Washington Law Review

Volume 67 | Number 3

7-1-1992

Leaving Your Speech Rights at the Bar—*Gentile v. State Bar*, 111 S. Ct. 2720 (1991)

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LEAVING YOUR SPEECH RIGHTS AT THE BAR—*Gentile v. State Bar,* 111 S. Ct. 2720 (1991).

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Abstract: In *Gentile v. State Bar,* the Supreme Court voided an attorney disciplinary rule regulating trial publicity for vagueness. The Court, however, upheld the substantive standard employed by the rule to identify dangerous speech. This standard restricts more attorney comments to the media than the Court has allowed for the press or public. This Note argues that the standard upheld in *Gentile* fails First Amendment scrutiny and proposes a response for states reviewing their professional disciplinary rules in light of *Gentile.* Adoption of this proposal will mitigate the danger of prejudicial trial publicity while recognizing the benefits of attorney publicity.

On February 2, 1987, the Las Vegas Metropolitan Police sheriff reported to the media that his undercover drug officers had found four kilograms of cocaine and $300,000 in traveller's checks missing from a sting operation.[1] The local press followed the subsequent investigation eagerly, reporting the sheriff's confidence in his officers and the investigation's focus on Grady Sanders. Sanders owned the vault company where the drugs and money were stored. The story became even more sensational over the course of the next year as additional people with drug connections reported money missing from Sanders' vaults. In February of 1988, the prosecutor finally indicted Sanders.

On the eve of the prosecutor's announcement, Sanders' attorney, Dominic Gentile, debated his options. On the one hand, after conducting his own investigation, Gentile believed that Sanders was a scapegoat for a corrupt police detective hooked on cocaine. Gentile believed that if he held a press conference to inform the media of his findings, he could stem the flow of negative publicity surrounding Sanders, publicity that had forced Sanders' vault company to close, his other business interests to stumble, and his health to suffer. On the other hand, Gentile realized that a press conference could violate Nevada Supreme Court Rule 177 which limits what attorneys can say to the media out of a concern for prejudice of potential jurors.[2]

Gentile went forward with the press conference, but in a manner deliberately designed to minimize prejudice to the trial. Gentile limited his comments, giving only the general outlines of his police-corruption defense. He also refused to answer many of the reporters' questions, citing his professional responsibility.

1. Unless otherwise noted, all facts are taken from Justice Kennedy's majority opinion in Gentile v. State Bar, 111 S. Ct. 2720, 2727–30 (1991) (Kennedy, J.).

2. NEV. SUP. CT. R. 177. *See infra* note 57 for text of the rule.

The local court impaneled a jury in August. None of the jurors had any recollection of Gentile's comments to the media. During the trial, Gentile supported every material allegation he had made in the press conference. The jury acquitted Sanders of all counts.

Gentile was not as successful with the State Bar as he was in the courtroom.[3] After the trial, the State Bar of Nevada filed a complaint against Gentile alleging a violation of Rule 177. The Southern Nevada Disciplinary Board of the State Bar held a hearing on the matter and recommended a private reprimand. Gentile waived the confidentiality of the disciplinary hearing and appealed to the Nevada Supreme Court, which affirmed the findings of the Board. Gentile took his case to the United States Supreme Court.

In *Gentile v. State Bar,*[4] the Supreme Court cleared Gentile of the disciplinary charges but upheld the principle that attorneys do not have the same speech rights as the public or the press. Writing for a five-member majority on the issue of vagueness, Justice Kennedy explained that section (c) of Rule 177, a list of exceptions to the general bar on statements to the press, was confusing to the average lawyer and thus the entire rule was void for vagueness.[5] However, Chief Justice Rehnquist persuaded four of his colleagues to join him on the issue of the state's power to regulate attorney speech, declaring that the standard employed in the main body of the rule was a legal restriction on speech despite the First Amendment. Unlike the press or the general public, the Chief Justice explained, attorneys can be punished for comments that do not pose a clear and present danger to a fair trial.[6]

This Note argues that states should reject the analysis of the Supreme Court and provide attorneys with the same free speech protection as the media and other individuals. Setting *Gentile* against the background of the Supreme Court's twin goals of free speech and fair trials highlights several inadequacies in the Rehnquist analysis and suggests a proposed response for states reviewing their professional disciplinary rules. Adoption of this proposal will maximize the potential benefits of attorney involvement in trial publicity while respecting the constitutional mandate of fair adjudications.[7]

3. *Gentile,* 111 S. Ct. at 2723.

4. *Id.*

5. *Id.* at 2731–32.

6. *Id.* at 2744.

7. *See* U.S. CONST. amend. VI.

I. THE CONFLICT BETWEEN FAIR TRIALS AND FREE SPEECH

The shifting majority in *Gentile* is the most recent attempt by the Court to accommodate two constitutional interests, fair trials and free speech, that provide little room for compromise.[8] Over the last few decades, the Court has protected judicial impartiality and freedom of speech with equal zeal.[9] However, the competition between the two principles is also responsible for the ambiguous dicta from the Court's landmark decision in this area, *Sheppard v. Maxwell.*[10] The problems resulting from this competition are evident in the struggle of the bench and bar to implement rules and procedures protecting both interests.

