Congress shall make no law...abridging the freedom of speech, or of the press.").

22. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.").

23. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.").

24. A gag order is a "judge's order directing parties, attorneys, witnesses, or journalists to refrain from publicly discussing the facts of a case." BLACK'S LAW DICTIONARY 700 (8th ed. 2004). There are two types of gag orders: gag orders directed at the press and gag orders directed at trial participants. DON R. PEMBER, MASS MEDIA LAW 413 (2000). A gag order directed at the press is considered to be a form of prior restraint. *Neb. Press Ass'n*, 427 U.S. at 556-59; *see infra* note 25 (defining prior restraint). The U.S. Supreme Court has not decided whether gag orders directed at trial participants are prior restraints. Chemerinsky, *supra* note 5, at 314-16; *see infra* Part II.B.

of a prior restraint on speech,<sup>25</sup> are viewed by some judges as a means to control pretrial publicity and ensure a fair trial.<sup>26</sup>

### A. *The Birth of the Gag Order*

The trend toward imposing gag orders grew out of the U.S. Supreme Court's decision in *Sheppard v. Maxwell*,<sup>27</sup> where the Court found that it is the trial judge's responsibility to ensure the fairness of the trial and to control publicity about the case.<sup>28</sup> *Sheppard* involved a defendant accused of bludgeoning his pregnant wife to death in 1954.<sup>29</sup> The case received intense and pervasive prejudicial publicity.<sup>30</sup> The Court held that the accused in a criminal trial is entitled to an impartial jury "free from outside influences."<sup>31</sup> The Court directed trial courts to "take strong measures to ensure that the balance is never weighed against the accused."<sup>32</sup> Justice Clark wrote the opinion, criticizing the trial judge for not taking action to control the prejudicial pretrial publicity.<sup>33</sup> The Court went on to say that the "cure" to prevent prejudice involves remedial measures and stated that courts "must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."<sup>34</sup> This language, although dicta, is often cited as the "authorization for indirect gag orders"<sup>35</sup> against trial participants.<sup>36</sup>

25. A prior restraint is "[a] governmental restriction on speech or publication before its actual expression. Prior restraints violate the First Amendment unless the speech is obscene, is defamatory, or creates a clear and present danger to society." BLACK'S LAW DICTIONARY 1232 (8th ed. 2004). Temporary restraining orders and permanent injunctions that forbid speech activities are examples of prior restraint. *Alexander v. United States*, 509 U.S. 544, 550 (1993). Gag orders are another example of a prior restraint. *Neb. Press Ass'n*, 427 U.S. at 556–59. There are some exceptions to the doctrine that prior restraints violate the First Amendment, including, but not limited to, prior restraints during war time and prior restraints against obscene publications and "incitements to acts of violence." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). However, these exceptions are "recognized only in exceptional cases." *Id.* at 716. Prior restraints are the "most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n*, 427 U.S. at 559, and they carry a "heavy presumption against [their] constitutional validity." *Id.* at 558 (quoting *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)); see *infra* notes 267–304 and accompanying text.

26. PEMBER, *supra* note 24, at 413.

27. 384 U.S. 333 (1966).

28. *Id.* at 357–63; see PEMBER, *supra* note 24, at 411–14; C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* 241 (1997).

29. *Sheppard*, 384 U.S. at 335–37.

30. *Id.* at 356.

31. *Id.* at 362.

32. *Id.*

33. *Id.* at 357–62. Justice Clark listed multiple devices that the trial judge could have employed to control some of the pretrial publicity. For example, the trial judge should have "adopted stricter rules governing the use of the courtroom by newsmen"; "more closely regulated the conduct of newsmen in the courtroom"; "insulated the witnesses"; "made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides"; "warned the newspapers to check the accuracy of their accounts"; "proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters"; "requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees"; and finally, the court could have "warned [reporters] as to the impropriety of publishing material not introduced in the proceedings." *Id.*

34. *Id.* at 363.

35. Sheryl A. Bjork, Comment, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. MIAMI L. REV. 165, 175 (1989).

36. Indirect gag orders are gag orders that "do not directly restrain the media's right to publish." *Id.* at

### B. *The Rise of Gag Orders Directed at Trial Participants*

After the Court's decision in *Sheppard*, judges began to use gag orders as a way to control prejudicial pretrial publicity.<sup>37</sup> Judges increasingly began to impose gag orders on the media, as well as on attorneys.<sup>38</sup> The Court's decision in *Nebraska Press Ass'n v. Stuart*<sup>39</sup> came ten years after *Sheppard* and specifically addressed the constitutional validity of a gag order on the media.<sup>40</sup>

*Nebraska Press Ass'n* involved a murder trial for a defendant accused of killing six members of a family in their home in a small town in Nebraska.<sup>41</sup> In evaluating the validity of the gag order, the Court handed down a three-prong test to determine whether a prior restraint on publication was justified.<sup>42</sup> In theory, the Court did not ban gag orders directed at the media.<sup>43</sup> However, in practice, courts have viewed *Nebraska Press Ass'n* as a prohibition on gag orders directed at the media.<sup>44</sup>

The language of the Court in *Nebraska Press Ass'n* demonstrates the Court's disfavored view of prior restraints on the news media and why the *Nebraska Press Ass'n* test is so difficult to meet.<sup>45</sup> The Court described a prior restraint as "one of the most extraordinary remedies known to our jurisprudence."<sup>46</sup> The Court made it clear that "even pervasive, adverse publicity" does not mean that the defendant cannot obtain a fair trial.<sup>47</sup> The Court added that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."<sup>48</sup> In addition, the Court held that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."<sup>49</sup>

The Court in *Nebraska Press Ass'n* held that parties seeking to impose a prior restraint on the press, such as a gag order, carry a heavy burden of demonstrating the justification for such prior restraint.<sup>50</sup> The Court listed several other alternatives that

167-68. Instead, indirect gag orders "restrain the extrajudicial speech of trial participants" and hinder the news media's efforts to obtain information. *Id.* at 168.

37. PEMBER, *supra* note 24, at 413.

38. DIENES, *supra* note 28, at 26-27, 252.

39. 427 U.S. 539 (1976).

40. *Id.* at 541.

41. *Id.* at 542.

42. *Id.* at 562. The first inquiry under the Court's test is to determine "the nature and extent of pretrial news coverage." *Id.* Next, the inquiry turns to "whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity." *Id.* The analysis ends by determining "how effectively a restraining order would operate to prevent the threatened danger." *Id.*

43. *Id.* at 570 ("[T]he guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.")

44. See Chemerinsky, *supra* note 5, at 328 ("[L]ower courts have treated *Nebraska Press* as tantamount to an absolute prohibition on such prior restraints, consistently refusing to permit orders limiting press coverage of judicial proceedings.") (quoting RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 8-4 (1994)).

45. See *id.*

46. *Neb. Press Ass'n*, 427 U.S. at 562.

47. *Id.* at 554.

48. *Id.* at 558 (quoting *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

49. *Id.* at 559.

50. *Id.* at 558 (citing *Carroll*, 393 U.S. at 181; *Bantam Books*, 372 U.S. at 70). In *Nebraska Press Ass'n*, the court struck down the gag order imposed on the press, holding that the trial court had not met this burden to justify imposing a prior restraint. *Id.* at 570.

courts may use as opposed to a prior restraint.<sup>51</sup> These alternatives include: (1) change of venue, (2) postponement of trial until public attention subsides, (3) extensive voir dire, (4) use of emphatic and clear instructions, and (5) sequestration of jurors.<sup>52</sup>

Following the Supreme Court's decision in *Nebraska Press Ass'n*, the use of gag orders directed at the media to control pretrial publicity has largely diminished.<sup>53</sup> Instead, the trend since *Nebraska Press Ass'n* has been to direct gag orders at the trial participants themselves, thereby preventing parties, lawyers, witnesses, jurors, law enforcement, and sometimes courthouse personnel from talking to the media about the case.<sup>54</sup> Rather than preventing the media from publishing or broadcasting certain information about a case, courts now prevent the sources of that information from talking to the media.<sup>55</sup> This limits the sources of information to which the media can turn.<sup>56</sup> The theory is that, "[i]f the press has nothing to report, it can't publicize prejudicial material."<sup>57</sup>

### C. Cases Upholding Gag Orders

There are many cases across jurisdictions both upholding and striking down gag orders directed at trial participants.<sup>58</sup> A court's decision whether to uphold or strike down a trial participant gag order depends largely on whether there is a sufficient factual record to support the gag order.<sup>59</sup> For example, in *Levine v. United States District Court*,<sup>60</sup> the Ninth Circuit held that it was appropriate to issue a gag order, finding that there was a sufficient factual foundation to justify a gag order for the protection of fair adjudication.<sup>61</sup>

The facts of *Levine* involved a gag order imposed on government and defense attorneys in a case involving espionage.<sup>62</sup> The case received widespread local and national publicity, which led the judge to grant the prosecution's motion for a gag order.<sup>63</sup> On appeal, the defense attorneys argued that the record did not contain

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51. *Id.* at 563–64.

52. *Id.*

53. DIENES, *supra* note 28, at 241.

54. *Id.*; Chemerinsky, *supra* note 5, at 312; Bjork, *supra* note 35, at 174; Rene 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, 1176 (1990).

55. PEMBER, *supra* note 24, at 419.

56. DIENES, *supra* note 28, at 241–42.

57. PEMBER, *supra* note 24, at 419.

58. Compare *Levine v. U.S. Dist. Court*, 764 F.2d 590 (9th Cir. 1985) (upholding gag order), and *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969) (upholding gag order), with *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (per curiam) (striking down gag order), *Breiner v. Takao*, 835 P.2d 637 (Haw. 1992) (striking down gag order), and *Kemner v. Monsanto Co.*, 492 N.E.2d 1327 (Ill. 1986) (striking down gag order).

59. See *Twohig v. Blackmer*, 1996-NMSC-023, ¶ 11, 918 P.2d 332, 335. Gag orders are implemented based on the specific facts of each case. See PEMBER, *supra* note 24, at 414.

60. 764 F.2d 590 (9th Cir. 1985).

61. *Id.* at 600–01. The trial court ordered "that all attorneys...shall not make any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury." *Id.* at 593. Ultimately, however, the Ninth Circuit held that the language in the gag order, "upon the merits to be resolved by the jury," was overbroad. *Id.* at 598–99. The court in *Levine* found that "many statements that bear 'upon the merits to be resolved by the jury' present no danger to the administration of justice." *Id.* at 599.

62. *Id.* at 591–93.

63. *Id.* at 593. The prosecution asked for the gag order after the defense attorneys spoke with the *Los Angeles*

sufficient facts to support the district court's findings that a gag order was necessary.<sup>64</sup> However, the Ninth Circuit took into account that the defense attorneys made statements to the media about the prosecution's case immediately before or during the trial, creating a greater chance for prejudice.<sup>65</sup> The court in *Levine* found that the "circus-like environment"<sup>66</sup> created by high profile trials "threatens the integrity of the judicial system."<sup>67</sup> The Ninth Circuit declared that the press did not have the right to hear the case argued prior to the court.<sup>68</sup>

Similarly, in *United States v. Tijerina*,<sup>69</sup> the Tenth Circuit concluded that a gag order was appropriate because there was a reasonable likelihood of prejudicing the trial and jurors.<sup>70</sup> The challenge to the gag order arose after two defendants were held in contempt for making public statements about the case at a convention.<sup>71</sup> The Tenth Circuit determined that statements made by the defendants while the trial was pending jeopardized a fair trial.<sup>72</sup> The court stated, "The guarantee of a public trial means a public trial in the courthouse, not in a convention hall."<sup>73</sup>

#### D. Cases Striking Down Gag Orders

The lack of specific factual findings to support imposing a gag order can cause a court to strike down a trial participant gag order.<sup>74</sup> For example, in *Chase v. Robson*,<sup>75</sup> the Seventh Circuit held that a pretrial order that prevented the attorneys and defendants from talking publicly about the case was unconstitutional.<sup>76</sup> The key factor in the Seventh Circuit's decision to invalidate the gag order was the

*Times* shortly before the trial began. *Id.* The defense attorneys discussed their case in detail and attacked the prosecution's case. *Id.* at 592-93. The defense attorneys alleged that the Federal Bureau of Investigation (FBI) exaggerated evidence against their client and misled the U.S. Attorney's office about the strength of the case. *Id.* at 592. They also claimed that their client admitted to passing documents only after five days of questioning and after he told the investigators that he would say anything to stop the interrogation. *Id.*

64. *Id.* at 598.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 597 (citing the trial court's findings). The court in *Levine* considered other alternatives but determined that they were not satisfactory to deal with the pretrial publicity generated by the case. *Id.* at 599-600. The Ninth Circuit considered alternatives to a gag order, such as searching voir dire, "emphatic and clear" jury instructions, change of venue or postponement, and jury sequestration. *Id.*

69. 412 F.2d 661 (10th Cir. 1969).

70. *Id.* at 666. The trial judge implemented the gag order after the defense counsel suggested it as a way to deal with the pretrial publicity. *Id.* at 662-63. The gag order prohibited attorneys, defendants, and witnesses from making any public statements (written or oral) at public meetings or for public reporting about jurors, evidence, the merits of the case, witnesses, and court rulings. *Id.* at 663.

71. *Id.* at 663-66. One defendant told a large crowd at the convention that he "told the witnesses what to say and what to do," that the trial judge was "using the law to take vengeance," and that he was going to advise people to "march around the court house." *Id.* at 665. A co-defendant stated that the United States was going to try to "put [them] to death." *Id.*

72. *Id.* at 666.

73. *Id.* at 667.

74. See, e.g., *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (per curiam); *Breiner v. Takao*, 835 P.2d 637, 640 (Haw. 1992); *Kemner v. Monsanto Co.*, 492 N.E.2d 1327 (Ill. 1986).

75. 435 F.2d 1059 (7th Cir. 1970) (per curiam).

76. *Id.* at 1061. The order prohibited counsel for the government and the defense, as well as the defendant, from making statements at public meetings regarding the jury, the merits of the case, evidence, witnesses, or court rulings. *Id.* at 1060. The trial judge had entered the gag order sua sponte. *Id.*

insufficiency of factual findings to satisfy either the “clear and present danger” standard, or the “reasonable likelihood” of prejudice standard.<sup>77</sup>

In *Chase*, the defendants were facing charges for destroying government records and preventing the administration of the Selective Service Act.<sup>78</sup> The Seventh Circuit held that cases should be tried in the courts, not in the media.<sup>79</sup> However, the Seventh Circuit determined that there were insufficient facts to justify a gag order.<sup>80</sup> The Seventh Circuit found that the newspaper articles that led to the gag order were seven months old when the order was issued and were “insufficient support for the proposition that the defendants’ future first amendment utterances, if any, would interfere with the fair administration of the trial.”<sup>81</sup>

*Breiner v. Takao*<sup>82</sup> and *Kemner v. Monsanto Co.*,<sup>83</sup> two other cases where gag orders were struck down, also demonstrate that there must be sufficient factual findings to support a gag order. In *Breiner*, the Hawaii Supreme Court struck down a gag order,<sup>84</sup> finding that there was insufficient evidence that the defense attorney talked with the media about the trial.<sup>85</sup> The court held that restricting extrajudicial statements by attorneys required a finding that the activity poses a “serious and imminent threat to a defendant’s right to a fair trial,”<sup>86</sup> a standard that was not met in *Breiner*.<sup>87</sup>

In *Kemner*, the Illinois Supreme Court held that mere possibilities were insufficient to support the conclusion that a “serious and imminent threat to the administration of justice exists.”<sup>88</sup> The court in *Kemner* held that there were insufficient facts to support the imposition of the gag order because there was no

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77. *Id.* at 1061; see *infra* notes 103–108 and accompanying text. The Seventh Circuit held that a gag order directed at trial participants constituted a prior restraint against speech. *Chase*, 435 F.2d at 1061.

