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Gentile v. State Bar: Core Speech and a Lawyer's Pretrial Statements to the Press

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Gentile v. State Bar: Core Speech and a Lawyer's Pretrial Statements to the Press

If one stops to consider the collision which occasionally occurs between the courts and the press, one discovers that it is a contest, not between right and wrong, but between two rights . . . . In such a tragedy the end is always disastrous . . . .[1]

I. INTRODUCTION

The media has always been interested in the courtroom, not only for its news but also for its entertainment value.[2] This interest has been fueled recently by sensationalized cases involving celebrities such as William Kennedy Smith and Mike Tyson. A new cable channel, devoted entirely to reporting trials, has also increased public interest in this area. These developments have brought new attention to an old debate about the propriety of a lawyer's statements to the press regarding pending litigation and the need for safeguards to mitigate the difficulty of finding a panel of objective jurors.[3]

This debate reveals an important point of friction in the principles the Supreme Court has developed for applying the First Amendment to statutory restrictions and punishment of speech. These principles, in rough outline, hold that the nearer a person's speech is to political speech, the "core" of the Free Speech Clause, the more compelling a state's reasons for regulating such speech must be for the regulations to pass First Amendment scrutiny.[4]

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1. Simon H. Rifkind, *When the Press Collides With Justice*, *in* SELECTED ESSAYS ON CONSTITUTIONAL LAW 651, 651 (Edward L. Barrett, Jr. et al. eds., 1963).

2. *See id.*

3. A recent political cartoon is illustrative of this problem. The cartoon depicts William Kennedy Smith's prosecutor waving her arms and saying, "Now, we don't want any hotshot Kennedy lawyers coming in here trying to prejudice a jury by manipulating the press. Listen, did you read about those women we found, the ones who say RAPE! WILLIE SMITH! RAPE! WILLIE SMITH!" Wright, PALM BEACH POST, *reprinted in* NEWSWEEK, Aug. 5, 1991, at 15.

4. *See infra* part III.A; *see also*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1024 (2d ed. 1991) (discussing the different levels of First Amendment protec-

One question that arises from this tenet is whether the First Amendment standard should differ when states attempt to regulate speech that impinges on another constitutionally guaranteed right, such as the Sixth Amendment guarantee of trial by an impartial jury. The Supreme Court recently had the opportunity to address this very question as it relates to the speech of attorneys.

In *Gentile v. State Bar*,[5] the Court considered the propriety of an attorney's press conference on behalf of a client who had been indicted the day before. The case offered the Court an opportunity to formulate a principle of law that would reconcile some of the inherent difficulties between the First and Sixth Amendments. Unfortunately, the Court's resolution of the issues presented in *Gentile* is not entirely satisfactory. But, the opinion does recognize the rule that an attorney's speech may be regulated more readily than that of the press.

This note examines the *Gentile* decision, paying particular attention to three of the arguments set forth by Justice Kennedy—two of which were rejected by a majority of the Court—for limiting a state's right to regulate attorney speech. Part II summarizes the underlying facts and procedural history of the *Gentile* decision. Part III discusses the argument that the speech in question was protected "political speech." The discussion points out that this was Justice Kennedy's most powerful theory and that it should have found favor with a majority of the Court. Part IV addresses Justice Kennedy's argument that the press conference was protected as a valid attempt to counteract the publicity already surrounding the case and finds this theory wanting. Part V discusses the "void for vagueness" argument, which was accepted by a majority of the Court. The examination of the Court's holding is designed to help attorneys and legislatures understand what extrajudicial speech is protected by the Constitution after this decision. Finally, this note concludes that the general rule formulated by Chief Justice Rehnquist—that an attorney's speech may be regulated more readily than that of the press—is proper, but that an exception should be made for attorneys engaged in core political speech that does not harm the interests of the accused.

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tion for "low value" and "high value" speech).

5. 111 S. Ct. 2720 (1991).