A. Protecting Argument Within and Without the Courtroom

To safeguard impartiality in the judicial process, the Supreme Court has followed the principle that a court may base its decisions only on evidence and argument offered within the courtroom.[11] For criminal trials, this principle flows from the Sixth Amendment guarantee of an impartial jury trial for all criminal defendants,[12] as a protection against government oppression. For civil trials, the Seventh Amendment preserves the right to a jury, but does not repeat the guarantee of impartiality granted in the Sixth Amendment.[13] The significance of this difference is unclear, but the absence of the word "impartial" may justify lower safeguards for civil trials.[14]

The Supreme Court is equally protective of the freedom of argument outside the courtroom. Implementing the command of the First Amendment,[15] the Supreme Court has developed several rigorous principles to scrutinize statutes and regulations that attempt to restrict speech. For example, the Court considers prior restraints on speech presumptively invalid because of their tendency to freeze political debate.[16] The Court also voids restrictions that are unduly vague

8. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 611–12 (1976) (Brennan, J., concurring).

9. *See infra* notes 11–18 and accompanying text.

10. 384 U.S. 333 (1966).

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

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

13. "In suits at common law . . . the right of trial by jury shall be preserved . . . ." *Id.* amend. VII.

14. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

15. "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ." U.S. CONST. amend. I.

16. Near v. Minnesota, 283 U.S. 697, 713 (1931).

because they may fail to give fair notice to those impacted and may facilitate discriminatory enforcement.[17] Similarly, the Court strikes down regulations that are overly broad in sweeping both protected and unprotected speech under their ambit.[18]

However, the Court has never held that the freedom of speech guaranteed by the First Amendment is an absolute right.[19] In *Schenck v. United States,*[20] Justice Holmes formulated the "clear and present danger" test to delineate the exception to free speech.[21] This test focuses on whether the seriousness and imminence of a danger created by the speech can overcome the interest in the speech's protection.[22]

More recently, the Court has created discrete categories of speech that states may more readily regulate when faced with compelling government interests.[23] After determining that the speech fits within one of these categories, the Court applies a two-prong test to determine the constitutionality of the regulation. First, the regulation must further a substantial and important government interest unrelated to the suppression of speech.[24] In advancing those interests, the suppression must not center on the identity of the speaker[25] but may account for the special characteristics of the environment.[26] Second, the limitation may be no greater than necessary to accomplish the government's interest.[27] This second prong requires precise drafting of the speech regulation,[28] a demonstrable relationship between the goal and the means chosen,[29] and the consideration of any less restrictive alternatives.[30]

17. *See* Kolender v. Lawson, 461 U.S. 352, 358–59 (1983).

18. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

19. *See* American Communications Ass'n v. Douds, 339 U.S. 382, 394 (1950).

20. 249 U.S. 47 (1919).

21. *Id.* at 52.

22. *See* United States v. Dennis, 341 U.S. 494, 510 (1951).

23. *See, e.g.,* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (upholding a protective order that restricted the publishing of information received during discovery to protect the integrity of the discovery process); Procunier v. Martinez, 416 U.S. 396 (1974) (upholding restrictions on speech rights of prisoners because of the special needs of the state in controlling the environment).

24. *Procunier,* 416 U.S. at 413.

25. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978) (corporations cannot be deprived of speech rights simply because they are corporations); Wood v. Georgia, 370 U.S. 375, 394 (1962) (sheriff cannot be deprived of speech rights simply because of position).

26. *See Procunier,* 416 U.S. at 409 (prison); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (school).

27. *Procunier,* 416 U.S. at 413.

28. *See* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968).

29. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 (1982).

30. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563–64 (1976).

B. Sheppard *and the Birth of the Anti-Publicity Measures*

Lower courts and professional bodies have often looked to the Court's opinion in *Sheppard v. Maxwell*[31] for guidance in addressing the conflict between free speech and fair trials. In *Sheppard,* the Court examined a trial that local publicity had turned into a carnival.[32] After overturning the defendant's conviction because he did not receive a fair trial consistent with due process,[33] the Court suggested, in dicta, several approaches the trial judge could have tried to insure impartiality. Two passages stand out. First, among a long list of non-speech restrictive measures the trial judge could have employed, the Court suggested a proscription on "extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters."[34] Second, the Court proposed that the best protections against a violation of impartiality were preventative and pointed to attorneys, stating that "[c]ollaboration between counsel and the press as to information affecting the fairness of the trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[35]

C. The Anti-Publicity Measures

Lower courts and state bar associations quickly responded to *Sheppard* and attempted to implement the Court's dicta.[36] The responses to *Sheppard* took two distinct, but intertwined, forms. First, courts employed judicial orders in individual cases, to prevent the release of prejudicial information by either the press or by trial participants ("gag orders"). Second, state bars created professional disciplinary rules to regulate the conduct of attorneys dealing with trial publicity ("no comment rules").

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31. 384 U.S. 333 (1966).

32. The local media used the investigation and subsequent trial of Dr. Sheppard to feed the public daily stories of murder, mystery, society, sex, and suspense, most of which were never introduced into evidence in court and all of which were available to the jurors. Even the jurors themselves became celebrities. *Id.* at 358.

33. *Id.* at 335.

34. *Id.* at 361.

35. *Id.* at 363.

36. Importantly, the *Sheppard* opinion discussed neither how the bench and bar should implement these suggestions nor how these measures relate to others like continuance, change of venue, sequestration of the jury, and new trials that do not impinge upon the speech rights of the media and attorneys.