78. *Chase*, 435 F.2d at 1060.

79. *Id.* at 1061.

80. *Id.*

81. *Id.*

82. 835 P.2d 637 (Haw. 1992). In *Breiner*, the defendant was facing his fourth murder trial in connection with the death of his infant son. *Id.* at 639.

83. 492 N.E.2d 1327 (Ill. 1986).

84. *Breiner*, 835 P.2d at 640. The gag order restricted the attorneys from “making any extrajudicial statement to any member of the media relating to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, during jury selection and the trial in this case.” *Id.* The court issued the gag order at the prosecution’s request after prosecutors saw the defense attorney talking to a reporter. *Id.* at 639.

85. *Id.* at 642. The defense attorney told the trial court that his conversation with the reporter was not related to the case and that he was aware of the disciplinary rules related to extrajudicial comments by attorneys. *Id.* at 639, 642.

86. *Id.* at 641.

87. *Id.* at 642. The court in *Breiner* found that there was no evidence in the record to show that the defense attorney’s statements posed a serious and imminent threat to the defendant’s right to a fair trial. *Id.* The trial court did not make any specific findings to show that the defense attorney “threatened the fair administration of justice.” *Id.* In addition, the court held that the trial court did not consider whether a gag order was the least restrictive alternative. *Id.* at 643.

88. *Kemner*, 492 N.E.2d at 1337. *Kemner* involved twenty-two consolidated actions for damages where people were exposed to chemicals following a train derailment. *Id.* at 1328. The trial court issued the gag order prohibiting defendant Monsanto Company from discussing the case after the plaintiffs filed a motion to hold the company in contempt for “attempting to influence the outcome of the trial by communicating with the jurors outside the courtroom.” *Id.* at 1331. The plaintiffs filed the motion after the defendant sent a letter to media organizations describing “flaws and inaccuracies” in a National Institute of Occupational Safety and Health report. *Id.* Portions of the letter appeared in a story about the litigation and the possible link between a chemical (dioxin) and cancer. *Id.*



evidence that showed any jurors were influenced by media reports.<sup>89</sup> In addition, the Illinois Supreme Court held that the gag order was unconstitutionally overbroad,<sup>90</sup> unconstitutionally vague,<sup>91</sup> and unnecessary because there were less restrictive alternatives that the court did not consider.<sup>92</sup> The court in *Kemner* held that the gag order constituted an impermissible prior restraint.<sup>93</sup>

### E. The Confusion Surrounding Standards in Ethics Rules on Trial Publicity

One area of confusion regarding trial participant speech is the appropriate standard that should be incorporated in ethics rules regulating attorney speech and trial publicity.<sup>94</sup> Model trial publicity rules have incorporated different standards throughout the years.<sup>95</sup> Following the Court's decision in *Sheppard*, the American Bar Association (ABA) included DR 7-107<sup>96</sup> in its Model Code of Professional Responsibility.<sup>97</sup> DR 7-107 instructed lawyers not to make any statements that were "reasonably likely to interfere with a fair trial."<sup>98</sup>

After *Nebraska Press Ass'n*, the ABA modified its ethics rule regarding trial publicity.<sup>99</sup> The rule prohibited attorneys from making extrajudicial comments that pose a "clear and present danger" of prejudicing a court proceeding.<sup>100</sup> But, in 1983, the ABA changed the rule again, this time introducing Model Rule of Professional Conduct 3.6.<sup>101</sup> Rule 3.6 stated that a lawyer should not make statements that he or

89. *Id.* at 1337. The gag order was directed only at defendant Monsanto Company, and it ordered the defendant not to mention the case in the media until the court entered its judgment. *Id.* at 1332. The order also prohibited the company from "taking any action outside [the] courtroom that is calculated to or is reasonably foreseeable to influence any juror in this cause." *Id.*

90. *Id.* at 1338. The Illinois Supreme Court determined that the gag order was unconstitutionally overbroad because the order prohibited any mention of the case, "whether or not [the] expressions constitute a serious and imminent threat to the administration of justice." *Id.* The court in *Kemner* held that an order "must be narrowly drawn so as not to prohibit speech within first amendment rights that would not be prejudicial to a fair trial." *Id.*

91. *Id.* at 1339. The court in *Kemner* determined that the order was unconstitutionally vague because "Monsanto can only guess as to what action and utterances will fall under" the order and because the order did not provide a reliable warning. *Id.*

92. *Id.* The less restrictive alternatives included the power to punish parties in contempt for attempting to influence the outcome of the litigation by communicating with the jury. *Id.*

93. *Id.* at 1337. The court in *Kemner* found that the gag order did not "fit within one of the narrowly defined exceptions to the prohibition against prior restraints." *Id.* at 1336 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)).

94. See *Gentile v. State Bar*, 501 U.S. 1030, 1068 (1991).

95. See *infra* notes 96-102, 137 and accompanying text.

96. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107 (1968).

97. DIENES, *supra* note 28, at 252; Gabriel G. Gregg, Comment, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1334 (1996).

98. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(D) (1968); DIENES, *supra* note 28, at 252.

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

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(D) (1968).

99. DIENES, *supra* note 28, at 253.

100. *Id.*

101. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (1983); DIENES, *supra* note 28, at 253.

she “‘knows or reasonably should know’ will have a ‘substantial likelihood of materially prejudicing an adjudicative proceeding.’”<sup>102</sup>

The confusion regarding standards for analyzing whether attorney comments pose a threat of prejudicing a proceeding stems from the use of different standards by jurisdiction.<sup>103</sup> Courts use a variety of standards including the “clear and present danger” standard, also referred to as the “serious and imminent threat” standard, the “substantial likelihood of material prejudice” standard, and the “reasonable likelihood” of material prejudice standard.<sup>104</sup> Some commentators question whether there is any constitutionally significant difference among the standards.<sup>105</sup> However, in *Gentile v. State Bar*,<sup>106</sup> Chief Justice Rehnquist held that the “substantial likelihood of material prejudice” standard is a “less demanding” standard than the “clear and present danger” standard.<sup>107</sup> Other courts have stated that the “reasonable likelihood of prejudice” standard is considered to be less protective of attorney speech than the “substantial likelihood of material prejudice” standard.<sup>108</sup>

Despite *Gentile*'s holding that “substantial likelihood” is a less demanding standard, Justice Kennedy, writing in a separate opinion for four justices, argued that the “clear and present danger” standard may be the linguistic equivalent of the “substantial likelihood” standard.<sup>109</sup> However, the history associated with the “clear and present danger” standard indicates that there is a difference. The “clear and present danger standard” is often traced to Justice Holmes' opinion in *Schenck v. United States*.<sup>110</sup> In that case, Justice Holmes articulated a test for determining whether the convictions of two defendants for distributing leaflets against the draft during World War I violated their First Amendment rights.<sup>111</sup> Justice Holmes held that the question was “whether the words used are used in 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.”<sup>112</sup>

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102. DIENES, *supra* note 28, at 253 (quoting MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (1983)). The rule also incorporated a safe harbor provision that included a list of statements that a lawyer can make. MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (1983); DIENES, *supra* note 28, at 253.

103. *Gentile v. State Bar*, 501 U.S. 1030, 1068 (1991); *United States v. Scruschy*, No. CR-03-BE-0530-S, 2004 U.S. Dist. LEXIS 6711, at \*10 n.3, \*10-12 (N.D. Ala. Apr. 13, 2004).

104. *Scruschy*, No. CR-03-BE-0530-S, 2004 U.S. Dist. LEXIS 6711, at \*10 n.3, \*10-12.

105. Joseph T. Rotondo, Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 CORNELL L. REV. 1106, 1119-20 (1980). Rotondo argues that courts should focus their inquiry on the “imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.” *Id.* (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

106. 501 U.S. 1030 (1991).

107. *Id.* at 1074-75. New Mexico's rule incorporates the “clear and present danger” standard. Rule 16-306 NMRA.

108. *Wachsman v. Supreme Court*, No. C-2-90-335, 1991 U.S. Dist. LEXIS 20899, at \*16 (S.D. Ohio Sept. 30, 1991).

109. Justice Kennedy stated that the difference between the standards “could prove mere semantics.” *Gentile*, 501 U.S. at 1037. The New Mexico Supreme Court in *Twohig* also stated the two standards might differ only “semantically.” 1996-NMSC-023, ¶ 16, 918 P.2d at 337.

110. 249 U.S. 47, 52 (1919).

111. *Id.* at 48-49.

112. *Id.* at 52.

Justice Holmes' "clear and present danger" test was applied to other freedom of speech cases, including *Bridges v. California*,<sup>113</sup> a consolidation of two cases dealing with defendants who had been convicted for comments published in the newspaper about pending litigation.<sup>114</sup> In *Bridges*, the U.S. Supreme Court recognized that the "clear and present danger standard" had been used in many cases dealing with freedom of expression.<sup>115</sup> The Court in *Bridges* used this standard to determine that the convictions of the defendants violated their First Amendment rights.<sup>116</sup> The Court found that the principle evolving from the use of "clear and present danger" in other cases was that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."<sup>117</sup> In addition, the Court recognized that the First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."<sup>118</sup>

The history of the "clear and present danger" test,<sup>119</sup> as well as the U.S. Supreme Court's recognition that the "substantial likelihood" test is a "less demanding" standard,<sup>120</sup> demonstrates that there is a difference among the standards. Furthermore, the ABA has stated that "substantial likelihood" was not intended to be the equivalent of "clear and present danger."<sup>121</sup> The difference among the standards means that attorney comments that might not be enough to present a "clear and present danger" of prejudicing a proceeding could be enough to create a substantial likelihood of materially prejudicing a proceeding.<sup>122</sup> Therefore, in states like New Mexico, which require a "clear and present danger" of prejudice, attorney speech is more protected than in other states where ethics rules allow an attorney to be disciplined for extrajudicial statements on a lesser showing of prejudice to the proceeding.<sup>123</sup>

#### F. Gentile: "Substantial Likelihood" Standard Sufficient for Analyzing Attorney Speech

In *Gentile*, the ABA's Model Rule 3.6 and its provisions regulating attorney speech became the center of controversy in a case involving a Nevada lawyer's out-of-court statements. The case involved a lawyer's challenge of the application of Nevada's equivalent of Rule 3.6.<sup>124</sup> *Gentile* did not involve the use of a gag order.<sup>125</sup>

113. 314 U.S. 252 (1941).

114. *Id.* at 258.

115. *Id.* at 262.

116. *See id.* at 270.

117. *Id.* at 263.

118. *Id.* In *Gentile*, Justice Kennedy argued that the words "clear and present danger" are not necessary to make a rule regulating speech constitutional. 501 U.S. at 1036. Justice Kennedy, quoting *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946), argued that Justice Holmes' test was not intended to "express a technical legal doctrine." *Gentile*, 501 U.S. at 1036.

119. *See supra* notes 110–118 and accompanying text.

120. *Gentile*, 501 U.S. at 1074–75.

121. *Gregg, supra* note 97, at 1367.

122. *See id.* at 1366–68.

123. *See id.*; *infra* text accompanying note 139.

124. NEV. SUP. CT. R. 177 (1986) (amended 1996); *Gentile*, 501 U.S. at 1033.

125. *Gentile*, 501 U.S. at 1030.

Rather, the State Bar of Nevada disciplined attorney Dominic Gentile for statements he made during a press conference after his client was indicted, before a gag order could be imposed.<sup>126</sup> The lawyer had been reprimanded for violating Nevada Supreme Court Rule 177, which was almost identical to ABA Model Rule 3.6.<sup>127</sup> The Supreme Court held that, “[b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative.”<sup>128</sup>

The Court described lawyers as “key participants”<sup>129</sup> in the justice system and added that the “State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.”<sup>130</sup> The Court held that the “substantial likelihood of material prejudice” standard incorporated in Rule 3.6 may be used to regulate attorney speech.<sup>131</sup> The Court held that although “substantial likelihood” was a “less demanding” standard, it “constitute[d] a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials.”<sup>132</sup>

The U.S. Supreme Court’s decision in *Gentile* allows courts to regulate attorney speech more than the speech of other trial participants.<sup>133</sup> That does not mean that states *must* regulate the speech more closely.<sup>134</sup> The Court’s holding stated that

126. *Id.* Gentile’s client, Grady Sanders, was indicted in connection with the theft of large amounts of cocaine and travelers’ checks from a safety deposit box at the vault company he owned. *Id.* at 1039–40. The drugs and money were being used as part of an undercover police investigation. *Id.* Two detectives who had access to the vault submitted to lie detector tests, but the person who administered the tests was later arrested for distributing cocaine to an FBI informant. *Id.* at 1041. Press reports suggested that the FBI suspected that local police officers were responsible for the theft. *Id.* Gentile was aware of the publicity surrounding the case, including numerous newspaper articles and television stories. *Id.* at 1042. In an effort to counter what he believed to be prejudicial publicity to his client, Gentile held a press conference and made statements concerning evidence that he said demonstrated his client’s innocence. *Id.* at 1042, 1045. In addition, Gentile’s statements indicated that the likely thief was a police detective and that the detective could be observed in a videotape suffering from symptoms of cocaine use. *Id.* at 1045. Gentile also said that other victims of theft at the vault company were not credible because most were drug dealers or money launderers. *Id.*

127. *Id.* at 1033. *Compare* NEV. SUP. CT. R. 177 (1986) (amended 1996) (“A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”), *with* MODEL RULES OF PROF’L CONDUCT R. 3.6 (1983). *See supra* note 102 and accompanying text. The Nevada rule also included a safe harbor provision, just as the 1983 version of Model Rule 3.6 did. NEV. SUP. CT. R. 177(3) (1986) (amended 1996); MODEL RULES OF PROF’L CONDUCT 3.6(c) (1983); *see infra* note 132.

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

129. *Id.*

130. *Id.*

131. *Id.* at 1075.

132. *Id.* at 1074–75. However, a different alignment of Justices found Nevada’s Rule 177 void for vagueness for its safe harbor provision, which stated:

[A] lawyer...may state without elaboration: (a) the general nature of the claim or defense; (b) the information contained in a public record; (c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved.

*Id.* at 1048, 1061–62; NEV. SUP. CT. R. 177 (1986). In a 5–4 decision written by Justice Kennedy, the Court held that Rule 177 failed to provide fair notice and failed to provide sufficient guidance to lawyers for when their remarks constitute a violation of the rule. *Gentile*, 501 U.S. at 1048–49.

133. *See supra* notes 128–132 and accompanying text.

134. *See Gentile*, 501 U.S. at 1074.

attorney speech “*may* be regulated under a less demanding standard.”<sup>135</sup> As the next section demonstrates, not all states have chosen to adopt the “substantial likelihood” standard in regulating attorney speech in pending cases.<sup>136</sup>

### G. Trial Participant Speech in New Mexico

In response to *Gentile*, the ABA again revised Model Rule 3.6 in 1994, maintaining the use of the “substantial likelihood of material prejudice” standard.<sup>137</sup> New Mexico has not adopted the amended 1994 version of Model Rule 3.6, maintaining a different version of the ethics rule regulating trial publicity.<sup>138</sup> New Mexico Rule of Professional Conduct 16-306 states that a lawyer should not make an extrajudicial statement in a criminal proceeding if the lawyer “knows or reasonably should know” that the statement “creates a clear and present danger of prejudicing the proceeding.”<sup>139</sup>

The New Mexico Constitution serves as a basis for Rule 16-306.<sup>140</sup> Article II, section 17 states that “[e]very person may freely speak...his sentiments on all subjects...; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”<sup>141</sup> As evidenced by the language of article II, section 17, New Mexico’s free speech provision differs somewhat from the First Amendment.<sup>142</sup> The New Mexico Court of Appeals has held that freedom of speech under article II, section 17 of the New Mexico Constitution provides greater protection than the First Amendment of the U.S. Constitution.<sup>143</sup>

While case law dealing with free speech rights of trial participants in New Mexico is scarce,<sup>144</sup> prior to *Twohig* the New Mexico Supreme Court addressed the issue of gag orders directed at the news media in *State ex rel. New Mexico Press*

135. *Id.*

136. *See infra* notes 138–139 and accompanying text.

137. MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (1994); DIENES, *supra* note 28, at 256. The amendments to the rule were intended to clarify the safe harbor provision held unconstitutional in *Gentile*. Gregg, *supra* note 97, at 1350. In addition, the rule included a “right of reply” provision, which allows lawyers to make limited statements, in certain circumstances, to respond to adverse publicity. MODEL RULES OF PROF’L CONDUCT R. 3.6(c) (1994); Gregg, *supra* note 97, at 1350–51.

138. Rule 16-306 NMRA.

139. *Id.*

140. *Twohig v. Blackmer*, 1996-NMSC-023, ¶ 12, 918 P.2d 332, 335.

141. *Compare* N.M. CONST. art. II, § 17, with U.S. CONST. amend. I (“Congress shall make no law...abridging the freedom of speech, or of the press.”).

142. *See City of Farmington v. Fawcett*, 114 N.M. 537, 545, 843 P.2d 839, 847 (Ct. App. 1992) (finding that the “authors of the New Mexico Constitution were aware of the language of the First Amendment to the United States Constitution and consciously chose to adopt a different formula”).

143. *See id.* at 547, 843 P.2d at 849; *State v. Rendleman*, 2003-NMCA-150, ¶ 58, 82 P.3d 554, 570; *infra* notes 447–454 and accompanying text.

144. *Albuquerque Journal v. Jewell*, 2001-NMSC-005, 17 P.3d 437, is one of the few New Mexico cases dealing with a trial participant gag order. However, the case is unusual in that it did not involve a gag order imposed by the court; rather, the gag order was stipulated to by the parties involved. *Id.* ¶ 6, 17 P.3d at 439. In addition, *Jewell* arose from a children’s court case. *Id.* ¶ 1, 17 P.3d at 438. In *Jewell*, the news media challenged the stipulated gag order on the grounds that the judge failed to make factual findings supporting the necessity of the gag order, and that the judge failed to consider less restrictive alternatives. *Id.* ¶ 7, 17 P.3d at 439–40. The court agreed, citing *Twohig*, and ordered the gag order dissolved. *Id.* ¶¶ 7, 9, 17 P.3d at 440. The New Mexico Supreme Court remanded the matter to the children’s court, requiring factual findings if the court chose to reinstate the order. *Id.* ¶ 9, 17 P.3d at 440.

*Ass'n v. Kaufman*.<sup>145</sup> *Kaufman* involved a challenge to a court order prohibiting the news media from publishing jurors' names in a criminal trial.<sup>146</sup> The trial arose out of a riot at the state penitentiary in Santa Fe in 1980.<sup>147</sup>

The court in *Kaufman* struck down the gag order, holding that the prohibition on publishing the jurors' names constituted a prior restraint.<sup>148</sup> By preventing the news media from publishing the names of the jurors, the court found that the trial court had "[i]n effect...partially closed the trial from the [m]edia."<sup>149</sup> After applying the three-prong test articulated in *Nebraska Press Ass'n*,<sup>150</sup> the court in *Kaufman* found that the order was not narrowly tailored.<sup>151</sup> The New Mexico Supreme Court held that "a prior restraint on publication of jurors' names must be based upon imperative circumstances supported by a record that clearly demonstrates that a defendant's right to a fair trial will be jeopardized and that there are no other reasonable alternatives to protect that right."<sup>152</sup> The emphasis in *Kaufman* on consideration of reasonable alternatives, and also of specific factual findings to support a gag order, is echoed in *Twohig*.<sup>153</sup>

In conclusion, prior to *Twohig*, the New Mexico Supreme Court had not addressed the issue of trial participant gag orders since the increase in their use following *Sheppard* and *Nebraska Press Ass'n*.<sup>154</sup> In its decision in *Twohig*, the New Mexico Supreme Court tackled some of the issues surrounding trial participant gag orders in New Mexico, including whether gag orders directed at trial participants are prior restraints and the appropriate analysis for evaluating extrajudicial comments by attorneys.<sup>155</sup> In addition, the court in *Twohig* discussed New Mexico's ethics rule on trial publicity, including the rule's use of the "clear and present danger" standard.<sup>156</sup> In doing so, the New Mexico Supreme Court provided guidance on the constitutionality of gag orders directed at trial participants in New Mexico.

### III. STATEMENT OF THE CASE

On Christmas Eve night in 1992, Paul Cravens, along with his wife Melanie and his three stepdaughters, nine-year-old Kandyce, eight-year-old Erin, and five-year-old Kacee, was driving west on Interstate 40.<sup>157</sup> The family was heading toward Nine Mile Hill for a better view of the Christmas lights around Albuquerque.<sup>158</sup> As

145. 98 N.M. 261, 263, 648 P.2d 300, 302 (1982).

146. *Id.* at 263, 648 P.2d at 302.

147. *Id.* at 266, 648 P.2d at 305.

148. *Id.* at 267, 648 P.2d at 306.

149. *Id.* at 266, 648 P.2d at 305.

150. 427 U.S. at 562. The court in *Kaufman* restated the *Nebraska Press Ass'n* test as follows: "(1) What is the nature and extent of the evil of publication? (2) Are there any alternatives to imposing a gag order? and (3) Were the means selected adequately tailored to accomplish the ends sought?" *Kaufman*, 98 N.M. at 266, 648 P.2d at 305; see *supra* note 42.

151. *Kaufman*, 98 N.M. at 267, 648 P.2d at 306.

152. *Id.*

153. *Twohig*, 1996-NMSC-023, ¶ 26, 918 P.2d at 340.

154. See *supra* Part II.B.

155. See *infra* notes 227-229, 251 and accompanying text.

156. See *infra* notes 218-221 and accompanying text.

157. See *Twohig v. Blackmer*, 1996-NMSC-023, ¶ 2, 918 P.2d 332, 333; Kate Nelson, *I-40 Crash Brings Back the Horror, the Pain, the Ghosts*, ALBUQUERQUE TRIB., Jan. 29, 2002 [hereinafter Nelson, *I-40 Crash*].

158. Nelson, *I-40 Crash*, *supra* note 157.

they approached 98th street, a pickup truck, driving the wrong way on the interstate, crashed head-on into their car.<sup>159</sup> Melanie Cravens and her three daughters were killed instantly.<sup>160</sup> Paul Cravens was seriously injured.<sup>161</sup>

Witnesses reported that Gordon House, the driver of the pickup truck, was driving at speeds of nearly ninety miles per hour when he collided with the Cravens' car.<sup>162</sup> Other drivers in House's path tried to avoid him by pulling off the highway onto the shoulder and into the median; some honked their horns and flashed their lights in an effort to stop House.<sup>163</sup> A police officer pacing House from the other side of the interstate shined his spotlight on House's pickup and turned his emergency lights on, but House never heeded the attempts to stop him.<sup>164</sup> Investigators suspected that he had been drinking.<sup>165</sup> House later admitted that he drank at least seven-and-one-half beers earlier that night.<sup>166</sup> Five hours after the deadly accident, tests revealed that House had a blood alcohol level of 0.10 percent, then the legal standard for intoxication.<sup>167</sup>

Publicity surrounding the fatal Christmas Eve accident and House's prosecution was considered to be "unprecedented in New Mexico."<sup>168</sup> The New Mexico Supreme Court described the case as one of the most publicized in New Mexico history.<sup>169</sup> The case was "so transformed by publicity that all those involved were compelled to evaluate how the defendant could receive a fair trial."<sup>170</sup>

Attorney Ray Twohig defended House during the three trials.<sup>171</sup> Twohig and District Attorney Robert Schwartz, as well as other prosecutors, talked extensively

159. See *Twohig*, 1996-NMSC-023, ¶ 2, 918 P.2d at 333; Kate Nelson, *The Eternity of Paul Cravens*, ALBUQUERQUE TRIB., Aug. 26, 2000.

160. *Twohig*, 1996-NMSC-023, ¶ 2, 918 P.2d at 333.

161. Nelson, *supra* note 159. Paul Cravens suffered a punctured lung, multiple fractures, and a severely bruised brain. *Id.* Initially, doctors told his family he would never walk or talk again. *Id.* Today, Cravens has regained his speech and walking abilities. *Id.*

162. Gutierrez Krueger, *Gordon House Case Isn't Over, Both Sides Say*, ALBUQUERQUE TRIB., Apr. 7, 1999.

163. See *State v. House*, 1999-NMSC-014, ¶ 6, 978 P.2d 967, 973; Nelson, *I-40 Crash*, *supra* note 157.

164. *House*, 1999-NMSC-014, ¶ 6, 978 P.2d at 973; Nelson, *I-40 Crash*, *supra* note 157.

165. *Twohig*, 1996-NMSC-023, ¶ 2, 918 P.2d at 333.

166. *State v. House*, 1998-NMCA-018, ¶ 3, 953 P.2d 737, 740.

167. *Twohig*, 1996-NMSC-023, ¶ 2, 918 P.2d at 333. At his trials, House maintained that it was not the alcohol that caused the accident. *House*, 1998-NMCA-018, ¶ 3, 953 P.2d at 740. He stated that a migraine headache caused him to become disoriented and turn onto the wrong side of the highway. *Id.* As a result of the accident that killed Melanie Cravens and her three daughters, New Mexico lowered the legal standard for intoxication to 0.08 percent three months after the accident. NMSA 1978, § 66-8-102(C)(1) (2004); Krueger, *supra* note 162.

168. *Twohig*, 1996-NMSC-023, ¶ 2, 918 P.2d at 333. The publicity surrounding the case was heaviest in Albuquerque, see *id.* ¶ 27, 918 P.2d at 340, although it also stretched across the state and nationally. See *House*, 1999-NMSC-014, ¶¶ 2-3, 8-10, 57, nn. 1-51, 978 P.2d at 973, 985, 998, nn. 1-51. *Court TV* broadcast House's third trial, which took place in Las Cruces. *Court TV Airs Live Coverage of House Trial*, ALBUQUERQUE J., July 24, 1995. *Dateline NBC* began following the case shortly after the accident and aired a story following House's third trial. J. Gutierrez Krueger, "Dateline NBC" *Delves Into Gordon House Case*, ALBUQUERQUE TRIB., Mar. 27, 1996. The *New York Times*, the *Los Angeles Times*, and other national newspapers also covered the case. See *Fatal Wrong-Way Driver Gets 22-Year Term*, CHI. TRIB., July 25, 1995; Michael Haederle, *Power of Grief*, L.A. TIMES, Dec. 16, 1993; *Navajo "Bright Star" Convicted in Deaths: Controversial Verdict in 3rd Trial*, HOUS. CHRON., July 26, 1995; *Repeat Trials of Navajo in Fatal Crash Polarize New Mexico Residents*, N.Y. TIMES, Apr. 22, 1995.

169. *House*, 1999-NMSC-014, ¶ 8, 978 P.2d at 973. In fact, the New Mexico Supreme Court said, "the media coverage itself became an inextricable part of the story." *Id.* ¶ 10, 978 P.2d at 973.

170. *Id.* ¶ 2, 978 P.2d at 972. In its 1999 opinion affirming House's convictions for vehicular homicide, the New Mexico Supreme Court went on to describe the publicity as "frenetic," "extensive," and "extreme, if not outrageous." *Id.* ¶¶ 2, 13, 57, 978 P.2d at 972, 974, 985.

171. *Lawyers to Honor Defense Attorney*, ALBUQUERQUE J., July 8, 2000.

to the media about the case prior to the first trial.<sup>172</sup> Both defense and prosecution attorneys talked about their strategies and their opinions about the case, including the results of House's blood test taken on the night of the crash.<sup>173</sup> In response to the release of information about the blood tests by the prosecution and police, Twohig attacked the results of the tests, telling a news reporter that the testing equipment at the Albuquerque Police Department lab was broken around the same time the blood test was analyzed and that not all of the "important facts" had been made public.<sup>174</sup>

Twohig also made multiple comments to the media about racial bias in the case.<sup>175</sup> Twohig argued that the charges against his client were racially motivated.<sup>176</sup> In a story by the *Navajo Times*, an Arizona newspaper, Twohig was quoted as saying, "[I]f Gordon House was not Native American and if the victims were not Anglos, despite tragedy, [this case] would not have received any where [sic] near the kind of media attention it has generated."<sup>177</sup> In the same article, Twohig alleged that the police were trying to leak information to the media to "get their story before the public as effectively as possible."<sup>178</sup> He told the newspaper that the media and the public had already convicted House and they had "the noose ready for him."<sup>179</sup>

After announcing a decision to add first-degree, depraved-mind murder charges against House,<sup>180</sup> District Attorney Robert Schwartz justified the decision by explaining that the State had obtained new information that gave it reason to believe that a more serious charge than vehicular homicide was appropriate.<sup>181</sup> Schwartz also told the *Albuquerque Tribune* that the State had evidence that House had a chance to avoid the accident.<sup>182</sup> In a story by the *Albuquerque Journal*, Twohig denounced the District Attorney's choice to pursue first-degree murder charges, calling the decision "prosecutorial overreaching."<sup>183</sup>

172. *Twohig*, 1996-NMSC-023, ¶ 3, 918 P.2d at 333.

173. *Id.* Twohig told the *Albuquerque Journal* in January of 1993 (prior to the first trial) that he was planning to use experts to determine whether the signs on the interstate off ramp were confusing. *Id.* (citing Patricia Gabbett Snow, *Officer: Pickup Sped Wrong Way 10 Miles*, ALBUQUERQUE J., Jan. 9, 1993). The chief deputy district attorney was quoted as saying that the tests from the blood sample taken at the hospital the night of the crash were consistent with the blood alcohol tests from the police department. *See id.* (citing Snow, *supra*); *supra* text accompanying note 167.

174. *Twohig*, 1996-NMSC-023, ¶ 4, 918 P.2d at 333 (citing Valerie Taliman, *Family Seeks Fair Justice*, NAVAJO TIMES, Jan. 14, 1993).

175. *Id.* ¶ 5, 918 P.2d at 334.

176. *Id.*

177. Taliman, *supra* note 174, at 1. The allegations of racial bias stemmed in part from a comment made by District Attorney Schwartz. Nelson, *supra* note 159. Schwartz said House should take responsibility for the "massacre." *Id.* Twohig alleged that the word "massacre" was intended to evoke negative images of Native Americans. *Id.*

178. Taliman, *supra* note 174, at 3.

179. *Id.*

180. *Twohig*, 1996-NMSC-023, ¶ 6, 918 P.2d at 334. House was also facing charges of vehicular homicide, driving while intoxicated, great bodily injury by vehicle, reckless driving, and eluding an officer. *State v. House*, 1999-NMSC-014, ¶ 11, 978 P.2d 967, 973. The trial judge dismissed the depraved-mind murder charges after a preliminary hearing. *Id.*

181. *Twohig*, 1996-NMSC-023, ¶ 6, 918 P.2d at 334 (citing Leslie Linthicum, *House May Face Murder Charges*, SUNDAY J. (Albuquerque), Mar. 21, 1993).

182. *Id.* (citing Laura Bendix, *DWI Defense Denounces Murder Charges*, ALBUQUERQUE TRIB., Mar. 22, 1993).

183. *Id.* (citing Linthicum, *supra* note 181).