II. A HISTORY OF THE *Gentile* DECISION

On January 31, 1987, the Las Vegas Metropolitan Police Department discovered that approximately $300,000 in American Express Travelers checks and a substantial amount of cocaine had been stolen from a safety deposit box at the Western Vault Corporation in Las Vegas. The stolen goods were the property of the police, who had used the goods as part of an undercover operation. Initially, both police officers and employees of Western Vault were considered possible suspects. Eventually, however, the officers who had access to the lock box were cleared of any charges, and the owner of the storage facility, Grady Sanders, was indicted for the crime.[6]

Sanders's attorney, Dominic Gentile, ostensibly hoping to offset some of the adverse publicity his client had received,[7] held a press conference the day after the indictment. The crux of Gentile's statement at this conference was that the trial would show that Sanders had been used as a scapegoat by the police department, that one of the police officers with access to the box was the actual party responsible for the break-in, and that the prosecution's witnesses were not credible since some of them were known drug dealers.[8] Six months later, Mr. Sanders was acquitted by a jury on all counts. After the acquittal, the Southern Nevada Disciplinary Board of the State Bar recommended a private reprimand of Mr. Gentile. The Board found that, in holding the press conference, he had violated Nevada Supreme Court Rule 177. The rule, which is patterned from and nearly identical to the ABA's Model Rule of Professional Conduct 3.6,[9] prohibits lawyers from making "an extrajudicial statement that a reasonable person would expect to be

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6. Brief of Petitioner at 2-7, Gentile v. State Bar, 111 S. Ct. 2720 (1991) (No. 89-1836).

7. Gentile was apparently concerned with the effect of repeated press statements that the police officers with access to the box had passed polygraph examinations clearing them of the charges, whereas Mr. Sanders had refused to submit to such a test. Polygraph results may not be submitted to the jury in Nevada. The administrator of the polygraph examination was later arrested in a cocaine sting and the veracity of his polygraph results were called into question. *See* Brief of Petitioner at 5, 7 n.6, Gentile v. State Bar, 111 S. Ct. 2720 (1991) (No. 89-1836).

8. Mr. Gentile's prepared statement is set forth in APPENDIX A of Justice Kennedy's opinion. *Gentile*, 111 S. Ct. at 2736-37.

9. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991). For a history and general discussion of ABA Rule 3.6 and its predecessors, beginning in 1908, see CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 633-35 (1986).

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."[10]

The Nevada Supreme Court rejected Mr. Gentile's First Amendment challenge to the private reprimand and affirmed the Board's action.[11] The U.S. Supreme Court, however, reversed. The opinion of the Court was a combination of part of Justice Kennedy's opinion,[12] which favored reversal, and part of Chief Justice Rehnquist's opinion,[13] which advocated affirmation. Justice O'Connor's concurrence provided a fifth vote for parts III and VI of Justice Kennedy's opinion and parts I and II of Chief Justice Rehnquist's opinion.[14] Thus, a majority of the Court accepted Justice Kennedy's argument that the case should be reversed because the statute, as interpreted,[15] was void for vagueness. No majority, however, was formed to accept Justice Kennedy's other arguments in favor of reversal.

III. THE PRESS CONFERENCE AS "POLITICAL SPEECH"

Perhaps the most significant result of the *Gentile* decision is the rejection of Justice Kennedy's argument that the speech in question should have been protected as "political." By not accepting this argument, a majority of the Court has essentially denied to lawyers (albeit in specific situations) important protections previously granted to the general public in some of the Court's most significant First Amendment cases.

Because Gentile's press conference implicated "crooked cops," Justice Kennedy argued that the speech was protected as

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10. NEV. SUP. CT. R. 177(1). The full text of Rule 177 is reprinted in APPENDIX B to Justice Kennedy's opinion. *Gentile*, 111 S. Ct. at 2737-38.

11. Gentile v. State Bar, 787 P.2d 386 (Nev. 1990).

12. Justice Kennedy was joined by Justices Marshall, Blackmun, and Stevens.

13. Chief Justice Rehnquist was joined by Justices White, Scalia and Souter.

14. Justice O'Connor agreed with Justice Kennedy that the Nevada rule was void for vagueness and that the Nevada Supreme Court's decision should be reversed. She also agreed with Chief Justice Rehnquist that a state may regulate a lawyer's speech more readily than that of the press and that the "substantial likelihood of material prejudice" test, contained in Rule 177, is constitutional despite the fact that it is not as speech-protective as the "clear and present danger" test traditionally employed by the Court. *Gentile*, 111 S. Ct. at 2748-49 (O'Connor, J. concurring).

15. Justice Kennedy stressed that other similarly worded statutes are not affected. The holding is limited to Nevada's particular interpretation of the statutory standard. *Id.* at 2724 (Kennedy, J., plurality opinion).