1. Judicial Gag Orders

Courts have developed two types of gag orders to stop prejudicial publicity. The Supreme Court quickly adressed the first, orders directed at the media, and virtually eliminated their use by adopting a strict clear and present danger standard. The second type of gag order, injunctions directed at trial participants, has split the circuit courts of appeal.

a. Judicial Orders Gagging the Press

Gag orders directed at the press did not survive long after *Sheppard.* In *Nebraska Press Ass'n v. Stuart,*[37] a unanimous Court declared that gag orders directed at the media breached the First Amendment protection of speech, thereby circumscribing the Court's sweeping language in *Sheppard.* Citing the heavy presumption against the validity of prior restraints,[38] the majority opinion concluded that a direct gag order on the press could only be valid if the particular circumstances presented a clear and present danger of prejudice to a fair trial, less restrictive alternatives were unavailable, and the gag order was an effective solution.[39] The high showing of probability required by the clear and present danger standard in the *Nebraska Press* decision effectively ended direct restraints on the media.[40]

b. Judicial Orders Gagging Trial Participants

The Court, in *Nebraska Press,* left open the possible validity of gag orders on trial participants.[41] This has led many courts to turn to such orders in highly publicized cases.[42] These orders attempt to cut off prejudicial publicity at its source, often identified as the trial attorneys.[43] While functioning as a direct restraint on the speech of attorneys, trial participant gag orders also act as indirect restraints on the press, drying up their richest sources of information. This dual effect, along with the inconclusive dicta from *Sheppard* and *Nebraska Press,*

37. 427 U.S. 539 (1976). For a wide-ranging discussion of the impact of this case see Symposium: Nebraska Press Association v. Stuart, 29 STAN. L. REV. 383 (1977).

38. *Nebraska Press,* 427 U.S. at 559. *See supra* note 16 and accompanying text.

39. *Nebraska Press,* 427 U.S. at 562.

40. Sheryl A. Bjork, Comment, *Indirect Gag Orders and the Doctrine of Prior Restraint,* 44 U. MIAMI L. REV. 165, 174 (1989).

41. *Nebraska Press,* 427 U.S. at 565 n.8.

42. Bjork, *supra* note 40, at 166.

43. *E.g., Nebraska Press,* 427 U.S. at 601 (Brennan, J., concurring).

has led to a split among the circuit courts regarding the constitutionality of gag orders on trial participants.[44]

The circuit courts have wrestled with two standards in deciding when the danger of prejudice is grave enough to justify suppressing trial participants' speech.[45] Courts articulate the first standard either as a "clear and present danger"[46] or a "serious and imminent threat."[47] Courts choosing this standard only uphold trial participant gag orders that restrict speech presenting a clear and present danger of prejudice to a fair trial. Application of this standard does not require proof of actual prejudice, but rather requires a showing of a near certainty of potential for prejudice. This standard approximates the strict scrutiny of speech restrictions found in *Nebraska Press.*[48]

Other courts have articulated a "reasonable likelihood" standard.[49] Relying on the dicta from *Sheppard,*[50] courts choosing this standard uphold trial participant gag orders that restrict speech presenting only a reasonable likelihood of prejudice to a fair trial. The decisions employing this standard often note the futility of predicting prejudice with any certainty, and instead focus on the possibility of prejudice.[51]

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44. Dow Jones & Co. v. Simon, 488 U.S. 946 (1988) (White, J., dissenting to denial of cert.). The split has led to a healthy debate among commentators. *Cf.* Bjork, *supra* note 40 (asserting that trial participant gag orders are indirect restraints on the media and make *Nebraska Press* gutless); Mark R. Stabile, Comment, *Free Press—Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?,* 79 GEO. L.J. 337 (1990) (arguing that there is a constitutional distinction between gag orders on the media and gag orders on trial participants); Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights,* 90 COLUM. L. REV. 1411 (1990) (arguing that trial participant gag orders should only be upheld on a showing of clear and present danger rather than a reasonable likelihood of danger to a fair trial).

45. At least one court has hinted that the only difference between the standards may be semantics. Younger v. Smith, 106 Cal. Rptr. 225, 240 (Ct. App. 1973). *But see* Swartz, *supra* note 44, at 1414 n.25. The circuit courts also disagree on whether to apply different standards based on the status of the party challenging the gag order. *See* Stabile, *supra* note 44.

46. *See, e.g.,* Bailey v. Systems Innovation, Inc., 852 F.2d 93, 99 (3d Cir. 1988).

47. *See, e.g.,* United States v. Ford, 830 F.2d 596, 600 (6th Cir. 1987); Levine v. United States Dist. Court, 764 F.2d 590, 598 (9th Cir. 1985), *cert denied,* 476 U.S. 1158 (1986). For an equivalent standard formulated as "clear and imminent danger," *see* CBS, Inc. v. Young, 522 F.2d 234, 240 (6th Cir. 1975).

48. At least one court has treated "clear and present danger" and "serious and imminent threat" as distinguishable standards, thus finding three from which to choose. *In re* Keller, 693 P.2d 1211 (Mont. 1984); *see also* Dianne Pappas, Comment, *First Amendment Protection of Criminal Defense Attorneys' Extrajudicial Statements in the Decade Since* Nebraska Press Association v. Stuart, 8 WHITTIER L. REV. 1021, 1028–37 (1987).

49. *See, e.g.,* United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).

50. The words "reasonable likelihood" are actually used in evaluating a motion for continuance or change of venue. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

51. *See* Younger v. Smith, 106 Cal. Rptr. 225, 242 (Ct. App. 1973).

These courts limit *Nebraska Press* to its facts, refusing to extend a high level of speech protection to lawyers or other trial participants.