As a result of the extensive pretrial publicity, House made a motion for a change of venue for his first trial.<sup>184</sup> The trial judge granted the motion and moved the trial to Taos County.<sup>185</sup> Extensive media coverage of the trial continued in Taos.<sup>186</sup> The jury in House's first trial found him guilty of driving while intoxicated.<sup>187</sup> However, the trial resulted in a hung jury on charges of reckless driving, vehicular homicide, and causing great bodily harm.<sup>188</sup> Following the jury verdict, the attorneys commented extensively about the trial in the media.<sup>189</sup> Amidst widespread media coverage, House was tried a second time on vehicular homicide charges in November 1994,<sup>190</sup> but the second trial also resulted in a mistrial.<sup>191</sup> After the second mistrial on vehicular homicide charges, District Attorney Schwartz announced that he would retry House for a third time.<sup>192</sup> Schwartz stated that House should take responsibility for his actions and also said that the jurors who voted to acquit only could have done so out of sympathy.<sup>193</sup>

After Schwartz announced his decision to pursue a third trial, the *Albuquerque Journal* published an article written by Twohig in response to Schwartz' comments.<sup>194</sup> Twohig argued that justice would not be served by a third trial.<sup>195</sup> In addition, he wrote that the district attorney has "adopted the lust for vengeance of some who speak for the Cravens...famil[y]."<sup>196</sup> During appearances on several radio talk shows, Twohig discussed issues of evidence and law at the first two trials and responded to questions.<sup>197</sup>

In response, the State sought an injunction prohibiting all attorneys, parties, witnesses, and related persons from making "any comment in the media...regarding any substantive issue dealing with [the House] case."<sup>198</sup> Twohig responded to the State's motion by asserting his First Amendment right to speak about the case.<sup>199</sup> Twohig argued that he had a right to respond to the "misleading and inaccurate statements of the District Attorney" and that the district attorney had "created a strong sentiment against [House] in the public arena."<sup>200</sup> Twohig also argued that the Code of Professional Responsibility only prohibited him from making comments

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184. *House*, 1999-NMSC-014, ¶ 12, 978 P.2d at 974.

185. *Id.*

186. *Id.* ¶ 13, 978 P.2d at 974.

187. *Twohig*, 1996-NMSC-023, ¶ 7, 918 P.2d at 334.

188. *Id.*

189. *Id.*

190. House's second trial also took place in Taos County. *House*, 1999-NMSC-014, ¶ 15, 978 P.2d at 974. The trial began on November 7, 1994. *Id.*

191. *Twohig*, 1996-NMSC-023, ¶ 8, 918 P.2d at 334.

192. *Id.* House's third trial took place in Las Cruces, New Mexico, in May 1995 after the judge granted a request for a change of venue to Doña Ana County. *House*, 1999-NMSC-014, ¶¶ 20-21, 978 P.2d at 975.

193. *Twohig*, 1996-NMSC-023, ¶ 8, 918 P.2d at 334.

194. *Id.* ¶ 9, 918 P.2d at 334.

195. Ray Twohig, *Justice Would Not Be Served by Third Trial for Gordon House*, ALBUQUERQUE J., Dec. 2, 1994.

196. *Id.*

197. *Twohig*, 1996-NMSC-023, ¶ 9, 918 P.2d at 334.

198. *Id.* ¶ 10, 918 P.2d at 334.

199. *Id.* ¶ 10, 918 P.2d at 335.

200. *Id.*

that were false or created a "clear and present danger of prejudicing the proceeding."<sup>201</sup>

After a hearing on the State's motion for an injunction, District Judge James F. Blackmer imposed a gag order prohibiting both defense and prosecuting attorneys, and all trial participants, from "making any extrajudicial oral or written statement, comment, opinion, press release, letter or other communication to or through any media or public fora,...on any substantive matters or substantive issues of this case."<sup>202</sup> The district court also prohibited the attorneys from releasing court documents to the media without the court's approval.<sup>203</sup>

Following the court's decision to implement the gag order, Twohig petitioned the New Mexico Supreme Court for a writ of superintending control vacating the trial court's order.<sup>204</sup> Twohig maintained that the gag order "impermissibly restricted his rights of free speech in violation of article II, section 17 of the New Mexico Constitution"<sup>205</sup> and New Mexico Rule of Professional Conduct 16-306.<sup>206</sup> The New Mexico Supreme Court vacated the gag order at a hearing held on March 22, 1995.<sup>207</sup> The court explained its reasoning for vacating the order in its opinion in *Twohig v. Blackmer*.<sup>208</sup> House's third trial resulted in convictions on vehicular homicide charges, great bodily injury by vehicle, and reckless driving.<sup>209</sup> He was sentenced to twenty-two years in prison.<sup>210</sup>

#### IV. RATIONALE

The New Mexico Supreme Court in *Twohig* held that there must be specific, factual findings to demonstrate that extrajudicial statements would pose a "clear and present danger" to the "administration of justice," in order for a court to justify issuing a gag order on trial participants.<sup>211</sup> In vacating the gag order, the court held

201. *Id.*

202. *Id.* This was not the first time the court had issued an order restricting speech concerning the trial. Leslie Linthicum, *House Gag Order Challenged*, ALBUQUERQUE J., Feb. 22, 1995. Judges in House's first two trials also imposed gag orders. *Id.*

203. *Twohig*, 1996-NMSC-023, ¶ 10, 918 P.2d at 335.

204. *Id.* ¶ 1, 918 P.2d at 333.

205. N.M. CONST. art. II, § 17 ("Every person may freely speak, write and publish his sentiments on all subjects...and no law shall be passed to restrain or abridge [that right].")

206. *Twohig*, 1996-NMSC-023, ¶ 1, 918 P.2d at 333. New Mexico Rule of Professional Conduct 16-306 states that "[a] lawyer shall not make any extrajudicial...statement in a criminal proceeding...that the lawyer knows or reasonably should know: (1) is false; or (2) creates a clear and present danger of prejudicing the proceeding." Rule 16-306 NMRA.

207. *Twohig*, 1996-NMSC-023, ¶ 1, 918 P.2d at 333. After the New Mexico Supreme Court vacated the gag order, the trial judge imposed a new gag order on public statements concerning the trial. *House*, 1999-NMSC-014, ¶ 18, 978 P.2d at 974. No litigation resulted from the second gag order. *Id.*

208. 1996-NMSC-023, 918 P.2d 332.

209. *House*, 1999-NMSC-014, ¶ 21, 978 P.2d at 975.

210. *Id.* House is currently serving his sentence at a prison outside of Santa Rosa, New Mexico. Leslie Linthicum, *High Court Rejects Gordon House Appeal*, ALBUQUERQUE J., Oct. 5, 1999. Following his conviction, House appealed the verdict to the New Mexico Court of Appeals. *House*, 1998-NMCA-018, 953 P.2d 737. The Court of Appeals reversed his convictions, holding that the court should have tried to select a jury in Taos County before moving the trial to Doña Ana County. *Id.* ¶ 70, 953 P.2d at 753. In 1999, the New Mexico Supreme Court reversed the Court of Appeals and affirmed House's convictions. *House*, 1999-NMSC-014, ¶ 113, 978 P.2d at 1001. House also appealed to the U.S. Supreme Court, but the Court declined to hear the case. *House v. New Mexico*, 528 U.S. 894 (1999).

211. *Twohig*, 1996-NMSC-023, ¶ 11, 918 P.2d at 335.

that the order imposed by the trial court violated both article II, section 17 of the New Mexico Constitution<sup>212</sup> and Rule of Professional Conduct 16-306.<sup>213</sup> The court in *Twohig* deemed that the findings by the trial court were insufficient to support a prior restraint on speech.<sup>214</sup> The court determined that the trial court failed to “la[y] out the factual foundation for finding a substantial likelihood of prejudice or clear and present danger to a fair and impartial trial.”<sup>215</sup> The court went on to say that the trial court “merely dr[ew] the conclusion” that the extrajudicial statements in the case would have had a substantial likelihood of materially prejudicing the jury trial, and did not analyze the facts supporting its conclusion that a gag order was necessary.<sup>216</sup> The trial court also failed to consider less restrictive alternatives to the gag order.<sup>217</sup>

An important consideration for the court in *Twohig*, in determining the validity of the gag order, was the balance between a defendant’s right to a fair trial in a criminal case and free speech rights.<sup>218</sup> The court turned to the New Mexico Rules of Professional Conduct for guidance on striking this balance when dealing with attorney speech.<sup>219</sup> The court found that New Mexico’s use of the “clear and present danger” standard was an “articulation of the abstract considerations”<sup>220</sup> that impacted the balancing of interests involved in evaluating pretrial publicity.<sup>221</sup>

In addition, the court looked at article II, section 17 of the New Mexico Constitution,<sup>222</sup> a foundation for Rule 16-306,<sup>223</sup> in determining the validity of a prior restraint on speech.<sup>224</sup> The court held that article II, section 17 prohibits the legislature from abridging free speech, and therefore, it follows that courts should not be allowed to do so either.<sup>225</sup> The court determined that, based on article II, section 17, the gag order was subject to constitutional scrutiny.<sup>226</sup>

The court then went on to determine that the gag order in the *Twohig* case, which prohibited trial participants from speaking about the case, was a prior restraint.<sup>227</sup> The court noted that prior restraints “come[] to [the] [c]ourt with a ‘heavy presumption’ against [their] constitutional validity.”<sup>228</sup> However, the court also determined that prior restraints are not unconstitutional per se and that a court may

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212. N.M. CONST. art. II, § 17.

213. Rule 16-306 NMRA; *Twohig*, 1996-NMSC-023, ¶ 1, 918 P.2d at 333.

214. *Twohig*, 1996-NMSC-023, ¶¶ 26–28, 918 P.2d at 340–41.

215. *Id.* ¶ 26, 918 P.2d at 340.

216. *Id.*

217. *Id.*

218. *Id.* ¶ 14, 918 P.2d at 336. This case is interesting because it involves a defense attorney requesting that the gag order be vacated. The defense attorney felt his client had a better chance at a fair trial if he could speak about the case and set the record straight. *Id.* ¶ 10, 918 P.2d at 334–35; see discussion *infra* Part VI.A.

219. *Twohig*, 1996-NMSC-023, ¶ 11, 918 P.2d at 335.

220. *Id.* ¶ 14, 918 P.2d at 336.

221. *Id.*

222. N.M. CONST. art. II, § 17; see *supra* note 205; *infra* notes 448–454 and accompanying text.

223. Rule 16-306 NMRA.

224. *Twohig*, 1996-NMSC-023, ¶ 12, 918 P.2d at 335.

225. *Id.*

226. *Id.*

227. *Id.* ¶ 13, 918 P.2d at 335. Not all courts are in agreement as to whether a gag order prohibiting trial participants from speaking is a prior restraint. See *infra* Part V.A.1.

228. *Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 336 (quoting *State ex rel. N.M. Press Ass’n v. Kaufman*, 98 N.M. 261, 264, 648 P.2d 300, 303 (1982)).

restrict extrajudicial comments by attorneys in order to balance fair adjudication and free speech.<sup>229</sup>

After establishing that prior restraints on speech are not favored, the court in *Twohig* reviewed other case law. The court in *Twohig* looked specifically to the U.S. Supreme Court's decision in *Gentile v. State Bar*<sup>230</sup> for guidance on analyzing attorney political speech.<sup>231</sup> The New Mexico Supreme Court found, based on *Gentile*, that attorneys have a responsibility to not engage in public debate that will impair a defendant's right to a fair trial.<sup>232</sup> In addition, the court in *Twohig* noted that the Supreme Court upheld the use of the "substantial likelihood" standard when dealing with attorney speech in *Gentile*.<sup>233</sup>

After discussing the Supreme Court's analysis in *Gentile*, the court in *Twohig* then turned back to New Mexico's Rule 16-306 to determine what standard to apply in addressing attorney speech outside of the courtroom.<sup>234</sup> The court observed that New Mexico's "clear and present danger" standard differs from the "substantial likelihood of material prejudice" standard.<sup>235</sup> While the "clear and present danger" standard is arguably more protective of speech, the New Mexico Supreme Court noted that the standards differ "semantically."<sup>236</sup> The court established that whatever standard is adopted, the analysis remains the same: "[A] court [must] make its own inquiry into the imminence and magnitude of the danger said to flow from [a] particular utterance and then...balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression."<sup>237</sup> Therefore, based on Rule 16-306<sup>238</sup> and the court's analysis of *Gentile*,<sup>239</sup> the proper test, regardless of which standard is used,<sup>240</sup> balances the potentially dangerous effects of extrajudicial comments on fair adjudication and the need for free speech.<sup>241</sup>

The court then continued its analysis of case law by focusing on cases upholding gag orders<sup>242</sup> and cases striking down gag orders in other jurisdictions.<sup>243</sup> The court explained that its research showed that the number of cases upholding and striking

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229. *Id.* ¶ 14, 918 P.2d at 336 (citing *Kemner v. Monsanto Co.*, 492 N.E.2d 1327, 1336-37 (1986)).

230. 501 U.S. 1030 (1991).

231. *Twohig*, 1996-NMSC-023, ¶ 15, 918 P.2d at 336; see *supra* Part II.F.

232. *Twohig*, 1996-NMSC-023, ¶ 15, 918 P.2d at 336 (citing *Gentile*, 501 U.S. at 1074 (citing *Neb. Press Ass'n*, 427 U.S. at 601 n.27 (Brennan, J., specially concurring))).

233. *Twohig*, 1996-NMSC-023, ¶ 15, 918 P.2d at 336 (citing *Gentile*, 501 U.S. at 1075); see *supra* Part II.F.

234. *Twohig*, 1996-NMSC-023, ¶ 16, 918 P.2d at 337.

235. *Id.*

236. *Id.*

237. *Id.* ¶ 16, 918 P.2d at 337 (quoting *Gentile*, 501 U.S. at 1036 (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978))).

238. Rule 16-306 NMRA.

239. *Twohig*, 1996-NMSC-023, ¶ 15, 918 P.2d at 336.

240. Despite describing the difference in standards for evaluating extrajudicial statements by attorneys as semantics, see *id.* ¶ 16, 918 P.2d at 337, the court in *Twohig* maintained the use of the "clear and present danger" standard in Rule 16-306, *id.* ¶ 1, 918 P.2d at 333, even though the U.S. Supreme Court held that the "substantial likelihood of material prejudice" standard is acceptable. *Gentile*, 501 U.S. at 1075; see *supra* Part II.E.

241. *Twohig*, 1996-NMSC-023, ¶ 16, 918 P.2d at 337.

242. *Id.* ¶¶ 18-20, 918 P.2d at 337-38; see *Levine v. U.S. Dist. Court*, 764 F.2d 590 (9th Cir. 1985); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969); see also *supra* Part II.C.