"political."[16] "At issue here is the constitutionality of a ban on political speech critical of the government and its officials . . . . [T]his case involves punishment of pure speech in the political forum."[17]

A. *Political Speech Is at the Core of First Amendment Protection*

In First Amendment cases, a court must balance the interests served by the speech-limiting regulation against the interests of the First Amendment.[18] In balancing such interests, some forms of protected speech weigh heavier than others.

A well established principle of constitutional law recognizes that political speech constitutes the most highly protected speech under the First Amendment. In *Butterworth v. Smith*,[19] for example, Chief Justice Rehnquist wrote for a Court that found a state statute disallowing grand jury witnesses from divulging their testimony, even after the grand jury investigation was completed, violated the First Amendment. The statute's scope included testimony regarding improprieties by public officials, which was the focus of the constitutional challenge in that case. According to the Chief Justice, "the publication of information relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment."[20]

Mr. Gentile's accusations against the police, who are government officials, certainly falls within the meaning of "information relating to alleged governmental misconduct"[21] and therefore should qualify as core speech. Society has definite interests in exposing political corruption,[22] and lawyers are

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16. *Id.*
17. *Id.*
18. "[T]he test requires a court to make its own inquiry into 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." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978); *see also*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984).
19. 494 U.S. 624 (1990).
20. *Id.* at 632.
21. *Id.*
22. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 606 (1976) (Brennan, J., concurring) ("[C]ommentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern . . . .").

often in an opportune position to perform that function. Therefore, any limitations on a lawyer's speech in this regard should be subject to First Amendment review.

B. The Clear and Present Danger Doctrine

In reviewing limitations on a lawyer's speech, the Court should remember certain principles regarding the First Amendment's relation to the judicial system that have already been enunciated. Because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[23] the "clear and present danger"[24] doctrine has traditionally governed First Amendment review. The doctrine was well explained in the brief of petitioner Times-Mirror Co. in *Bridges v. California*,[25] a case invalidating contempt convictions for editorial speech against the judicial system, as follows:

> The clear and present danger doctrine requires a weighing of the evidence and a determination "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" a substantial interference with the orderly administration of justice.[26]

The *Bridges* decision, which struck down limitations on free speech under the clear and present danger test, was reaffirmed in *Pennekamp v. Florida*[27] and *Wood v. Georgia*,[28] both of which struck down similar limitations on editorial speech critical of the judiciary.

In *Nebraska Press Ass'n v. Stuart*,[29] the Court found that a "clear and present danger" had not been demonstrated and invalidated a restraining order that prevented the press from reporting on certain aspects of a pending multiple-murder case. The Court stated that one of its tasks was to determine whether other measures, short of the restraining order, "would have

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23. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
24. The doctrine was first formulated by Justice Holmes in Schenk v. United States, 249 U.S. 47, 52 (1919).
25. 314 U.S. 252 (1941).
26. *Id.* at 255. Times-Mirror Co. was one of two successful petitioners in this case.
27. 328 U.S. 331 (1946); *see also*, Craig v. Harney, 331 U.S. 367 (1947).
28. 370 U.S. 375 (1962).
29. 427 U.S. 539 (1976).

insured the defendant a fair trial."[30] Though assuring a fair trial through means other than restraining speech may be inconvenient, a limitation on free speech must be motivated by something that "rises far above public inconvenience."[31]

In addition to being in an opportune position to recognize political corruption, lawyers are able to provide valuable commentary on the workings of the public courts. As the Court said in *Landmark Communications, Inc. v. Virginia*,[32] a case that struck down a Virginia statute making it illegal to report on the proceedings of a commission that heard complaints about judges: "The operations of the courts . . . are matters of utmost public concern."[33] No less so are the operations of the police, who bring criminal matters before the court. "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive *public* scrutiny and criticism."[34] For these reasons the Supreme Court has consistently upheld the Sixth Amendment guarantee of a public criminal trial.[35]

The importance of public knowledge of the workings of the court system is one factor the *Landmark* Court considered when it stated that the "Court has consistently rejected the argument that [out-of-court] commentary constituted a clear and present danger to the administration of justice."[36] There is "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[37] And, this "danger must not be remote or even probable; it must immediately imperil."[38]

The dangers of out-of-court commentary are greatest where the out-of-court publicity relates to matters that will not be