2. *Attorney Disciplinary Rules*

State bars were generally unsuccessful in their first response to the *Sheppard* dicta, Disciplinary Rule (DR) 7-107.[52] A recommendation of the American Bar Association (ABA), the rule took a "lists approach" to the problem of extrajudicial speech, prohibiting many specific categories of statements by attorneys while permitting others.[53] In several subsections, the rule applied a blanket standard prohibiting comment on matters "reasonably likely" to interfere with fair proceedings.[54] Courts split on the constitutionality of the reasonable likelihood standard in DR 7-107, but most found at least one section of the rule overbroad or vague.[55]

The ABA responded quickly to the judicial criticism, commissioning a redrafting of DR 7-107 to cure its constitutional defects.[56] The ABA adopted the resulting proposal, Model Rule 3.6,[57] with the *Model Rules of Professional Conduct* in 1983. The biggest change from DR 7-107 in the new rule is the generalization of the standard in section (a) of Model Rule 3.6, prohibiting public comments by attorneys that have a "substantial likelihood of materially prejudicing" a

52. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980) (hereinafter MODEL CODE). *See* GEOFFREY C. HAZARD, THE LAW OF LAWYERING: A HANDBOOK OF THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.6:102 (1990).

53. HAZARD, *supra* note 52, at 665.

54. MODEL CODE, *supra* note 52, at DR 7-107(D), (E), G(5), H(5).

55. *See, e.g.*, Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (upholding constitutionality of reasonable likelihood standard as applied to criminal jury trials, but holding other clauses vague or overbroad); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (holding that only a "serious and imminent threat" standard could be constitutional and that several clauses of DR 7-107 are overbroad or vague), *cert. denied*, 427 U.S. 912 (1976).

56. HAZARD, *supra* note 52, at 665.

57. Model Rule 3.6 reads as follows:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
>
> (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or

judicial proceeding.[58] The drafters intended this standard to approximate the clear and present danger test regarding speech.[59] In addition, section (b) of Model Rule 3.6 simplifies the lists of prohibited statements and recasts them as presumptions of prejudicial comments. Section (c) transforms the lists of permitted statements from DR 7-107 into a safe harbor clause,[60] listing categories of statements that lawyers may make notwithstanding the first two sections. The state bars have slowly changed their codes of professional conduct to conform to the

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statement given by a defendant or suspect or that person's refusal or failure to make a statement;

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

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

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

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

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

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

(2) the information contained in a public record;

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

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

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

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

(7) in a criminal case:

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

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

58. *Id.*

59. *See* HAZARD, *supra* note 52, at 666; Michael R. Scheurich, Note, *The Attorney "No-Comment" Rules and the First Amendment,* 21 ARIZ. L. REV. 61, 80 (1979). Hazard explains that "the danger of prejudice to a proceeding must be clear (material) and present (substantially likely)." HAZARD, *supra,* at 668.

60. *See* HAZARD, *supra* note 52, at 675.

new rule.[61] Model Rule 3.6 remained untested in the courts until Dominic Gentile challenged his disciplinary sanctions.

II. *GENTILE V. STATE BAR*

In two opposing opinions written by Justice Kennedy and Chief Justice Rehnquist in *Gentile v. State Bar,*[62] a shifting majority of the Supreme Court cleared Gentile of the reprimand he received after holding the pretrial press conference. The Court, however, upheld the substantive standard articulated in Nevada Supreme Court Rule 177.[63] Justice O'Connor provided the swing vote, voting for the portions of Justice Kennedy's opinion that reversed the Nevada Supreme Court and declared section (c) of Rule 177 void for vagueness. However, O'Connor also voted with the Chief Justice and Justices White, Scalia, and Souter to uphold the constitutionality of standards that provide less protection for attorney speech than would a clear and present danger test.[64]

A. The Vagueness of the Safe Harbor Clause

The Supreme Court, speaking through Justice Kennedy, voided Rule 177 for vagueness because the word "notwithstanding" in section (c) could mislead attorneys into believing that they could violate sections (a) and (b) without fear of discipline. The Court concluded that the safe harbor provisions of Rule 177(c) set a trap for the unwary and created a risk of discriminatory enforcement.[65] Gentile's earnest but unsuccessful attempt to obey the rule, Kennedy noted, demonstrated this concern.[66]

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61. Thirty-two states have adopted a form of Model Rule 3.6. Eleven states have retained DR 7-107. Five states have adopted rules with a "serious and imminent threat" standard. Only Virginia has explicitly adopted a "clear and present danger" standard. California's *Rules of Professional Conduct* have no provision for trial publicity. *See* Gentile v. State Bar, 111 S. Ct. 2720, 2741 (1991); *see also* ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991).

62. 111 S. Ct. 2720 (1991). See *supra* text accompanying notes 1–6 for the facts of the case.

63. *Gentile,* 111 S. Ct. at 2748–49. Nevada Supreme Court Rule 177 is identical to Model Rule 3.6 in all relevant aspects. Both Rehnquist and Kennedy assumed without discussion, however, that the "substantial likelihood of material prejudice" standard as applied by the Nevada Supreme Court restricted more speech than the "clear and present danger" standard. *See id.* at 2725 (Kennedy, J.), 2741–42 (Rehnquist, C.J.). *But see supra* note 60 and accompanying text.

64. Justice O'Connor explained her split vote in a brief concurring opinion. *Gentile,* 111 S. Ct. at 2748.

65. *Id.* at 2731. *See supra* note 17 and accompanying text.

66. *Id.* at 2731–32. Chief Justice Rehnquist dissented from this conclusion and found that Rule 177 was not vague. Rehnquist pointed to Gentile's admission at the disciplinary hearing that he intended to influence public opinion. Such intent, Rehnquist asserted, was an attempt to

B. The Level of First Amendment Protection for Attorneys

1. The Rehnquist View

Writing for a separate majority, Chief Justice Rehnquist went further than the vagueness issue and upheld the standard employed by Model Rule 3.6. Rehnquist began by offering five reasons why attorney speech fit into a category subject to diminished protection.[67] First, ethical codes for attorneys have always had a provision restricting comments members of the bar may make to the press.[68] Second, most states currently have trial publicity rules that restrict attorney speech.[69] Third, court rules circumscribe attorney speech within a courtroom.[70] Fourth, decisions considering trial publicity in other contexts have often contained statements suggesting that attorney speech may be regulated.[71] And fifth, decisions concerning a lawyer's right to advertise or solicit business have not given attorneys blanket speech protection.[72] Based on this evidence, Chief Justice Rehnquist concluded, the clear and present danger standard is unnecessary in evaluating restrictions on lawyers' comments to the media.