243. *Twohig*, 1996-NMSC-023, ¶¶ 21-25, 918 P.2d at 338-40; see *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (per curiam); *Breiner v. Takao*, 835 P.2d 637 (Haw. 1992); *Kemner v. Monsanto Co.*, 492 N.E.2d 1327 (Ill. 1986); see also *supra* Part II.D.

down gag orders were equal.<sup>244</sup> Based on cases considering gag orders, the court laid out five considerations that a trial court must address before issuing a gag order: “what may not be said, when it may not be said, where it may not be said, who may not say it, and whether alternatives less restrictive of free speech than an outright ban would suffice to alleviate any prejudice caused by further speech.”<sup>245</sup>

After considering cases that upheld and struck down gag orders, the New Mexico Supreme Court determined that the facts in the instant case showed that the pretrial publicity was not a significant factor in the case.<sup>246</sup> The court pointed out that the trial was not taking place where most of the media coverage had occurred.<sup>247</sup> In addition, the court looked at news articles, which showed that despite publicity about the case, residents where the first two trials had taken place did not know much about the trial.<sup>248</sup> The court also noted that the attorneys had the opportunity for voir dire and jurors had been questioned extensively about a variety of issues in the case.<sup>249</sup>

In issuing the writ of superintending control vacating the order, the court in *Twohig* concluded that

allow[ing] the gag order to stand in the face of a complete lack of factual findings to support the conclusion that such an order was necessary to preserve the parties’ right to a fair trial would have done serious injustice to the principle that post-speech remedies are favored over prior restraints.<sup>250</sup>

The New Mexico Supreme Court held that the gag order did not indicate whether the trial court had made specific factual findings to support the order and the gag order also did not indicate whether the trial court considered less restrictive alternatives.<sup>251</sup>

Each of the trial participant gag order cases that the court in *Twohig* analyzed turned on the criteria of whether there were specific factual findings to justify the imposition of a gag order.<sup>252</sup> The court based its decision on the lack of factual findings sufficient to uphold the gag order.<sup>253</sup> The court concluded that any prior restraint must be supported by specific factual findings showing that extrajudicial comments violate Rule 16-306, or in the words of the rule, that the comments pose a “clear and present danger” to the “administration of justice.”<sup>254</sup>

244. *Twohig*, 1996-NMSC-023, ¶ 17, 918 P.2d at 337.

245. *Id.*

246. *Id.* ¶¶ 26–27, 918 P.2d at 340.

247. *Id.* ¶ 27, 918 P.2d at 340. The case received a “tremendous amount of publicity” in Albuquerque, but the trial took place in Taos. *Id.*

248. *Id.* (citing Ed Asher, *Gordon House? Who’s That? Taos Asks*, ALBUQUERQUE TRIB., June 7, 1994). House’s first two trials took place in Taos. *Id.*

249. *Id.* (citing Leslie Linthicum, *Potential House Jurors Questioned*, ALBUQUERQUE J., June 7, 1994). Voir dire and the extensive questioning of jurors are “tool[s] [used] to combat potential prejudice caused by pretrial publicity.” *Id.* Voir dire is an example of a less restrictive alternative that may be used instead of a gag order. *Neb. Press Ass’n*, 427 U.S. at 563–64; see *supra* text accompanying note 52.

250. *Twohig*, 1996-NMSC-023, ¶ 28, 918 P.2d at 341.

251. *Id.* ¶ 26, 918 P.2d at 340.

252. *Id.* ¶ 17, 918 P.2d at 337.

253. *Id.* ¶ 26, 918 P.2d at 340.

254. *Id.* ¶ 11, 918 P.2d at 335.

## V. ANALYSIS

The role of the media is to serve as a check on the government, including the courts.<sup>255</sup> The U.S. Supreme Court in *Sheppard v. Maxwell*<sup>256</sup> acknowledged the importance of disseminating information about court proceedings to the public.<sup>257</sup> By covering trials and reporting news to the public, the press “guards against the miscarriage of justice.”<sup>258</sup> To be able to perform this role effectively, the news media must be able to provide complete and accurate reports, without the restricted flow of information.<sup>259</sup>

Therefore, the New Mexico Supreme Court took the correct approach when it provided broad protection for trial participant speech in New Mexico in *Twohig*. The court did so by defining and analyzing a trial participant gag order as a prior restraint,<sup>260</sup> and by requiring judges to make specific factual findings<sup>261</sup> showing that they considered less restrictive alternatives<sup>262</sup> as justification for imposing a gag order.<sup>263</sup> While the court in *Twohig* failed to recognize “clear and present danger” as a more protective standard,<sup>264</sup> in light of the court’s determination that gagging trial participants constitutes a prior restraint, the “clear and present danger” standard is more appropriate when dealing with attorney speech.<sup>265</sup> Despite the ABA’s decision to adopt the “substantial likelihood of prejudice” standard for regulating attorney speech,<sup>266</sup> New Mexico’s continued use of the “clear and present danger” standard in its rule of professional conduct adds to the expansive protection given to trial participant speech in New Mexico.<sup>267</sup>

### A. A Gag Order on Trial Participants Is a Prior Restraint

The New Mexico Supreme Court was correct in *Twohig* when it held that a gag order on attorneys and other trial participants is a prior restraint.<sup>268</sup> While some courts have held that gag orders directed at trial participants, unlike gag orders directed at the media, are not prior restraints,<sup>269</sup> the more appropriate approach is to analyze all gag orders as prior restraints.<sup>270</sup> By invoking prior restraint analysis, the

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255. See *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

256. 384 U.S. 333.

257. *Id.* at 349; see *supra* note 20 and accompanying text.

258. *Sheppard*, 384 U.S. at 350.

259. See Gauthier, *supra* note 9.

260. *Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 335.

261. *Id.* ¶ 1, 918 P.2d at 333.

262. See *id.* ¶ 26, 918 P.2d at 340.

263. *Id.* ¶ 28, 918 P.2d at 341.

264. See *id.* ¶ 16, 918 P.2d at 337.

265. See *infra* notes 348–357 and accompanying text.

266. See *supra* note 137 and accompanying text.

267. See Rule 16-306 NMRA.

268. *Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 335.

269. See *In re Dow Jones*, 842 F.2d 603, 608–09 (2d Cir. 1988); *RTNA v. U.S. Dist. Court*, 781 F.2d 1443, 1447 (9th Cir. 1986); *infra* text accompanying notes 289–293.

270. See *United States v. Salameh*, 992 F.2d 445, 446–47 (2d Cir. 1993); *United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987); *Journal Publ’g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986); *Levine v. U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985); *CBS, Inc. v. Young*, 522 F.2d 234, 239 (6th Cir. 1975); *Breiner v. Takao*, 835 P.2d 637, 641 (Haw. 1992); *Chemerinsky*, *supra* note 5, at 313; *infra* text accompanying notes 277–288.

New Mexico Supreme Court imposed a heavy burden that must be overcome before a gag order is properly placed on trial participants.<sup>271</sup>

### 1. Division Among the Courts

After *Nebraska Press Ass'n v. Stuart*,<sup>272</sup> there is no question that gag orders directed at the *news media* are prior restraints.<sup>273</sup> However, the U.S. Supreme Court has not addressed the question of whether gag orders directed at *trial participants* fall into the same category.<sup>274</sup> Characterizing a trial participant gag order as a prior restraint is significant because it invokes a "heavy presumption against... constitutional validity" and increases the burden of proving that a gag order is necessary.<sup>275</sup> There is not a consensus among federal circuit and state courts on whether trial participant gag orders are prior restraints.<sup>276</sup>

Some circuits have held that trial participant gag orders are prior restraints.<sup>277</sup> In *CBS, Inc. v. Young*,<sup>278</sup> for example, the court held that an order that prohibited the parties, relatives, close friends, and associates from discussing the case with the news media was a prior restraint.<sup>279</sup> The gag order was placed on trial participants involved in a civil lawsuit that arose from the killings of four Kent State University students by the National Guard in 1970.<sup>280</sup> The Sixth Circuit found that the gag order created a "restrictive ban upon freedom of expression" and an "extreme example of a prior restraint."<sup>281</sup>

The Sixth Circuit applied the same analysis in the criminal context in *United States v. Ford*.<sup>282</sup> In *Ford*, Congressman Harold Ford was on trial for mail and bank fraud.<sup>283</sup> The district court imposed a gag order that prohibited Congressman Ford from making any public comments.<sup>284</sup> Again, the court found that the order was a prior restraint on speech, holding that "such broadly based restrictions on speech in connection with litigation are seldom, if ever, justified."<sup>285</sup> The Tenth Circuit, in

271. *Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 336; *Neb. Press Ass'n*, 427 U.S. at 558 (quoting *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968)).

272. 427 U.S. 539 (1976).

273. *Id.* at 558–59; *see supra* note 25.

274. *Neb. Press Ass'n*, 427 U.S. 539.

275. *See id.* at 558.

276. *Compare In re Dow Jones*, 842 F.2d 603, 608–09 (2d Cir. 1988) (holding that a gag order directed at trial participants is not a prior restraint), *with Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) (holding that "any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint").

277. *See United States v. Salameh*, 992 F.2d 445, 446–47 (2d Cir. 1993); *United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987); *Mechem*, 801 F.2d at 1236; *Levine v. U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985); *CBS, Inc. v. Young*, 522 F.2d 234, 239 (6th Cir. 1975); *Breiner v. Takao*, 835 P.2d 637, 641 (Haw. 1992).

278. 522 F.2d 234 (6th Cir. 1975).

279. *Id.* at 240.

280. *Id.* at 236.

281. *Id.* at 239–40.

282. 830 F.2d 596, 599 (6th Cir. 1987).

283. *Id.* at 597.

284. *Id.*

285. *Id.* at 599.

*Journal Publishing Co. v. Mechem*,<sup>286</sup> and the Second Circuit, in *United States v. Salameh*,<sup>287</sup> also held that trial participant gag orders are prior restraints.<sup>288</sup>

Other courts do not follow this line of reasoning, holding that gag orders directed at trial participants are not prior restraints on speech.<sup>289</sup> *RTNA v. United States District Court*<sup>290</sup> represents an example of a case where the court refused to analyze the gag order as a prior restraint on speech.<sup>291</sup> In *RTNA*, the Radio and Television News Association (RTNA) challenged the gag order on trial participants in a criminal case for a defendant charged with espionage.<sup>292</sup> The Ninth Circuit held that the media's interest in interviewing trial participants was "outside the scope of protection offered by the first amendment" and was not "a sufficient interest to establish an infringement of freedom of the press."<sup>293</sup>

In some cases, determining whether a gag order directed at a trial participant is a prior restraint depends on whether the news media or the trial participants themselves challenge the order.<sup>294</sup> While the Ninth Circuit in *RTNA* held that a gag order directed at trial participants was not a prior restraint,<sup>295</sup> the Ninth Circuit in *Levine v. United States District Court*<sup>296</sup> found that a gag order directed at attorneys and parties in the case was a prior restraint.<sup>297</sup> The difference is that the trial participants themselves challenged the gag order in *Levine*,<sup>298</sup> while the news media challenged the gag order in *RTNA*.<sup>299</sup> The Second Circuit approaches gag orders on trial participants the same way as the Ninth Circuit.<sup>300</sup>

The distinction between whether the news media or the trial participant challenges the gag order leads some courts to conclude that trial participant gag orders are less offensive than news media gag orders because the media is not being directly prevented from publishing or broadcasting information.<sup>301</sup> As a result, courts

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286. 801 F.2d 1233 (10th Cir. 1986).

287. 992 F.2d 445 (2d Cir. 1993).

288. *Id.* at 446 (holding that "[a]n order that prohibits the utterance or publication of particular information or commentary imposes a 'prior restraint' on speech"); *Mechem*, 801 F.2d at 1236 (holding that "any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint").

289. *In re Dow Jones*, 842 F.2d 603, 608–09 (2d Cir. 1988); *RTNA v. U.S. Dist. Court*, 781 F.2d 1443, 1447 (9th Cir. 1986).

290. 781 F.2d 1443 (9th Cir. 1986).

291. *Id.* at 1447.

292. *Id.* at 1444.

293. *Id.* at 1447.

294. See *infra* notes 295–299 and accompanying text. Compare *Levine v. U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985), with *RTNA*, 781 F.2d at 1447; compare *In re Dow Jones*, 842 F.2d at 609, with *Salameh*, 992 F.2d at 446.

295. *RTNA*, 781 F.2d at 1447.

296. 764 F.2d 590 (9th Cir. 1985).

297. *Id.* at 595.

298. *Id.*

299. *RTNA*, 781 F.2d at 1447.

300. Compare *In re Dow Jones*, 842 F.2d at 609, with *Salameh*, 992 F.2d at 446. In *In re Dow Jones*, the Second Circuit held that "there is a substantial difference between a restraining order directed against the press—a form of censorship which the First Amendment sought to abolish from these shores—and [an] order...directed solely against trial participants and challenged only by the press." 842 F.2d at 608. The difference between the Second Circuit's holding in *In re Dow Jones* and its holding in *Salameh* was that the news media challenged the gag order in *In re Dow Jones*, while the defense attorney challenged the order in *Salameh*. *Id.* at 609; *Salameh*, 992 F.2d at 446; see *supra* note 288.

301. See *In re Dow Jones*, 842 F.2d at 608–09; Gauthier, *supra* note 9.



that do not recognize trial participant gag orders as prior restraints do not subject gag orders to the heightened scrutiny required of prior restraints.<sup>302</sup> When courts do not analyze trial participant gag orders as prior restraints, this increases the chance that these gag orders will be upheld and that courts will continue to use them as a tool to control prejudicial pretrial publicity.

The conflict in appellate courts over whether a gag order directed at a trial participant is a prior restraint has created uncertainty as to which approach is correct.<sup>303</sup> It appears that jurisdictions will continue to apply a variety of approaches to the issue until the U.S. Supreme Court decides whether a trial participant gag order is a prior restraint on speech.<sup>304</sup> Until then, the New Mexico Supreme Court in *Twohig* has made its decision on the issue, opting to characterize trial participant gag orders as a prior restraint, the same as a gag order imposed on the news media.<sup>305</sup>

## 2. New Mexico's Choice: Trial Participant Gag Orders Are Prior Restraints

While the New Mexico Supreme Court in *Twohig* did not specify why it characterized a gag order on trial participants as a prior restraint, the court was right to do so because the effect a gag order has on trial participants is similar to the effect of a gag order on the news media.<sup>306</sup> That effect is to restrict information that the news media can report.<sup>307</sup> The New Mexico Supreme Court's definition of a prior restraint supports the assertion that a gag order directed at the media and a gag order directed at trial participants produce similar effects on the dissemination of information by the media.<sup>308</sup> In *Twohig*, the New Mexico Supreme Court defined the gag order as a prior restraint because it was "an order...which prohibit[ed] trial participants from speaking with anyone about the case."<sup>309</sup> In other words, it prohibited speech before it could be spoken, thus limiting the information available to the news media and restraining the news media in advance of publication or broadcast.<sup>310</sup>

The court's finding in *Twohig* is further supported by the Second Circuit's decision in *In re Dow Jones*.<sup>311</sup> Despite refusing to define a trial participant gag order as a prior restraint, the Second Circuit in *Dow Jones* recognized that the effect

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302. See *United States v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000); *RTNA*, 781 F.2d at 1447. In *Brown*, the Fifth Circuit found that gag orders on trial participants are evaluated under a "less stringent" standard than gag orders on the news media. *Brown*, 218 F.3d at 425. Still, the Fifth Circuit recognized that gag orders on litigants "still exhibit the characteristics of prior restraints." *Id.* at 424.

303. See Chemerinsky, *supra* note 5, at 319.

304. *Id.*

305. *Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 335.

306. See *In re Dow Jones*, 842 F.2d at 608. The Second Circuit recognized that restricting the flow of information to the media has an effect similar to that of a prior restraint on the media. *Id.* Despite this recognition, the court in *In re Dow Jones* ultimately concluded that a gag order directed at trial participants is less intrusive of First Amendment rights than one aimed at the press. *Id.*; see *Young*, 522 F.2d at 239; see also Gauthier, *supra* note 9.

307. See *Young*, 522 F.2d at 239; Bjork, *supra* note 35, at 183.

308. See *In re Dow Jones*, 842 F.2d at 608; *Young*, 522 F.2d at 239; Gauthier, *supra* note 9.

309. *Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 335.

310. *In re Dow Jones*, 842 F.2d at 608; *Young*, 522 F.2d at 239; Bjork, *supra* note 35, at 183.