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30. *Id.* at 563.
31. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
32. 435 U.S. 829 (1978).
33. *Id.* at 839.
34. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (emphasis added).
35. *See, e.g.*, Waller v. Georgia, 467 U.S. 39 (1984) (holding that the closure of a suppression hearing despite the objections of the accused, is valid only if: (1) overriding interests are likely to be prejudiced by an open hearing; (2) closure is no broader than necessary; and (3) the trial court considered reasonable alternatives); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (limiting a state's right to close voir dire proceedings in a criminal trial).
36. *Landmark*, 435 U.S. at 844.
37. *Bridges v. California*, 314 U.S. 252, 263 (1941).
38. Craig v. Harney, 331 U.S. 367, 376 (1947).

discussed in the courtroom. Thus, the Court in *Sheppard v. Maxwell*,[39] which overturned Sam Sheppard's conviction for the murder of his wife on the grounds that intensive and unrestrained press coverage had limited his chances of a fair trial, found it especially compelling that "[m]uch of the [prejudicial] material printed or broadcast during the trial was never heard from the witness stand."[40] Accordingly,

> in *Marshall v. United States* . . . we set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence "for it is then not tempered by protective procedures."[41]

Unlike the material that was produced in the media and never heard at the *Sheppard* trial, Mr. Gentile's remarks were directed towards evidence that he did intend to bring forth at trial. Thus, the dangers of out-of-court commentary in this case were not as serious as those in *Sheppard* because the out-of-court comments were to be discussed and weighed more fully in the courtroom.

C. Valid and Invalid Limits on a Lawyer's First Amendment Rights

The cases cited thus far deal primarily with the speech rights of the press[42] during litigation, and not with the rights of an attorney. Indeed, "the two major opinions in *Nebraska Press Association* both contain unsupported, conclusory language suggesting that the special protection afforded the press might somehow be inapplicable to restraints against defendants and defense attorneys."[43] Chief Justice Rehnquist uses

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39. 384 U.S. 333 (1966).

40. *Id.* at 356.

41. *Id.* at 351.

42. Other cases have extended protection to citizens who publish statements critical of the government. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941) (protecting a labor leader's publication of a letter critical of a judge).

43. Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys:* Ratio Decidendi v. Obiter Dictum, 29 STAN. L. REV. 607, 607 (1977). This article makes a strong argument for the proposition that the Court's rationale in *Nebraska Press Ass'n* weighs equally in favor of allowing defense attorneys the same free speech rights that the case upholds for the press, and that the Court's *dictum* to the effect that this is not the case is unsupported.

these statements to support his finding that the clear and present danger test and other principles enunciated therein do not apply to attorneys, and that

> lawyers are [not] protected by the First Amendment to the same extent as those in other businesses . . . . [T]he speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Ass'n v. Stuart* and the cases which preceded it.[44]

That practicing attorneys give up some First Amendment protection is undisputed. "Membership in the bar is a privilege burdened with conditions."[45] "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been 'officers of the courts.' "[46] As Justice Stewart wrote in a concurring opinion in *In re Sawyer*,[47] "A lawyer belongs to a profession with inherited standards of propriety and honor . . . . He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."[48]

> [T]he conflict [between the Court's *obiter dicta* and *ratio decidendi*] is a superficial one, and the compelling analysis underlying *Nebraska Press Association* will require at least the same heavy presumption against prior restraints on the first amendment rights of defendants and their attorneys as has been recognized with respect to orders limiting press reports of pending litigation.

Id. at 619.

44. Gentile v. State Bar, 111 S. Ct. 2720, 2744 (1991) (Rehnquist, C.J., opinion of the Court) (citation omitted). Justice Kennedy, on the other hand, argues that the Nevada test "approximated" the "clear and present danger" test and should be interpreted accordingly. *Id.* at 2725 (Kennedy, J., plurality opinion). *In re Sawyer*, a case overturning the temporary suspension of an attorney for speech regarding litigation, presented facts similar to the *Gentile* case. However, the Court decided not to reach the constitutional issue, stating that "since it is clear . . . that the finding upon which the suspension rests is not supportable by the evidence adduced, we have no occasion to consider the applicability of *Bridges*, *Pennekamp*, or *Craig*. We do not reach or intimate any conclusion on the constitutional issues presented." In re Sawyer, 360 U.S. 622, 626-27 (1959) (citations omitted).

45. Theard v. United States, 354 U.S. 278, 281 (1957) (quoting *In re* Rouss, 116 N.E. 782, 783 (N.Y. 1917)).

46. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). *But cf.* Cammer v. United States, 350 U.S. 399, 405 (1956) (holding that attorneys are not "officers of the court" in the same way as are publicly paid court employees).