Rehnquist then applied the two-prong compelling government interests test[73] to uphold the constitutionality of the Nevada Supreme Court Rule 177. First, Rehnquist concluded that the state's interest in providing fair trials is substantial and important enough to uphold this regulation.[74] Second, Rehnquist found that Rule 177 is narrowly tailored to meet that objective because the "substantial likelihood of material prejudice" standard sufficiently circumscribes the comments that are prohibited.[75]

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violate section (a) and not an attempt to rely on the safe harbor section. *Id.* at 2746–47 (Rehnquist, C.J., dissenting).

67. *See supra* text accompanying note 23.

68. *Gentile,* 111 S. Ct. at 2740–41.

69. *Id.* at 2741.

70. *Id.* at 2743.

71. *Id.* at 2743–44. Rehnquist specifically highlighted portions of *In re* Sawyer, 360 U.S. 622 (1959), and Sheppard v. Maxwell, 384 U.S. 333 (1966) (discussed at *supra* text accompanying notes 31–35). *Sawyer* involved the discipline of an attorney involved in Smith Act prosecutions in Hawaii. *Sawyer,* 360 U.S. at 623. A majority of the *Sawyer* Court reversed the discipline because the facts did not support the finding that the attorney's comments to a reporter impugned the fairness and integrity of the judge involved in the trial. *Id.* at 626. However, in two separate opinions, five justices hinted in dicta that the First Amendment does not exempt attorney comments to the press from proven charges of attempting to interfere with a fair trial. *Id.* at 646–47 (Stewart, J., concurring in the result), 666–67 (Frankfurter, J., dissenting).

72. *Gentile,* 111 S. Ct. at 2744.

73. *See supra* text accompanying notes 23–30.

74. *Gentile,* 111 S. Ct. at 2745.

75. *Id.*

2. *The Kennedy View*

Justice Kennedy argued in dissent that attorney speech should not be subject to diminished protection.[76] Like Gentile's claims of police corruption, Kennedy argued, attorney speech is often classic political speech going to the heart of First Amendment protection.[77] Kennedy distinguished the cases relied upon by Rehnquist, stressing that they involved either commercial speech[78] or information that an attorney could receive only through discovery,[79] not political commentary on the administration of justice. Kennedy concluded that without a justification for downgrading protection of attorney speech, the Court should not go further and apply the compelling government interests test.

Even if the balancing test were appropriate, Kennedy argued, Rule 177 fails the first prong because the state cannot show that the danger of prejudice due to attorney comments is grave enough to justify the restrictions on free speech.[80] Disagreeing with Rehnquist on the magnitude of the danger, Kennedy noted that few extrajudicial comments pose a risk of prejudice to a trial.[81] In addition, Kennedy continued, any special danger presented by the status of the speaker as an attorney is balanced by that speaker's value to the public as a unique source of information on the judicial system.

III. STATES SHOULD REJECT THE *GENTILE* ANALYSIS

Notwithstanding the Court's decision to void Nevada Supreme Court Rule 177 because of vagueness, states should reject the more restrictive speech standard approved by the Court in *Gentile.* In addition to the arguments set forth in Justice Kennedy's dissent, three flaws undermine the analysis offered by the Rehnquist majority. First, the compelling government interests test is unnecessary because the Court's evidence fails to justify diminished speech protection for attorneys. Second, assuming that the compelling government interests test is appropriate, the Court's application of the second prong fails to establish that the speech restrictions of Model Rule 3.6 are the least restrictive means necessary to remedy the danger of prejudice. Third, the Court's analysis fails to recognize that the blanket prohibition in

76. *Id.* at 2733–35.
77. *Id.* at 2724–25.
78. Bates v. State Bar, 433 U.S. 350 (1977).
79. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).
80. *Gentile,* 111 S. Ct. at 2735 (Kennedy, J.).
81. *Id.* at 2734.

Model Rule 3.6 is overbroad in treating all attorney speech as equally dangerous. In response to the Court's weak analysis, states should interpret their disciplinary rules as approximating a clear and present danger test and exclude criminal defense counsel and attorneys involved in civil litigation. In addition, states should encourage the use of procedural remedies to sidestep the threat of prejudice and maximize the benefits of attorney involvement in trial publicity.

A. Flaws in the Court's Analysis

The Court's analysis, as offered by Chief Justice Rehnquist, fails in three respects. First, Rehnquist fails to support a constitutional distinction between attorney speech and that of the press or public. Second, Model Rule 3.6 is not the least restrictive means to reach the state's interest in protecting impartiality. Third, Rehnquist fails to consider the overbreadth of Model Rule 3.6 in light of the diminshed risk of prejudice presented by criminal defense counsel and the diminshed interest in protection presented by civil attorneys.