311. 842 F.2d 603 (2d Cir. 1988).

of trial participant gag orders is similar to gagging the media.<sup>312</sup> The Second Circuit found that a gag order directed at trial participants “limits the flow of information readily available to the news agencies—and for that reason might have an effect similar to that of a prior restraint.”<sup>313</sup>

Furthermore, the U.S. Supreme Court’s definition of a prior restraint in *Nebraska Press Ass’n* also provides support for the idea that the practical result of a trial participant gag order is also to gag the press.<sup>314</sup> The Court defined a prior restraint on speech as an “order[] that prohibit[s] the publication or broadcast of particular information or commentary.”<sup>315</sup> When a trial participant is restricted from speaking about the case to the media, this is in fact limiting the “publication or broadcast of particular information or commentary.”<sup>316</sup> Trial participants often have their own opinion about whether justice is being done.<sup>317</sup> But that commentary, and any information the trial participant has about the trial, cannot be shared with the media when a gag order is imposed. This in turn limits the media to reporting information they can obtain from observing a trial, without the benefit of being able to speak to those who may have the most knowledge about the case.<sup>318</sup>

Without the ability to interview credible sources of information participating in the trial, such as the attorneys, the flow of accurate information to the news media, and thus the public, is restricted, creating the same effect as a gag order on the media.<sup>319</sup> The Sixth Circuit in *Young* agreed with this line of reasoning.<sup>320</sup> “Although the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives. To that extent their protected right to obtain information concerning the trial is curtailed and impaired.”<sup>321</sup> Trial participants have information that may not have been discussed in the courtroom but that may be relevant to the public.<sup>322</sup> By not allowing trial participants to speak to the media about this information and by restricting participants’ ability to present their version of courtroom events, a gag order restricts

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312. *Id.* at 608. The Fifth Circuit has also recognized that gag orders on trial participants share similar characteristics as prior restraints. *United States v. Brown*, 218 F.3d 415, 424 (5th Cir. 2000).

313. *In re Dow Jones*, 842 F.2d at 608. Although recognizing the similar effect of gagging trial participants, the Second Circuit went on to hold that a gag order directed at trial participants is less intrusive of First Amendment rights than a gag order on the news media. *Id.*

314. 427 U.S. 539 (1976).

315. *Id.* at 556.

316. *Id.*

317. See Todd, *supra* note 54, at 1199.

318. *RTNA*, 781 F.2d at 1446–47 (recognizing that the press has a “right of access” to trials or “right to gather information” about trials, but holding that the press has no greater privilege than the right to attend the trial and report on their observations). The Ninth Circuit held that “the ‘right to gather information’ does not include a constitutional ‘right’ to understand what has been gathered.” *Id.* at 1446 n.3. The court found that the press must rely on its own resources to interpret the information they obtain at criminal proceedings. *Id.*; see *Gentile*, 501 U.S. at 1056–57 (plurality) (Kennedy, J.) (arguing that lawyers are credible sources of information that the press and public rely upon for information); Chemerinsky, *supra* note 5, at 312.

319. See *Gentile*, 501 U.S. at 1057 (arguing that attorneys are among the most reliable sources of accurate trial information); PEMBER, *supra* note 24, at 423 (stating that “it would be better...to provide journalists...with accurate...statements rather than push them to report what is ground out by a rumor mill”).

320. *Young*, 522 F.2d at 239.

321. *Id.*

322. Todd, *supra* note 54, at 1199.

the media's ability to tell the public about trials.<sup>323</sup> This creates an effect similar to a gag order that directly prohibits the media from publishing or broadcasting and, therefore, is properly characterized as a prior restraint.<sup>324</sup>

By characterizing a trial participant gag order as a prior restraint, the New Mexico Supreme Court did not foreclose the possibility of imposing gag orders on trial participants; it simply required heightened scrutiny when analyzing such an order.<sup>325</sup> When analyzing a trial participant gag order as a prior restraint, there must be a "clear and imminent danger," also described as a "serious and imminent threat," to the administration of justice in a court proceeding, and the gag order must be narrowly tailored, not overbroad or vague.<sup>326</sup> These requirements impose a heavy burden of demonstrating justification for imposing a prior restraint.<sup>327</sup> The First Amendment was intended to prohibit the government from imposing prior restraints on freedom of speech and freedom of the press,<sup>328</sup> and, therefore, it is correct to analyze prior restraints, including gag orders directed at trial participants under this heightened level of scrutiny.<sup>329</sup>

#### B. Using the "Clear and Present Danger" Standard to Analyze Attorney Speech

When the New Mexico Supreme Court held that a gag order directed at an attorney was a prior restraint on speech,<sup>330</sup> thus requiring a "clear and present danger" to the administration of justice,<sup>331</sup> its ruling was consistent with New Mexico's rule regarding trial publicity in a criminal proceeding, which also incorporates a "clear and present danger" standard.<sup>332</sup> The "clear and present danger" standard is the more protective standard for attorney speech,<sup>333</sup> and it is also the more appropriate standard for analyzing gag orders directed at trial participants.<sup>334</sup>

As previously discussed, not all courts are in agreement as to what standard should apply in analyzing attorney speech.<sup>335</sup> *Gentile v. State Bar*<sup>336</sup> makes it clear that attorney speech can be regulated under a less protective standard: "substantial

323. *Chemerinsky*, *supra* note 5, at 323.

324. *See In re Dow Jones*, 842 F.2d at 608; *Young*, 522 F.2d at 239; *Gauthier*, *supra* note 9.

325. *See Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 335-36 (holding that a "prior restraint requires special judicial attention"); *see supra* text accompanying note 28.

326. *Mechem*, 801 F.2d at 1236; *Young*, 522 F.2d at 239-40.

327. *Neb. Press Ass'n*, 527 U.S. at 558; *see Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 335-36.

328. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-14 (1931) (holding that the "chief purpose of the guaranty [of liberty of the press is] to prevent previous restraints upon publication"); *PEMBER*, *supra* note 24, at 64-65.

329. *See Chemerinsky*, *supra* note 5, at 322-23.

330. *Twohig*, 1996-NMSC-023, ¶ 13, 918 P.2d at 335.

331. *Mechem*, 801 F.2d at 1236; *Young*, 522 F.2d at 240.

332. Rule 16-306 NMRA. The rule states in part that "[a] lawyer shall not make any extrajudicial... statement... that the lawyer knows or reasonably should know... creates a clear and present danger of prejudicing the proceeding." *Id.* Rule 16-308 describes special responsibilities of a prosecutor in a criminal case, including "exercis[ing] 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 prosecutor would be prohibited from making under Rule 16-306." Rule 16-308 NMRA.

333. *See Gentile*, 501 U.S. at 1070-71.

334. *See infra* notes 348-357 and accompanying text.

335. *See supra* Part II.E.

336. 501 U.S. 1030 (1991).

likelihood of material prejudice.<sup>337</sup> However, it is worth noting that *Gentile* did not address the standard that applies to prior restraints on trial participants.<sup>338</sup> That case only dealt with the standard for after-the-fact punishment of attorney speech and whether *Gentile*'s statements had violated the rule of professional conduct on trial publicity.<sup>339</sup> There was no gag order in *Gentile*.<sup>340</sup> Even so, the New Mexico Supreme Court, thus far, has chosen not to change the current standard to the "substantial likelihood of material prejudice standard" in *Gentile*,<sup>341</sup> which is also incorporated in the Model Rules of Professional Conduct.<sup>342</sup> The court has maintained the "clear and present danger" standard incorporated in Rule 16-306.<sup>343</sup>

Unfortunately, the New Mexico Supreme Court's language in *Twohig* did not take the position that the "clear and present danger" standard is more protective than the "substantial likelihood" standard.<sup>344</sup> In fact, the court in *Twohig* stated that the standards may be only semantically different,<sup>345</sup> and then implied that the articulation of the standard was less important than the balancing inquiry that takes place when analyzing restrictions on attorney speech.<sup>346</sup> Still, although the New Mexico Supreme Court did not find the difference to be significant, the U.S. Supreme Court in *Gentile* held that the "substantial likelihood" standard is a "less demanding standard."<sup>347</sup> Therefore, based on the U.S. Supreme Court's interpretation, the "clear and present danger" standard incorporates more protection for attorney speech in New Mexico.

It is more appropriate to analyze attorney speech under the "clear and present danger" standard in light of the court's ruling in *Twohig* that an order that gags trial participants is a prior restraint.<sup>348</sup> A prior restraint triggers a "heavy presumption against its constitutional validity" and therefore is subject to heightened scrutiny.<sup>349</sup> *Nebraska Press Ass'n* incorporated the "clear and present danger" standard in analyzing a prior restraint directed at the news media.<sup>350</sup> Considering that the effect

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337. *Id.* at 1075.

338. Chemerinsky, *supra* note 5, at 316. The State Bar of Nevada punished *Gentile* for violating the Nevada trial publicity rule. *Gentile*, 501 U.S. at 1033. *Gentile* addressed whether the "substantial likelihood of material prejudice" standard was constitutionally permissible to determine if an attorney's comments violated the trial publicity rule of professional conduct. *Id.* at 1062-63. The court did not determine the standard for analyzing a prior restraint on the attorney speech. *See id.* at 1062-63.

339. *See Gentile*, 501 U.S. at 1062-63.

340. *See id.* at 1030.

341. *Twohig*, 1996-NMSC-023, ¶ 16, 918 P.2d at 337. The court in *Twohig* pointed out that the New Mexico Supreme Court amended its trial publicity rule after *Gentile* was decided, but the court adopted the "clear and present danger" standard, not the "substantial likelihood" standard that was endorsed in *Gentile*. *Id.*

342. MODEL RULES OF PROF'L CONDUCT R. 3.6 (2004).

343. Rule 16-306 NMRA.

344. *See Twohig*, 1996-NMSC-023, ¶ 16, 918 P.2d at 337.

345. *Id.* In *Gentile*, Justice Kennedy, writing in a separate opinion for four justices, found the difference in the standards to be "mere semantics." *Gentile*, 501 U.S. at 1037.

346. *Twohig*, 1996-NMSC-023, ¶ 16, 918 P.2d at 337.

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

348. *See Mechem*, 801 F.2d at 1236 (finding a prior restraint and holding that, "[i]f a court order burdens constitutional rights and the action proscribed by the order presents no clear and imminent danger to the administration of justice, the order is constitutionally impermissible"); *Young*, 522 F.2d at 240 (ruling that prior restraints "cannot escape the proscriptions of the First Amendment, unless it is shown to have been required to obviate serious and imminent threats to the fairness and integrity of the trial").

349. *Neb. Press Ass'n*, 427 U.S. at 558.

350. *Gentile*, 501 U.S. at 1069.

of a gag order, whether directed at the press or at trial participants, is to limit the flow of information to the public,<sup>351</sup> it follows that the “clear and present danger” standard would be more applicable in dealing with trial participant speech.<sup>352</sup>

Other courts have adopted this approach, opting to follow *Nebraska Press Ass’n* and the use of the “clear and present danger” standard when analyzing gag orders directed at trial participants.<sup>353</sup> Bearing in mind that prior restraints are an extraordinary measure and presumptively invalid,<sup>354</sup> *Gentile*’s less demanding “substantial likelihood” standard does not provide the same protection for trial participant speech.<sup>355</sup> Despite the U.S. Supreme Court’s holding that the “substantial likelihood” standard is sufficient,<sup>356</sup> New Mexico is not required to adopt the *Gentile* standard<sup>357</sup> and, by maintaining the use of “clear and present danger,” New Mexico guarantees a more protective environment for attorney speech.

While the court in *Twohig* did not take a strong stance on the issue of which standard is more appropriate, the court still implemented the requirement that a trial court must balance the interests at stake, holding that the inquiry remained the same regardless of what standard was incorporated.<sup>358</sup> By requiring a balancing of interests, the *Twohig* decision requires trial courts to look at a series of factors<sup>359</sup> and issue specific findings of fact before imposing a gag order.<sup>360</sup>

### C. Requirement of Factual Findings

The holding of the court in *Twohig* requiring specific factual findings in determining the necessity of a gag order is crucial in striking the balance between a defendant’s right to a fair trial, guaranteed by the Sixth Amendment, and the right to free speech, safeguarded by the First Amendment.<sup>361</sup> The requirement of specific factual findings forces judges to carefully balance the right to free speech and a defendant’s right to a fair trial, instead of making general conclusions about the need for a gag order.<sup>362</sup> Trial judges must analyze the facts supporting the conclusion that a gag order is necessary.<sup>363</sup> Requiring judges to engage in this analysis adds another layer of protection for trial participant speech in New Mexico.

351. See *supra* notes 306–313, 319–324 and accompanying text.

352. See *Young*, 522 F.2d at 239 (finding a prior restraint and applying a clear and present danger standard where the news media’s access to “meaningful” sources of information is restricted). The court in *Young* held that “[t]he protected right to publish the news would be of little value in the absence of sources from which to obtain it.” *Id.* at 238.

353. *Mechem*, 801 F.2d at 1236; *Young*, 522 F.2d at 238.

354. *Neb. Press Ass’n*, 427 U.S. at 558.

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

356. *Id.* at 1075.

357. *Id.* at 1074. The Court’s holding in *Gentile* that “the speech of lawyers...may be regulated under a less demanding standard” reflects that states are free to decide which standard to use in regulating attorney speech. *Id.* (emphasis added).

358. *Twohig*, 1996-NMSC-023, ¶ 16, 918 P.2d at 337.

359. *Id.* ¶ 17, 918 P.2d at 337; see *supra* text accompanying note 245.

360. *Twohig*, 1996-NMSC-023, ¶ 1, 918 P.2d at 333.

361. *Id.* ¶ 11, 918 P.2d at 335.

362. See *Neb. Press Ass’n*, 427 U.S. at 562–63; *Chase*, 435 F.2d at 1061; *Kemner*, 492 N.E.2d at 1337; *Twohig*, 1996-NMSC-023, ¶ 26, 918 P.2d at 340.

363. See *Neb. Press Ass’n*, 427 U.S. at 562–63; *Chase*, 435 F.2d at 1061; *Kemner*, 492 N.E.2d at 1337; *Twohig*, 1996-NMSC-023, ¶ 26, 918 P.2d at 340.

The New Mexico Supreme Court demonstrated the importance of judges making specific factual findings to justify gag orders on trial participants by striking down the gag order in *Twohig*.<sup>364</sup> There is no doubt that the Gordon House case was one of the most publicized trials in New Mexico history.<sup>365</sup> In House's appeal to the New Mexico Supreme Court, the court acknowledged the pervasive and extensive publicity associated with the case.<sup>366</sup> Yet, the court in *Twohig* refused to accept the general conclusions of the trial judge that a gag order was necessary.<sup>367</sup>

While it was well known that the unprecedented publicity in the House case resulted in two venue changes,<sup>368</sup> the court found that the gag order was unconstitutional because it lacked specific findings supporting the conclusion that there was a "clear and present danger" to a fair trial.<sup>369</sup> The New Mexico Supreme Court made it clear that regardless of how much publicity is associated with a case, unless the trial judges make specific factual findings demonstrating a "clear and present danger" to a fair trial, a gag order will not be imposed.<sup>370</sup>

The requirement of findings to show a "clear and present danger" to a fair trial flows from the idea set forth by the U.S. Supreme Court in *Gentile* and *Nebraska Press Ass'n* that "[o]nly the occasional case presents a danger of prejudice from pretrial publicity."<sup>371</sup> Gag orders on trial participants are often based on the assumption that pretrial publicity automatically leads to an unfair trial or a conviction for defendants.<sup>372</sup> The New Mexico Supreme Court rejected that assumption by requiring a showing of specific facts, not general conclusions, that pretrial publicity resulted in a "clear and present danger" of prejudicing the proceeding.<sup>373</sup>

#### D. Less Restrictive Alternatives

Another example of the New Mexico Supreme Court's protection of trial participant speech is the holding in *Twohig* requiring judges to consider less

364. See *Twohig*, 1996-NMSC-023, ¶ 26, 918 P.2d at 340.

365. *House*, 1999-NMSC-014, ¶ 8, 978 P.2d at 973; see *supra* notes 168–170 and accompanying text.