47. 360 U.S. 622 (1959).

48. *Id.* at 646-47.

Gentile's speech, however, was not just speech that "*might* be constitutionally protected."[49] Rather, it was speech that dealt with alleged improprieties on the part of public officials, and should be protected as "core" First Amendment speech. The underlying principles and rationale of the cases enunciating the "clear and present danger" test are strong and important enough to apply even to lawyers when they are engaged in such core political speech.[50] This argument is especially compelling in light of more recent cases invalidating professional rules regulating even the non-core, commercial speech of attorneys.[51]

Perhaps the strongest argument against reversing the Nevada court's decision on "political speech" grounds, however, is that it would force the Supreme Court to prioritize between First and Sixth Amendment rights. The Court made it clear in *Nebraska Press Ass'n* that it was unwilling to do this.[52] According to the facts in *Gentile*, such a prioritization might not be necessary. The Sixth Amendment guarantee of trial by an "impartial jury" was designed primarily to protect the accused, not the state, or even the judicial system.[53] Indeed, ABA Mod-

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49. *Id.* (emphasis added).

50. *See, e.g.*, WOLFRAM, *supra* note 9, at 632 n.88 ("All of the opinions in *In re Sawyer*, for example, seem to concur that speech by a lawyer abstractly attacking rules of law or the administration of justice could not constitutionally be used to discipline a lawyer.") (citation omitted). Special rules for prosecutors, or for lawyers in general, that do not apply to others may raise questions of "viewpoint discrimination which is 'censorship in its purest form' and is 'subjected to the highest levels of scrutiny.' " Scott M. Matheson, *The Prosecutor, the Press and Free Speech*, 58 FORDHAM L. REV. 865, 904-905 (1990) (footnotes omitted).

51. Bates v. State Bar, 433 U.S. 350 (1977) (advertising for legal clinic, so long as it is not deceptive, is entitled to First Amendment protection from state regulation); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (state ethics rule prohibiting lawyer from soliciting by sending letters to potential clients held unconstitutional). In both of these cases, First Amendment interests prevailed over arguments that the maintenance of professionalism or the reputation of the legal system required protection from certain types of lawyer speech. This standard prevails in other professions as well. *E.g.*, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (invalidating limitation on speech by pharmacist, despite rationale concerning the reputation of the profession). However, as Chief Justice Rehnquist points out, even in these cases a balancing test was employed. Gentile v. State Bar, 111 S. Ct. 2720, 2744 (1991) (Rehnquist, C.J., opinion of the Court).

52. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976). Chief Justice Rehnquist came close to rejecting this principle, however, when he declared that, "[f]ew, *if any*, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors." *Gentile*, 111 S. Ct. at 2745 (emphasis added).

53. Although an impartial jury works both to the benefit of the accused and

el Rule 3.6 also seems to have been drafted primarily with the rights of the accused in mind.[54] The accused in this case, however, was, if anything, benefitted by his attorney's behavior. This does not matter as far as Rule 177 is concerned, but it does suggest a way for the Court to reject the statute itself on constitutional grounds and avoid having to hold that the right to free speech is more or less important than the right to a fair trial.

A principle could be formulated whereby an attorney's statements to the press would fall outside the condemnation of the rule if they did not prejudice the potential venire *against the accused* and if the speech in question was "directed at public officials and their conduct in office."[55] Mr. Gentile argued that the clear and present danger standard that applies to the

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the state, the Sixth Amendment says, "the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST., amend. VI (emphasis added). The superior importance of the rights of the accused is illustrated by the procedure allowing an accused to appeal a conviction on due process grounds, whereas the state may not appeal an acquittal on similar grounds. For example, in *Sheppard v. Maxwell* the Court held that "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the *accused*." *Sheppard v. Maxwell* 384 U.S. at 333, 362 (1966) (emphasis added). *See also* Freedman & Starwood, *supra* note 43, at 618 ("The Sixth Amendment guarantees a fair trial to the defendant, not to the state, and the defendant's exercise of First Amendment rights poses no threat to that guarantee.").