1. Attorneys Are Not Constitutionally Inferior

The Court's first conclusion, that attorneys should be granted less speech protection than the press, rests on the unsupported proposition that lawyers may be punished for extrajudicial comments solely because of their status as lawyers.[82] Two of Rehnquist's arguments for diminished protection, the history and prevalence of trial publicity speech restrictions on lawyers, merely support the tradition and popularity of speech restrictions, but do not establish the level of protections given attorney speech. In addition, the dicta from the fair trial opinions, *Sheppard*[83] and *Nebraska Press,*[84] only support the proposition that attorney comments may be regulated, but do not bear on the scope of such regulations.[85] Rehnquist's analogies to speech in the courtroom and in advertisements similarly establish that attorney speech protection is not absolute, but fail to distinguish extrajudicial

82. While this proposition would get much support from the general public, courts and commentators have rejected restrictions on speakers based on the speaker's status alone. *See, e.g., In re* Conduct of Lasswell, 673 P.2d 855, 857 (Or. 1983); Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity,* 64 B.U. L. REV. 1003, 1023–24 (1984); Pappas, *supra* note 48, at 1027–28.

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

84. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

85. Justice Stewart's dictum in *Sawyer* is somewhat more helpful for Rehnquist's analysis. Stewart suggested that professional conduct rules may "require abstention from what in other circumstances might be constitutionally protected speech." *In re* Sawyer, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring). Stewart's opinion, however, garnered only one vote.

comments of attorneys from those of the press or public. Each of the Court's arguments, thus, approve some level of regulation on attorney speech. These arguments fail, however, to establish whether this level is above or below the clear and present danger level generally applicable to the press and public.

2. *Model Rule 3.6 Is Not the Least Restrictive Remedy*

Assuming for argument that attorney speech is entitled to diminished protection, Model Rule 3.6 does not fulfill the second prong of the compelling government interests test: that the speech restrictions be narrowly tailored to the interest presented.[86] In particular, the Court failed to appreciate the ability of alternatives to Model Rule 3.6 to remedy the danger presented by attorney comments.[87] Three alternatives to the rule approved by the Rehnquist majority could limit prejudicial publicity while allowing greater freedom of speech for attorneys. First, disciplinary rules employing a clear and present danger test would permit more speech than the rule approved by *Gentile,* but would still punish speech that threatened a fair trial. Second, procedural remedies available to the parties and the trial judge allow a means of thwarting prejudice to trials without restricting attorney speech. Third, judicial gag orders restrict speech on an ad hoc basis, instead of chilling the speech of all attorneys. Each of these alternatives is preferable to Model Rule 3.6.

The first alternative, substituting a clear and present danger test for the Nevada Supreme Court's interpretation of "substantial likelihood of material prejudice," still restricts dangerous speech. This standard would only require a greater magnitude and proximity of prejudice before disciplinary sanctions could issue. For example, a state interpreting its disciplinary rule as a clear and present danger test may still sanction an attorney for releasing prejudicial information to the public on the eve of jury selection, because the danger of prejudice would be both serious and imminent.[88] The clear and present danger interpretation, however, would not allow a state to discipline an attorney who speaks to the press long before jury selection, when the threat of preju-

86. *See supra* notes 27–30 and accompanying text.

87. The danger of prejudice is not overwhelming. Gentile v. State Bar, 111 S. Ct. 2720, 2734 (1991) (Kennedy, J.). *See* 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, 35 (1989); Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?,* 29 STAN. L. REV. 515, 528 (1977).

88. *See Gentile,* 111 S. Ct. at 2725 (Kennedy, J.); United States v. Bingham, 769 F. Supp. 1039, 1044–45 (N.D. Ill. 1991).

dice to the trial is still speculative. The significance of time is demonstrated by the facts in *Gentile,* where six months was sufficient lead time to dissipate the threat of prejudice to Grady Sanders' trial, yet accomplished Gentile's goal of balancing the one-sided publicity so harmful to his client.[89]

Additionally, Supreme Court precedents considering trial publicity have repeatedly recommended procedural remedies as an alternative way to safeguard impartiality.[90] For example, a continuance allows the fervor surrounding high-profile cases to subside, often leaving a more dispassionate atmosphere for the trial. Similarly, a change of venue transfers a case to a dispassionate community when the risk of prejudice is limited to one locality. Searching voir dire by the judge and competent counsel filters out prejudicial jurors from the panel. Finally, once an impartial jury is selected, sequestration can eliminate the danger by restricting juror access to potentially prejudicial information. Each of these remedies, whether used individually or in concert, minimizes the risk of a trial tainted by prejudice, without trampling on free speech protection.[91]

Even a gag order on trial participants, regardless of the substantive standard applied by the judge, is potentially less speech restrictive than Model Rule 3.6.[92] Gag orders can be tailored to fit individual cases, minimizing the danger of overbreadth. In addition, gag orders grant courts the opportunity to hold an adversarial hearing and take evidence on the extent and nature of the publicity involved, the danger of prejudice, the appropriate standard the court should apply, and the impact of the speech restriction on the press and public interests.[93]

The clear and present danger standard, procedural remedies, and ad hoc gag orders are all less restrictive of speech than Model Rule 3.6. The Court has specifically endorsed these remedies in prior deci-

89. *Gentile,* 111 S. Ct. at 2730 (Kennedy, J.).

90. *See, e.g.,* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563–64 (1976); Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Justice Brennan strongly endorsed rigorous voir dire and commented that along with continuance, change of venue and reversal on appeal, these measures may be enough to protect impartiality in any trial. *Nebraska Press,* 427 U.S. at 602–04 (Brennan, J., concurring).

91. Critics of these remedies claim that they exact a high toll in time and money from the court. *See, e.g., Gentile,* 111 S. Ct. at 2745. However, this objection effectively puts a price on attorneys' free speech rights. *See* Swift, *supra* note 82, at 1049–51, for a discussion of the advantages and disadvantages of each procedural remedy.

92. *See* Swift, *supra* note 82, at 1051–54. *But see* Swartz, *supra* note 44, at 1440 n.215.