366. *House*, 1999-NMSC-014, ¶¶ 2, 13, 57, 978 P.2d at 972, 974, 985.

367. *Twohig*, 1996-NMSC-023, ¶ 26, 918 P.2d at 340.

368. *House*, 1999-NMSC-014, ¶¶ 12, 20, 978 P.2d at 974, 975.

369. *Twohig*, 1996-NMSC-023, ¶ 1, 918 P.2d at 333.

370. See *id.* ¶ 28, 918 P.2d at 341.

371. *Gentile*, 501 U.S. at 1054; see *Neb. Press Ass'n*, 427 U.S. at 565 (holding that pervasive pretrial publicity is not considered to automatically lead to an unfair trial). The Sixth Circuit in *United States v. Ford* also agreed, stating, "Trial judges, the government, the lawyers and the public must tolerate robust and at times acrimonious or even silly public debate about litigation." 830 F.2d 596, 599 (6th Cir. 1987).

372. Chemerinsky, *supra* note 5, at 312. High profile cases like the rape trial of William Kennedy Smith and the O.J. Simpson murder trial resulted in acquittals for the defendants, rebutting the assumption that pretrial publicity automatically results in a conviction. *Id.* Also, the first two trials of Gordon House did not result in a conviction for the most serious charges of vehicular homicide. *Twohig*, 1996-NMSC-023, ¶¶ 7–8, 918 P.2d at 334. It is unclear what effect, if any, pretrial publicity has on a defendant's right to a fair trial. Some research suggests jurors are able to disregard prejudicial trial publicity. *Gentile*, 501 U.S. at 1055–56; Chemerinsky, *supra* note 5, at 312. One study showed that relatively few convictions were overturned because of prejudicial publicity, and defense attorneys rarely raised the issue on appeal. 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, 15 (1989) (discussing study conducted from 1976 to 1980 by Professor Dale Spencer). Another study found that juror bias caused by news coverage might only occur in one out of every 10,000 cases. *Id.* at 16.

373. *Twohig*, 1996-NMSC-023, ¶ 26, 918 P.2d at 340.

restrictive alternatives than a prior restraint on speech.<sup>374</sup> In *Nebraska Press Ass'n*, the U.S. Supreme Court's three-prong test for analyzing gag orders directed at the media included a prong that required consideration of less restrictive alternatives.<sup>375</sup> Because the effect of a gag order on a trial participant is the same as a gag order on the media, and because a trial participant gag order is considered a prior restraint, this analysis applies with equal force in this context.<sup>376</sup> By requiring judges to examine less restrictive alternatives, like a change of venue or extensive voir dire,<sup>377</sup> the New Mexico Supreme Court created a substantial hurdle to cross before a gag order can be imposed.<sup>378</sup>

If a judge considers all potential less restrictive alternatives, it is unlikely that he or she would be able to find that none of those alternatives would be effective in addressing trial publicity.<sup>379</sup> The court in *Nebraska Press Ass'n* found that there was insufficient evidence to show that other alternatives would not have protected the defendant's right to a fair trial in that case.<sup>380</sup> In addition, it would be difficult to argue that if those alternatives, such as change of venue, sequestration of the jury, and extensive voir dire, would not prevent prejudicial pretrial publicity, that a prior restraint would be any more effective.<sup>381</sup>

In *Nebraska Press Ass'n*, the Supreme Court expressly adopted a standard that allows a prior restraint to be imposed only if it would be workable and effective in protecting a defendant's right to a fair trial.<sup>382</sup> The court in *Nebraska Press Ass'n* recognized the difficulties trial judges encounter when dealing with gag orders, including "problems of managing and enforcing pre-trial restraining orders."<sup>383</sup> Oftentimes, leaks and violations undermine the effectiveness of the gag order.<sup>384</sup> For example, despite a gag order prohibiting trial participants from speaking to the media in *United States v. Koubriti*,<sup>385</sup> the nation's highest law enforcement official, Attorney General John Ashcroft, violated the gag order by talking about the case on two separate occasions.<sup>386</sup>

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374. *Id.*

375. *Id.* at 562; see *supra* text accompanying note 52.

376. See *supra* Part V.A.

377. For example, despite the extensive trial publicity surrounding the House case, the court noted that less restrictive measures were employed during the first and second trials, including a change of venue to Taos and extensive voir dire. *Twohig*, 1996-NMSC-023, ¶ 27, 918 P.2d at 340. The court in *Twohig* found that jurors in the third trial were extensively questioned about whether they knew anything about the case, drinking and driving, migraines, and any racial stereotypes about Native Americans. *Id.* Further, there was evidence that, despite the amount of publicity surrounding the case in Albuquerque, residents of Taos knew very little about the case. *Id.* (citing Ed Asher, *Gordon House? Who's That? Taos Asks*, ALBUQUERQUE TRIB., June 7, 1994).

378. See Chemerinsky, *supra* note 5, at 328 (arguing that a judge who considers less restrictive alternatives would have a difficult time justifying why none of them would work).

379. *Id.*

380. *Neb. Press Ass'n*, 427 U.S. at 569.

381. Chemerinsky, *supra* note 5, at 330.

382. *Neb. Press Ass'n*, 427 U.S. at 565.

383. *Id.*

384. Gauthier, *supra* note 9.

385. 305 F. Supp. 2d 723 (E.D. Mich. 2003). *Koubriti* involved the trial of three Middle Eastern men on terrorism-related charges.

386. *Id.* at 725. The defendants in *Koubriti* motioned the court to impose contempt sanctions on the Attorney General. *Id.* The court declined to do so, holding that the violation was not willful, and instead chose to publicly admonish the Attorney General. *Id.* at 742, 764-65.

Another problem involving the management and enforcement of gag orders is that, even when a gag order is issued, rumors can surface, and these rumors may be “more damaging than reasonably accurate news accounts.”<sup>387</sup> Media coverage of high profile cases does not end when a gag order is issued.<sup>388</sup> Limiting the sources of information for reporters may cause the news media to turn to less accurate sources.<sup>389</sup>

No gag order against the news media has been upheld under the test articulated in *Nebraska Press Ass’n*.<sup>390</sup> By incorporating a requirement that trial courts consider less restrictive alternatives, the New Mexico Supreme Court imposed a heavy burden that must be overcome in order to impose a gag order on trial participants, especially considering the difficulty in showing that all other alternatives are not effective.<sup>391</sup> This provides further speech protection for trial participants in New Mexico.

In summary, the New Mexico Supreme Court’s decision in *Twohig* provided broad protection for trial participant speech in New Mexico by creating a high burden that must be overcome before a gag order can be imposed on trial participants.<sup>392</sup> This burden is evidenced by the court’s decision to analyze a gag order on trial participants as a prior restraint,<sup>393</sup> which invokes a heavy presumption against the validity of the order.<sup>394</sup> In view of the court’s decision to recognize trial participant gag orders as prior restraints, the “clear and present danger” standard is the more appropriate standard to analyze attorney speech, even though the New Mexico Supreme Court failed to recognize the standard as more protective.<sup>395</sup> In addition, by requiring judges to make specific factual findings and consider less restrictive alternatives before imposing a gag order on trial participants, the court created additional obstacles that must be overcome before a gag order may be imposed on trial participants.<sup>396</sup> While these obstacles are not impossible to overcome, *Twohig* provides safeguards to ensure that gag orders on trial participants are imposed only when absolutely necessary.

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387. *Neb. Press Ass’n*, 427 U.S. at 567.

388. Chemerinsky, *supra* note 5, at 313.

389. *Id.* One commentator argues that it would be better to provide journalists with accurate information than to push them to report rumors. PEMBER, *supra* note 24, at 423. In *Gentile*, Justice Kennedy also argued that allowing attorneys to comment on cases might actually be a value to the bar because attorneys are well informed about the case. 501 U.S. at 1056–57.

390. Chemerinsky, *supra* note 5, at 328. While the U.S. Supreme Court in *Nebraska Press Ass’n* did not expressly state that it was creating an outright ban on gag orders directed at the news media, the result has been similar. *Id.*

391. See *supra* notes 379–381 and accompanying text. There is criticism about the effectiveness of less restrictive alternatives to gag orders. See *Gentile*, 501 U.S. at 1075. Writing for the majority in *Gentile*, Chief Justice Rehnquist pointed out that, while less restrictive alternatives, like change of venue or voir dire, can ensure a fair trial, there are problems with the use of these alternatives. *Id.* The Court stated that even using extensive voir dire may not be sufficient to offset the pretrial publicity, and a change of venue also may not make up for the pretrial publicity, in light of pervasive media coverage. *Id.*; see also Jaime N. Morris, *The Anonymous Accused: Protecting Defendants’ Rights in High-Profile Criminal Cases*, 44 B.C. L. REV. 901, 924–32 (2003).

392. See *Twohig v. Blackmer*, 1996-NMSC-023, 918 P.2d 332.

393. *Id.* ¶ 13, 918 P.2d at 335.

394. *Id.* ¶ 13, 918 P.2d at 336.

395. See *supra* Part V.B.

396. *Twohig*, 1996-NMSC-023, ¶ 26, 918 P.2d at 340.



## VI. IMPLICATIONS

The New Mexico Supreme Court's decision in *Twohig* raises two important issues regarding free speech in New Mexico. First, attorney Ray Twohig argued that as defense counsel he had a right to speak to the news media in order to defend his client from statements made by the prosecution.<sup>397</sup> Since the defendant's Sixth Amendment right to a fair trial is at stake in a criminal prosecution, this brings up the question of whether regulating defense attorney speech is necessary, and whether defense attorney free speech rights should not be infringed upon.<sup>398</sup>

Second, the New Mexico Supreme Court's decision in *Twohig* raises the question of how broadly the free speech and free press provision of New Mexico's Constitution should be interpreted. Attorney Ray Twohig claimed the gag order that prevented him from speaking to the news media violated his free speech rights, not under the First Amendment of the U.S. Constitution, but instead, under article II, section 17 of the New Mexico Constitution.<sup>399</sup> The court in *Twohig* agreed, holding that the gag order in *Twohig* violated article II, section 17.<sup>400</sup> Other states with similar free speech provisions as New Mexico's have found that their state constitutions provide greater protection than the First Amendment, and in one context, so has New Mexico.<sup>401</sup> This brings up the issue of whether the free speech provision of New Mexico's Constitution can be interpreted more broadly than the U.S. Constitution to provide more protection for trial participant speech in light of the court's analysis in *Twohig*.

### A. Regulating Defense Attorney Speech: Is It Necessary?

The debate over the necessity of regulating attorney speech played out in *Gentile v. State Bar*<sup>402</sup> between Chief Justice Rehnquist and Justice Kennedy. In *Gentile*, Chief Justice Rehnquist reasoned that lawyers have a responsibility not to make out-of-court statements that will pose a threat to a fair trial.<sup>403</sup> In addition, the Court held that the lawyers' extrajudicial comments may be seen as more authoritative, since lawyers have access to more information.<sup>404</sup> However, Justice Kennedy took a different view in *Gentile*, stating that regulating attorney speech requires strict First Amendment protections.<sup>405</sup>

397. *Id.* ¶ 10, 918 P.2d at 335.

398. *See infra* Part VI.A.

399. *Twohig*, 1996-NMSC-023, ¶ 1, 918 P.2d at 333.

400. *Id.*

401. *See People v. Ford*, 773 P.2d 1059, 1066 (Colo. 1989) (en banc) ("[O]ur constitution extends broader protection to freedom of expression than does the first amendment to the United States Constitution."); *City of Farmington v. Fawcett*, 114 N.M. 537, 546, 843 P.2d 839, 848-49 (Ct. App. 1992) (holding that the New Mexico Constitution required a broader standard for demonstrating obscenity than what the U.S. Constitution required, relying heavily on the Colorado Supreme Court's decision in *Ford*, 773 P.2d 1059); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988) ("[T]he rights of free speech and press guaranteed by our Texas Constitution are more extensive than those guaranteed by the Federal Constitution.").

402. 501 U.S. 1030 (1991).

403. *Id.* at 1074 (quoting *Neb. Press Ass'n*, 427 U.S. at 601 n.27 (Brennan, J., concurring)).

404. *Id.*

405. *Id.* at 1055.

There is doubt as to whether regulating defense attorney speech is necessary to protect a defendant's right to a fair trial.<sup>406</sup> In *Twohig*, defense attorney Ray Twohig argued that he had a right to counter statements made by the district attorney.<sup>407</sup> *Twohig* argued that the district attorney's statements "created a strong sentiment against the Defendant in the public arena."<sup>408</sup> Prosecutor statements are a concern for defense attorneys, and some argue that they need to be able to reply to the charges against their clients.<sup>409</sup>

Several courts have held that regulating attorney speech is far more questionable when restrictions are placed on defense attorneys.<sup>410</sup> In *Gentile*, Justice Kennedy questioned the need to regulate defense attorney speech at all.<sup>411</sup> Justice Kennedy wrote, "An attorney's duties do not begin inside the courtroom door.... A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."<sup>412</sup> Justice Kennedy pointed out that the government in a criminal case has multiple means of publicizing information that is adverse to a defendant, which puts the defense at a disadvantage to be able to counter government statements.<sup>413</sup> Justice Kennedy cited the lack of evidence demonstrating that defense attorneys actually prejudice the prosecution's case.<sup>414</sup>

Similarly, the Sixth Circuit in *United States v. Ford*<sup>415</sup> agreed that a defendant has an "interest in replying to...adverse publicity."<sup>416</sup> In turn, the Sixth Circuit recognized that the public also has a right to hear what the defense has to say, since the public has an interest in ensuring that justice is being served.<sup>417</sup> Justice Kennedy agreed that there are times when making out-of-court statements to the news media may be "necessary to protect the rights of the client and prevent abuse of the courts."<sup>418</sup> The U.S. Supreme Court in *Nebraska Press Ass'n v. Stuart*<sup>419</sup> also agreed that "protection against prior restraint should have particular force as applied to reporting of criminal proceedings."<sup>420</sup>

In *Twohig*, Ray Twohig argued that both the district attorney and his assistants made "misleading and inaccurate statements" about the case.<sup>421</sup> New Mexico's ethics rules add special responsibilities on prosecutors to ensure that investigators, law enforcement officials, and other persons assisting the prosecution in criminal cases

406. *See id.*

407. *Twohig*, 1996-NMSC-023, ¶ 10, 918 P.2d at 335.

408. *Id.*

409. *See Gentile*, 501 U.S. at 1058; *Ford*, 830 F.2d at 599.

410. *See Gentile*, 501 U.S. at 1055; *Ford*, 830 F.2d at 599.

411. *Gentile*, 501 U.S. at 1055.

412. *Id.* at 1043.

413. *Id.* at 1056.

414. *Id.* at 1055 (discussing that respondent and its amici did not present evidence of any situations where a defense attorney prejudiced the State's case, and noting the "absence of anecdotal or survey evidence in a much-studied area of the law").

415. 830 F.2d 596 (6th Cir. 1987).

416. *Id.* at 599.

417. *Id.*

418. *Gentile*, 501 U.S. at 1058.

419. 427 U.S. 539 (1976).

420. *Id.* at 559.