54. The clearest instance of potential for such interference [with judicial proceedings] is prosecutorial comment on a pending case, and occasional decisions can be found in which a court has applied [the predecessor to Rule 3.6] to a prosecuting lawyer for such public comment . . . . Moreover, because of the fact that prosecutor statements are typically much more likely to influence prospective jurors, Rule 3.6 . . . can be violated more readily by prosecutors in criminal cases than by defense lawyers or by lawyers in any other setting.

WOLFRAM, *supra* note 9, at 634-35; *see also* Matheson, *supra* note 50 at 868-69 ("[I]t is the prosecutor's extrajudicial publicizing, not defense counsel's, that might imperil the defendant's fair trial right.").

55. *Gentile*, 111 S. Ct. at 2724 (Kennedy, J., plurality opinion). Other commentators have argued that defense attorneys in general should be afforded immunity from extrajudicial speech limitations. *See, e.g.*, Freedman & Starwood, *supra* note 43. The rule proposed herein would have much the same effect but would limit the scope of such arguments to speech not only made on behalf of the accused but that also furthers "core" or political expression. For an opinion more akin to this argument see Richard B. Hirst, Comment, *Silence Orders: Preserving Political Expression by Defendants and their Lawyers*, 6 HARV. C.R.-C.L. L. REV. 595 (1971) (arguing that defense attorneys should not be subject to silence orders in cases involving indictments that are politically motivated).

press should also apply to him in this case.[56] Gentile's proposal, though, only makes it more difficult for lawyers to be disciplined. It does not consider whether the speech in question is "core speech" or is furthering society's interest in exposing political corruption. The rule formulated above, however, has an advantage over the clear and present danger standard in dealing with lawyers. It advances society's strong interest in exposing political corruption while protecting the accused from negative pretrial publicity.

This rule would be a valid exception to the general rule allowing regulation of attorney speech on pending litigation. The Court has recognized such "political speech" exceptions to restrictions on lawyer speech before. For example, although the Court upheld a regulation on direct solicitation of clients in *Ohralik v. Ohio State Bar Ass'n*,[57] the Court also carved out an exception to this rule for solicitations that furthered "political" causes in *In re Primus*.[58]

The *Primus* case involved solicitation by an ACLU attorney of a possible client in an anti-sterilization case. According to the Court, "This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance . . . . And her actions were undertaken to express personal *political* beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain."[59] If a "political speech" exception can be carved from a general rule upholding state anti-solicitation regulations, so too, can such an exception be carved from a general rule upholding state regulations against an attorney's comments on pending litigation.

IV. THE PRESS CONFERENCE AS AN ATTEMPT TO COUNTER PRIOR PREJUDICIAL STATEMENTS

In part II of his opinion, Justice Kennedy details the great amount of adverse publicity Mr. Sanders received prior to his indictment, together with the favorable publicity received by

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56. *Gentile*, 111 S. Ct. at 2742 (Rehnquist, C.J., opinion of the Court); *but see supra* text accompanying note 44.

57. 436 U.S. 447 (1978).

58. 436 U.S. 412 (1978).

59. *Id.* at 422 (emphasis added); *see also* NAACP v. Button, 371 U.S. 415 (1963). In *Button*, the Court held that the NAACP's attempts to advance civil rights goals by explaining those goals to potential clients may not be penalized under state anti-solicitation rules. *Id.* This case was relied on in *In re Primus*, 436 U.S. 412 (1978).

the police.[60] Justice Kennedy noted that, "[f]ar from an admission that he sought to 'materially prejudic[e] an adjudicative proceeding,' petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community."[61]

A. A Lawyer's Role in Highly Publicized Cases

Justice Kennedy's arguments paint an admirable picture of a lawyer battling against the unfair forces lined in opposition to his client. "An attorney's duties do not begin inside the courtroom door."[62] Perhaps especially compelling is the argument that Mr. Gentile's client had suffered great personal and economic harm as a result of the adverse publicity before the case, and that the press conference in his favor helped to alleviate this. The strength of this argument, however, is weakened by the self-contradictory nature of the statement that a lawyer is in fact not trying to prejudice a proceeding, but is merely trying to counter already existing prejudice. The battle is to be fought in the courtroom, and the fact that one side has broken this rule by engaging in out-of-court commentary doesn't give the other side clearance to do the same. "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[63] "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[64]

A committee of the New York Bar that met to formulate a statute similar to Nevada Supreme Court Rule 177, discussed the issue of whether an attorney, when faced with publicity adverse to his client, should be able to use the press to fight back, and concluded as follows:

> At first blush, it may seem reasonable enough to permit a lawyer to fight fire with fire, but a moment's reflection

60. *Gentile*, 111 S. Ct. at 2727-28 (Kennedy, J., plurality opinion). Such treatment is apparently routine in criminal cases because reporters tend to rely on law enforcement for their sources. *See, e.g.*, Matheson, *supra* note 50, at 890 n.143 ("It is well established that reporters get most of their crime news from law enforcement sources.").