93. The Court has clearly demonstrated a preference for ad hoc rather than permanent restrictions. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510–13 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607–08 (1982).

sions.[94] By failing to consider the ability of these alternatives to minimize prejudice while maximizing speech protection, *Gentile* represents a relaxation of the Court's protection of free speech.

3. *All Attorney Publicity Is Not the Same*

The Court's analysis also sidesteps the issue of overbreadth. By assuming that the danger of extrajudicial comments does not vary with the status of the attorney or the type of judicial proceeding, Model Rule 3.6 prohibits speech that does not present a danger of unconstitutional prejudice. Such an indiscriminate sweep creates unconstitutional overbreadth when Model Rule 3.6 is applied to defense counsel and to civil trials.

Model Rule 3.6 fails to account for the difference between criminal defense counsel and prosecutors.[95] The Sixth Amendment only guarantees a fair trial to criminal defendants. The Constitution does not extend this protection to prosecutors.[96] This differentiation is rational because criminal defense attorneys are less likely to be the source of prejudice to their own clients. As a result, their comments rarely violate the Constitution's fair trial guarantee. Furthermore, as Justice Kennedy correctly noted, the vagueness issue cuts especially hard against criminal defense attorneys. The risk of discriminatory enforcement is greatest for the class of attorneys whose professional mission is to challenge the government's actions.[97]

On a practical level, the danger of prejudice from prosecutors is greater because the press tends to depend on the prosecution and other agents of the government for their information.[98] Prosecutorial sources are usually available from the beginning of the case, and often develop long-term relationships with the media through repeated contact in different cases. Despite a traditional reputation as a govern-

94. *See supra* notes 90, 93.

95. *Accord Gentile,* 111 S. Ct. at 2734–35; Monroe H. Freedman & Susan Kahan, *Restrictions on Trial Publicity by Defendants and Defense Lawyers, in* 3A CRIMINAL DEFENSE TECHNIQUES Chapter 63, § 63.04 (Steven W. Allen et al. eds., 1979); Max D. Stern, *The Right of the Accused to a Public Defense,* 18 HARV. C.R.-C.L. L. REV. 53, 120 (1983); Swift, *supra* note 82, at 1005 n.13; Sally R. Weaver, Note, *Judicial Restrictions on Attorneys' Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech,* 33 VAND. L. REV. 499, 514 (1980). *But see* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250–51 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).

96. The Sixth Amendment is personal to the criminal defendant. Faretta v. California, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting). *See also* Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial,* 60 S. CAL. L. REV. 1019, 1024–30 (1987).

97. *Gentile,* 111 S. Ct. at 2732.

98. *See* Drechsel, *supra* note 87, at 26.

ment watchdog, the press also tends to favor the prosecution's perspective on fighting crime.[99] Quite simply, sympathizing with alleged murderers, rapists, and drug dealers does not sell newspapers or television commercials.

Model Rule 3.6 also fails to account for the difference between civil and criminal trials. On a constitutional level, the difference between the Sixth Amendment's guarantee of an "impartial jury" for criminal trials[100] and the Seventh Amendment's guarantee of a "trial by jury" for civil trials[101] suggests a diminished risk of a constitutional violation by publicity in a civil trial.[102] Moreover, the longer length of civil trials may postpone attorney comment longer than a criminal adjudication, perhaps past the attention span of the public.[103]

In addition to the diminished risk of unconstitutional prejudice, the public policy questions involved in many civil actions heighten the concern for protection of political expression.[104] Political action groups like the ACLU or NAACP use civil trials as an element of a long term strategy to influence national politics. Other political activists often file class actions and private attorney general suits to make a political statement. Thus, the comments of the attorneys working on these suits may be classic political speech—the heart of the First Amendment's protection.

B. A Proposed Response to Gentile

States should take the opportunity created by *Gentile* to reconsider their trial publicity rules. The unconstitutionality of the safe harbor provision mandates at least the elimination of the word "notwithstanding" from section (c) of Model Rule 3.6 to clarify the status of the list of safe statements.[105] While considering this change, states should also respond to the weaknesses in the Court's analysis by refusing to restrict attorney speech to the full extent allowed by *Gentile.* Although the Court's decision permits states to restrict the speech of attorneys more readily than the press or public, *Gentile* does not mandate this result. The *Gentile* decision only sets the minimum constitu-

99. *Id.*

100. U.S. CONST. amend. VI.

101. *Id.* amend. VII.

102. *See supra* text accompanying note 14.

103. *See* Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257–59 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

104. *See Hirschkop,* 594 F.2d at 373; *Bauer,* 522 F.2d at 257–59; Ruggieri v. Johns-Manville Products Corp., 503 F. Supp. 1036, 1040 (D.R.I. 1980).

105. *See supra* text accompanying notes 65–66.

tional standard. States are free to offer speech protection beyond that approved by the Court.

States should recognize the value of attorney speech and encourage a comprehensive approach to trial publicity. This response should include the interpretation of professional disciplinary rules to conform with the clear and present danger standard. States should also reform such rules to account for the smaller risk of unconstitutional prejudice presented by criminal defense lawyers and civil litigators. Finally, states should encourage the use of alternatives to disciplinary rules that are less restrictive of speech.