421. *Twohig*, 1996-NMSC-023, ¶ 10, 918 P.2d at 335.

do not make extrajudicial comments that are false or that present a “clear and present danger of prejudicing the proceeding.”<sup>422</sup> Still, prosecutors often have more contact with the news media than defense attorneys.<sup>423</sup> One study found that, because prosecutors have more frequent contact with reporters, prosecutors have the ability “to influence journalists’ agendas.”<sup>424</sup> In contrast, as Justice Kennedy noted in *Gentile*, “a defendant cannot speak without fear of incriminating himself and prejudicing his defense.”<sup>425</sup>

It is important to note that a defendant’s Sixth Amendment right to a fair trial is not the only consideration for the court in addressing pretrial publicity. Courts also recognize the public’s right to a fair trial<sup>426</sup> and the state’s interest in the fair administration of justice.<sup>427</sup> The government’s interest in a fair trial stems in part from U.S. Supreme Court precedent.<sup>428</sup> In *Singer v. United States*,<sup>429</sup> the Court held that “the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.”<sup>430</sup>

While the Supreme Court recognized that the government does have an interest in a fair trial, the Sixth Circuit found that, in cases involving gag orders, the government’s interest is more limited than the defendant’s interest in a right to a fair trial.<sup>431</sup> The Sixth Circuit in *United States v. Ford*<sup>432</sup> noted that the Sixth Amendment and First Amendment protect individuals, not the government.<sup>433</sup> The court in *Ford* noted the availability of less restrictive alternatives if the “ability of the government to try the defendant in a ‘fair’ forum” is threatened.<sup>434</sup> “To the extent that publicity is a disadvantage for the government, the government must tolerate it. The government is our servant, not our master.”<sup>435</sup> Not all courts have the same opinion. The Fifth Circuit specifically disagreed with the Sixth Circuit in *United States v.*

422. Rule 16-308 NMRA; Rule 16-306 NMRA; *see supra* text accompanying note 139.

423. Drechsel, *supra* note 372, at 26.

424. *Id.*

425. *Gentile*, 501 U.S. at 1056. Justice Kennedy also noted that most defendants cannot afford to hire a public relations team to counter extrajudicial statements made by prosecutors. *Id.*

426. *In re Morrissey*, 168 F.3d 134, 138 (4th Cir. 1999) (citing *Hirschkop v. Snead*, 594 F.2d 356, 363–64 (4th Cir. 1979)).

427. *United States v. Brown*, 218 F.3d 415, 424 (5th Cir. 2000). The government interest stems from Article II of the U.S. Constitution, which charges the executive branch to ensure that the “laws are faithfully executed” to produce a fair result in a prosecution. *United States v. Ford*, 830 F.2d 596, 600 n.1 (6th Cir. 1987); U.S. CONST. art. II (“[The President] shall take care that the Laws be faithfully executed.”).

428. *See Singer v. United States*, 380 U.S. 24 (1965).

429. 380 U.S. 24 (1965). *Singer* involved a challenge to a federal rule of criminal procedure that did not permit a defendant to waive a jury trial in a federal criminal case unless the prosecution and the court consented. *Id.* at 24–25. The Court upheld the rule. *Id.* at 37.

430. *Id.* at 36. ABA Standard for Criminal Justice 3-1.2(c) supports the notion of the state’s interest in fairness, stating that the “duty of the prosecutor is to seek justice, not merely to convict.” ABA STANDARDS FOR CRIM. JUSTICE 3-1.2(c) (1993).

431. *See Ford*, 830 F.2d at 600 n.1.

432. 830 F.2d 596 (6th Cir. 1987).

433. *Id.* at 600.

434. *Id.*; *see supra* text accompanying note 52.

435. *Ford*, 830 F.2d at 600. The Sixth Circuit stated that, while more publicity may result in a case where a gag order is not imposed, this does not necessarily produce an unfair trial for the government. *Id.*

*Brown*,<sup>436</sup> stating that the court was “incorrect.”<sup>437</sup> Still, the Sixth Circuit in *Ford* found that the defendant’s interest in responding to adverse publicity is “at a peak” when the “full power of the government” is against the defendant.<sup>438</sup>

In conclusion, the court in *Twohig* did not address whether a distinction should be drawn in regulating prosecutor speech and defense attorney speech.<sup>439</sup> The necessity of restricting defense attorneys from speaking to the media is not clear, especially when it might be necessary for attorneys to speak to the media to protect their clients. Although Justice Kennedy discussed this in *Gentile*, advocating for careful scrutiny of restrictions on defense attorney speech, the majority of the Supreme Court did not agree.<sup>440</sup> Courts often apply trial participant gag orders to both parties equally.<sup>441</sup> Arguably, however, there are reasons why a court could make a distinction and determine that defense attorney speech should not be regulated. Some of those reasons include the defendant’s interest in replying to adverse publicity, the public’s interest in hearing what the defendant has to say, and the prosecutors’ ability to influence journalists as a result of more frequent contact with the news media.

### *B. New Mexico’s Free Speech Provision: Greater Protection Than the First Amendment?*

The argument that New Mexico’s Constitution provides greater protection for free speech and free press rights did not arise in *Twohig*. However, by basing part of its decision in *Twohig* on article II, section 17 of the New Mexico Constitution, rather than the First Amendment, the question arises whether the New Mexico Supreme Court might recognize greater protection for trial participant speech under the New Mexico Constitution in future gag order cases.<sup>442</sup> The New Mexico Court of Appeals may have already taken the first step by providing broader protection for free speech under the New Mexico Constitution in the context of obscenity standards.<sup>443</sup> Other states with similar constitutional provisions have also found

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436. 218 F.3d 415 (5th Cir. 2000).

437. *Id.* at 424 n.9.

438. *Ford*, 830 F.2d at 599. While it is not clear from case law whether the defendant’s right to a fair trial outweighs the government’s interest, it appears that both interests should be considered when courts balance the interests at stake in determining whether to impose a gag order on trial participants. *Brown*, 218 F.3d at 424 n.9.

439. *Twohig v. Blackmer*, 1996-NMSC-023, 918 P.2d 332.

440. *Gentile*, 501 U.S. at 1055–56.

441. *See, e.g.*, *United States v. Salameh*, 992 F.2d 445, 446 (2d Cir. 1993) (per curiam); *Levine v. U.S. Dist. Court*, 764 P.2d 590, 593 (9th Cir. 1985); *United States v. Tijerina*, 412 F.2d 661, 663 (10th Cir. 1969).

442. *Twohig*, 1996-NMSC-023, ¶ 1, 918 P.2d at 333; *see San Antonio Express-News v. Roman*, 861 S.W.2d 265, 267 (Tex. App. 1993) (choosing to base its decision on the Texas Constitution because it provides greater protection for free speech). In *State v. Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d 1, 7, the New Mexico Supreme Court adopted an interstitial approach to interpreting the New Mexico Constitution. Under this approach, the first question is whether the asserted right is protected under the U.S. Constitution. *Id.* ¶ 19, 932 P.2d at 7. If it is not protected under the federal constitution, the court will turn to the state constitution. *Id.* The court will provide broader protection under the New Mexico Constitution when it finds that federal analysis is “flawed,” or when there are “distinctive state characteristics,” or when there are “undeveloped federal analogs.” *Id.* ¶ 20, 932 P.2d at 7.

443. *State v. Rendleman*, 2003-NMCA-150, ¶¶ 57–58, 82 P.3d 554, 569–70 (reaffirming the New Mexico Court of Appeals’ interpretation that the New Mexico Constitution is broader than the First Amendment with regard to content-based restrictions); *City of Farmington v. Fawcett*, 114 N.M. 537, 546, 843 P.2d 839, 848 (Ct. App. 1992).

greater protection for free speech under their state constitutions.<sup>444</sup> In light of the New Mexico Supreme Court's broad protection for trial participant speech in *Twohig*, the question of greater protection under article II, section 17 appears to be legitimate.

The groundwork for a claim of greater protection under article II, section 17 may have been laid down in *City of Farmington v. Fawcett*,<sup>445</sup> where the New Mexico Court of Appeals held that New Mexico's Constitution is more protective of free speech in the context of obscenity standards.<sup>446</sup> In *Fawcett*, a case involving the prosecution of a man accused of violating a city obscenity ordinance, the New Mexico Court of Appeals held that the New Mexico Constitution required a broader standard for demonstrating obscenity than what the U.S. Constitution required, thus providing more protection for free speech.<sup>447</sup> New Mexico can determine the scope of the rights guaranteed in the New Mexico Constitution.<sup>448</sup> The court in *Fawcett* pointed out that, while state constitutions may not provide less protection than the U.S. Constitution, states are free to provide greater protection.<sup>449</sup> In *State v. Rendleman*,<sup>450</sup> the New Mexico Court of Appeals reaffirmed its holding that the New Mexico Constitution is interpreted more broadly than the First Amendment in free speech, at least in the context of obscenity.<sup>451</sup> In light of *Fawcett* and *Rendleman*, the scope of article II, section 17's protection of free speech appears to be broad, at least in certain contexts.<sup>452</sup>

The textual difference between the free speech provision of the New Mexico Constitution and the First Amendment of the U.S. Constitution provided a basis for the court's conclusion in *Fawcett*.<sup>453</sup> The court of appeals observed that there was a difference in the language of the two provisions, although the court noted that the New Mexico Supreme Court has recognized article II, section 17 as being "similar" to the First Amendment.<sup>454</sup> Still, the court in *Fawcett* determined that even when the language is identical, which is not the case in New Mexico, states "may find greater protection under their state constitutions."<sup>455</sup> The court went on to say that the authors of the New Mexico Constitution knowingly chose to adopt different language than that of the First Amendment.<sup>456</sup>

444. See *People v. Ford*, 773 P.2d 1059, 1066 (Colo. 1989); *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988).

445. 114 N.M. 537, 843 P.2d 839 (Ct. App. 1992).

446. *Id.* at 546-47, 843 P.2d at 848-49.

447. *Id.* at 546, 843 P.2d at 848.

448. *Id.* at 544, 843 P.2d at 846 (citing *State v. Cordova*, 109 N.M. 211, 784 P.2d 30 (1989)).

449. *Id.* at 545, 843 P.2d at 847.

450. 2003-NMCA-150, 82 P.3d 554.

451. *Id.* ¶¶ 57-58, 82 P.3d at 569-70.

452. See *id.* ¶¶ 57-58, 82 P.3d at 569-70; *Fawcett*, 114 N.M. at 546, 843 P.2d at 848.

453. *Fawcett*, 114 N.M. at 544-45, 843 P.2d at 846-47. Compare N.M. CONST. art. II, § 17 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."), with U.S. CONST. amend. I ("Congress shall make no law...abridging the freedom of speech, or of the press.")

454. *Fawcett*, 114 N.M. at 544, 843 P.2d at 846 (citing *Curry v. Journal Publ'g Co.*, 41 N.M. 318, 328, 68 P.2d 168, 174-75 (1937)).

455. *Id.* at 545, 843 P.2d at 847.

456. *Id.*

A key difference in the text of the New Mexico Constitution's free speech provision is the affirmative grant of rights, as opposed to a restriction on government power, as found in the First Amendment.<sup>457</sup> Article II, section 17 states, "Every person may freely speak, write and publish his sentiments on all subjects,"<sup>458</sup> while the First Amendment states, "Congress shall make no law...abridging the freedom of speech, or of the press."<sup>459</sup> Other state courts have interpreted similar language from their state constitutions as being more expansive than the First Amendment.<sup>460</sup> Texas and Colorado are among the states that have similar free speech provisions<sup>461</sup> and have recognized broader protection for free speech under their state constitutions.<sup>462</sup>

For example, the Texas Supreme Court in *Davenport v. Garcia*<sup>463</sup> invalidated a gag order that prohibited trial participants from speaking to the media about a case involving toxic chemical exposure to children.<sup>464</sup> The court struck down the gag order as a violation of the Texas Constitution's freedom of expression provision, rather than the First Amendment.<sup>465</sup> The court declined to "limit the liberties of Texans to those found in the Federal Constitution."<sup>466</sup> In striking down the gag order, the court in *Davenport* held that Texas's freedom of expression provision provided greater rights than its federal equivalent.<sup>467</sup> The court looked to the textual differences between Texas's freedom of expression provision and the First Amendment, noting that the framers of the Texas Constitution explicitly adopted language distinct from the First Amendment and subsequently rejected a proposal that would have put the language more in line with the First Amendment.<sup>468</sup>

In conclusion, *Davenport* provides an example of a state constitution being interpreted to provide broader protection than the First Amendment for freedom of expression in the context of gag orders. The holding in *Fawcett* that article II, section 17 offers greater protection than the First Amendment, at least in the context of obscenity,<sup>469</sup> provides precedent from which it can be argued that New Mexico's

457. Compare N.M. CONST. art. II, § 17, with U.S. CONST. amend. I. In addition to text, some states recognize other factors that aid in determining whether there is broader protection under a state constitution, including state constitutional and common law history, preexisting state law, differences in structure between the federal and state constitutions, and matters of particular state interest or local concern. *Washington v. Gunwall*, 740 P.2d 808, 812-13 (Wash. 1986) (en banc).

458. N.M. CONST. art. II, § 17.

459. U.S. CONST. amend. I.

460. *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 944 (Tex. 1988); *O'Quinn v. State Bar*, 763 S.W.2d 397, 402 (Tex. 1988) (citing J. HARRINGTON, THE TEXAS BILL OF RIGHTS 40 (1987)) (arguing that "positively phrased" grants of rights in state constitutions, rather than restrictions on Congress's power in the federal constitution, are more expansive and "offer a significant distinction upon which courts rely to construe their state constitutions").

461. TEX. CONST. art. I, § 8 states, "Every person shall be at liberty to speak, write or publish his opinions on any subject, . . . and no law shall ever be passed curtailing the liberty of speech or of the press." COLO. CONST. art. II, § 10 states, "[E]very person shall be free to speak, write or publish whatever he will on any subject."

462. See *Briggs*, 759 S.W.2d at 944; *People v. Ford*, 773 P.2d 1059, 1066 (Colo. 1989) (en banc).

463. 834 S.W.2d 4 (Tex. 1992).

464. *Id.* at 6, 11.

465. *Id.* at 11.

466. *Id.* at 11-12. The court also found that the Texas Constitution had "independent vitality." *Id.* at 11.

467. *Id.* at 10.

468. *Id.* at 7-8. Early case law providing greater protection under the Texas Constitution served as a basis for the court's holding. *Id.* at 8-9.

469. *Fawcett*, 114 N.M. at 546-47, 843 P.2d at 848-49.

free speech provision provides greater protection in other contexts as well. The textual language and the history of New Mexico's free speech provision also provide support for this assertion.<sup>470</sup> The fact that the New Mexico Supreme Court based its ruling in *Twohig* on the New Mexico Constitution, rather than the First Amendment,<sup>471</sup> is debatably an indication that the court viewed article II, section 17 as broader, although the court did not explicitly state this. However, recognizing article II, section 17 as providing greater protection would certainly fall in line with the court's decision to characterize a trial participant gag order as a prior restraint, triggering a heightened level of scrutiny and broad speech protection for trial participants in New Mexico.<sup>472</sup>

## VII. CONCLUSION

*Twohig* ensures that trial participant speech in New Mexico is well protected. Under *Twohig*, there is a heavy burden to justify imposing a gag order on attorney speech, if it is even necessary at all. *Twohig* provides clear requirements for trial judges to follow in determining whether a gag order should be imposed on trial participants. It follows then that trial participants also have clear guidelines as to when their speech is properly gagged. Although the necessity of restricting attorney speech through gag orders is questionable, it is unlikely that the use of gag orders will end in the near future. Therefore, the duty remains with trial judges to undertake the required critical analysis before imposing a gag order. The duty also falls on trial participants, however, to serve as a check on trial judges by challenging gag orders when the heavy burden against its constitutional validity is not overcome.

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470. See *supra* notes 451–460 and accompanying text; *Fawcett*, 114 N.M. at 545, 843 P.2d at 847.

471. *Twohig*, 1996-NMSC-023, ¶ 1, 12, 918 P.2d at 333, 335.

472. *Id.* ¶ 13, 918 P.2d at 335–36.