61. *Gentile*, 111 S. Ct. at 2728 (Kennedy, J., plurality opinion).

62. *Id.*

63. Bridges v. California, 314 U.S. 252, 271 (1941).

64. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

> will make it apparent that even the publication of an indictment may be thought to justify defense counsel in publishing his version of the merits, what defense witnesses will testify, and so on. Once the interchange of publicity has begun, there is no way to stop it or in many if not most cases even to tell when or how it began.[65]

Rather than fighting back in the press, the attorney's primary responsibility is to assure that a fair trial is had despite any prior adverse publicity. Various means are at the disposal of the lawyer and the court to accomplish this, including voir dire, change of venue, instructing the jury to disregard press reports about the trial, and even after-trial appeals based on a tainted jury.

B. The Difficulty of Ignoring an Adversary's Press Statements

On the other hand, voir dire, change of venue, and other such methods do not always assure that the accused will receive a fair trial. As Chief Justice Rehnquist stated:

> Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of [pre-trial] statements . . . .[66]

Furthermore, in cases like *Gentile*, prosecutors can make highly prejudicial statements to the press, and be protected under subdivision 3(b) of the Nevada rule,[67] so long as their statements came from the defendant's indictment—a public record. As Justice Kennedy pointed out, considerations other than the fairness of the trial also need to be examined. In upholding a restraint on pretrial publicity, for example, the Fed-

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65. SPECIAL COMM. ON RADIO, TELEVISION, AND THE ADMIN. OF JUSTICE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL: FINAL REPORT WITH RECOMMENDATIONS 18 (1967).

66. Gentile v. State Bar, 111 S. Ct. 2720, 2745 (1991) (Rehnquist, C.J., opinion of the Court). Although the Chief Justice does not acknowledge it, this argument, which he makes against Gentile's position, cuts both ways.

67. "Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration: . . . [t]he information contained in a public record . . . ." NEV. SUP. CT. R. 177(3)(b).

eral District Court for the Southern District of New York, in *United States v. Simon*,[68] pointed to the plight of a defendant in a highly publicized case, who, after his acquittal, wanted to know "where he might go to have his reputation restored to him."[69] The court elaborated:

> In the aftermath of a celebrated trial, members of the public may come to believe that certain defendants were acquitted not because of their innocence, but rather, because of a prosecutor's incompetence or tactical error, the fame or oratorical skill of defense counsel, or even because of vaguely understood concepts of the 'legal technicality' through which an otherwise guilty individual escapes the grasp of justice.[70]

Despite their shortcomings and costs, however, voir dire, change of venue and other such methods are the means that have been created to deal with negative pretrial publicity. The efficacy of these tools is uncertain. But equally uncertain is the effectiveness of an attorney's statements to the press as a tool for offsetting previous statements by the other side. Consequently, Justice Kennedy's argument that Gentile's statement should be protected because it countered prejudice was rightfully rejected by a majority of the Court.

V. VOID FOR VAGUENESS

A. *The Argument*

That the statute in question is vague on its face is a difficult argument to overcome. Nevada Supreme Court Rule 177(2) lists several types of statements that are likely to be prohibited under the rule. These include statements relating to, "[t]he character, credibility, reputation or criminal record of a party . . . or witness," as well as "[a]ny opinion as to the guilt or innocence of a defendant or suspect in a criminal case."[71] Rule 177(3) then lists statements a lawyer may make "without elaboration"; these include "[t]he general nature of . . . the defense."[72] Gentile found, as would any defense attorney whose strategy revolved around the credibility of witnesses and the innocence of his own client, that the prohibitions of Rule 177(2)

68. 664 F. Supp. 780 (S.D.N.Y. 1987).
69. *Id.* at 789 n.13.
70. *Id.*
71. NEV. SUP. CT. R. 177(2).
72. NEV. SUP. CT. R. 177(3).

were difficult to reconcile with Rule 177(3)'s authorization of a statement on the general nature of the defense.