1. States Should Adopt the Clear and Present Danger Standard

States should mandate that trial publicity rules employ clear and present danger principles. The clear and present danger syntax itself is not magic, as long as the states apply the correct principles.[106] Rewriting the "substantial likelihood of material prejudice" standard may be unnecessary if state courts interpret the current standard in line with the clear and present danger principles on which the original drafters relied.[107] The clear and present danger standard establishes a minimum for attorney behavior that both encourages political speech and protects fair trial interests. Although generally more protective of speech, this standard still allows punishment for truly dangerous speech.[108]

2. States Should Account for Varying Levels of Danger

In reconsidering their disciplinary rules, states should also remedy the failure of Model Rule 3.6 to account for the differing levels of danger to fair trials. States should exempt criminal defense counsel from the coverage of trial publicity rules.[109] This change recognizes the constitutional and real-world differences between the threat presented by criminal defense counsel and prosecutors. States should also account for the differences between the civil and criminal trials by restricting application of trial publicity rules to criminal trials. Other portions of state professional conduct codes will continue to restrict the release of confidential information by criminal defense counsel and civil litigators. Trial strategy may also limit the comments these attor-

106. *See* Gentile v. State Bar, 111 S. Ct. 2720, 2725 (1991) (Kennedy, J.); *see, e.g.*, ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991).

107. *See supra* text accompanying note 58.

108. *See supra* text accompanying note 88.

109. Vermont has exempted criminal defense counsel from at least a portion of its trial publicity rule. *In re* Axelrod, 549 A.2d 653 (Vt. 1988).

neys may make to the media. These proposed reforms properly scale speech restrictions to the demonstrated threat of unconstitutional prejudice.

3. *States Should Encourage Less Restrictive Alternatives*

States should not consider professional disciplinary rules as the first line of defense against the danger of prejudice to trials. While states should encourage judges to raise the issue of procedural remedies sua sponte, states should also encourage attorneys, who may be more aware of the potential for prejudice, to move quickly in requesting such remedies. States can create the impetus for these remedies by directing disciplinary boards to consider their use or non-use in deliberating abuses of trial publicity. States should encourage procedural remedies such as continuance, change of venue, rigorous voir dire, and sequestration because they are less restrictive of speech than a blanket disciplinary rule.[110] In extreme cases, when procedural remedies and the threat of disciplinary sanctions under a clear and present danger standard are insufficient, courts could employ gag orders on lawyers. Although restrictive of attorney speech, such ad hoc orders are more protective of attorney speech than imposing a blanket restriction on the entire state bar.[111]

C. *Attorney Comments Can Benefit Courts and Clients*

Adoption of the proposed response will maximize the opportunity for attorney speech while respecting the need to protect the impartiality of adjudicative proceedings. This proposal does not deny that attorney-generated publicity can seriously compromise the integrity of the judicial system by prejudicing a fair trial. However, the standard approved by the Court in *Gentile* is not the only, nor is it the best, remedy to this danger. Extending the protection of speech beyond the level approved by the Court in *Gentile* will accrue important benefits for the judicial system and for clients.

Extrajudicial comments by attorneys benefit the administration of justice in several ways. Trial publicity provided by attorneys may encourage witnesses to come forward.[112] In addition, the participation of attorneys in a media campaign may encourage public entities and large institutional defendants interested in protecting a public image to engage in settlement negotiations, quickening the speed of justice and

110. *See supra* text accompanying notes 91–92.

111. *See supra* text accompanying notes 92–93.

112. *See* Stern, *supra* note 95, at 100.

decreasing the backlog of cases in the courts.[113] Attorneys are also unique sources of information about the court system and about the particular cases on which they are working.[114] By commenting on litigation through the media while the topic has the fickle attention of the public, attorneys aid in the understanding of the judicial system, contributing to the legitimacy of the courts.

Just as the state benefits from the extrajudicial comments of lawyers to the press, clients may also benefit from attorney publicity. Often, attorneys are the most eloquent spokespersons for defendants who do not know when or how to speak to the press or cannot speak without jeopardizing their defense.[115] Public appeals by attorneys on behalf of their clients may also help raise the funds necessary for the defense, appeal, or posting of a bond.[116]

With the adoption of more liberal trial publicity rules, lawyers may come to the realization that extrajudicial comments to the press are not the sole domain of attorneys seeking notoriety for themselves. Justice Kennedy's comments in *Gentile* imply that publicity should be viewed as an alternative to litigation within the traditional role of attorneys.[117] For clients frustrated by high attorney fees, the use of publicity to avoid litigation may shorten the lifespan, and thus the cost, of a case. Such an approach admittedly runs the risk of trying a case in public. However, this alternative should be the choice of a

113. *See* Gentile v. State Bar, 111 S. Ct. 2720, 2728–29 (1991) (Kennedy, J.).

114. *See* Swift *supra* note 82, at 1027–28. The Court has indicated that an attorney's special knowledge may trigger a special duty. "Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so." *In re* Sawyer, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting).

115. "[A] defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel for the sole purpose of countering prosecution statements." *Gentile*, 111 S. Ct. at 2735 (Kennedy, J.).

116. *See* Stern, *supra* note 95, at 99–100; MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 229 (1990).

117. Kennedy noted:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. 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.

Gentile, 111 S. Ct. at 2728–29 (Kennedy, J.).

well-informed client, not the choice of overly restrictive and unconstitutional codes of conduct.

IV. CONCLUSION

The Supreme Court cleared Dominic Gentile of disciplinary charges for his role in exposing police corruption. However, the Court was shortsighted in allowing greater speech restrictions on attorneys than the press or public. Punishing lawyers for their service to the courts repudiates the dynamic role attorneys have played, and should continue to play, as actors in our judicial and political system. Furthermore, the direct benefits of attorney-generated publicity to the courts and clients point to a standard that allows the maximum protection for speech under the First Amendment. Thus, states reconsidering their codes of professional conduct in response to *Gentile* should decline to regulate attorney speech to the full extent allowed by the Court. Instead, states should interpret their trial publicity rules in light of clear and present danger principles, account for the varying threats of different attorney comments, and encourage the use of less restrictive alternatives.