A majority of the Court held that the rule was void for vagueness because a reasonable attorney had no way of knowing whether a statement would be protected under the Rule 177(3) safe harbor, for statements regarding the "general nature" of the defense, or whether it would be construed as an "elaboration," forbidden under Rule 177(1). Thus, the rule met the traditional test for vagueness because people "of common intelligence must necessarily guess at its meaning and differ as to its application."[73]

B. Can an Attorney Speak to the Press "Safely" After Gentile*?*

The Court's void-for-vagueness ruling is a step in the right direction and will probably curtail some overly vigorous enforcement of ABA Model Rule 3.6, as enacted by the various states.[74] Whether *Gentile* offers any real guidance to attorneys who wish to hold a press conference or speak to reporters without violating the rule is unclear. Any guidelines the case offers are ambiguous at best.

Nevertheless, some points are worth noting. For example, Mr. Gentile's testimony that he thought his statements were protected under Rule 177(3) seemed to weigh very favorably with the Court. Passages from Mr. Gentile's conference are given to show his "attempt to obey the rule."[75] When asked if he could elaborate on some of the statements, Mr. Gentile replied, "I can't because ethics prohibit me from doing so. Last night before I decided I was going to make a statement, I took a close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?"[76]

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73. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

74. According to WOLFRAM, *supra* note 9, at 635, many decisions have upheld Rule 3.6's predecessor statute, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107, against free-speech, vagueness and overbreadth attacks. One case went so far as to refuse admission *pro hac vice* to a lawyer previously in violation of the rule. State v. Ross, 304 N.E.2d 396 (Ohio 1973), *appeal dismissed*, 415 U.S. 904 (1974). Another condemned a lawyer for encouraging a juror to talk to the media about a completed case. State v. Young, 438 A.2d 344 (N.J. Super. Ct. App. Div. 1981).

75. Gentile v. State Bar, 111 S. Ct. 2720, 2731 (1991) (Kennedy, J., opinion of the Court).

76. *Id.*

Thus, even though Gentile's opening statement may have violated some of the taboos set forth in rule 177(2), the fact that he refused to answer some of the questions on grounds that his reading of the rule precluded him from doing so allowed the Court to hold that he had made a good faith effort to stay within the safe harbor. The Court stated, "The fact Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary."[77]

A lawyer wishing to hold a press conference under Nevada Rule 177, or a similar rule, would thus be wise to let it be known at the press conference that he has studied the ethical rule in question and is making a good faith effort to follow its precepts.[78] In states like Nevada, which have no common law or further interpretations of the rule, such actions may assure at least some defense to any charges of violations of the rule on void-for-vagueness grounds. This suggests the need for the states, either legislatively or in the courts, to formulate clearer guidelines. Nevertheless, the best rule for attorneys is to proceed with caution.[79]

VI. CONCLUSION

The rule formulated by Chief Justice Rehnquist in *Gentile* that allows a state to "regulate speech by lawyers representing clients . . . more readily than it may regulate the press,"[80] and thus to ignore the rigid "clear and present danger" test in its restrictions on attorney speech is supported by important policies. It is a principle that should not be cast aside simply to allow lawyers to fight pretrial fire with fire. However, "[t]his does not mean . . . that lawyers forfeit their First Amendment rights . . . ."[81] When core political speech is involved, a narrow

77. *Id.* at 2732.

78. United States v. Bingham, 769 F. Supp. 1039, 1043 (N.D. Ill. 1991), one of the first attorney disciplinary actions to cite *Gentile* in dealing with a lawyer's statements to the press, shows that if an attorney offers no excuse for "knowingly" and "willfully" violating a similar rule, courts will not hesitate to impose a penalty. The *Bingham* decision also discussed with approval Justice Kennedy's opinion that the timing of the attorney's statements are an important consideration. *Id.* at 1044-45. Statements made close to the eve of trial seem more likely to be reprimanded.

79. This is especially true now that Justice Marshall, who sided with Justice Kennedy, has left the Court.

80. *Gentile*, 111 S. Ct. at 2748 (O'Connor, J. concurring).

81. *Id.*

exception should be carved from Chief Justice Rehnquist's general rule that would allow attorneys to engage in such speech so long as the Sixth Amendment rights of the accused are not damaged by this speech. Such a rule would allow the press a head start in pursuing claims of political corruption, while at the same time protecting the right of the accused to be tried by a jury that is not poisoned against him.

D. Christopher Albright