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RHETORIC, EVIDENCE, AND BAR AGENCY RESTRICTIONS ON SPEECH BY ATTORNEYS

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I. INTRODUCTION

Courts generally engage in the business of resolving disputes between litigants based on evidence presented by the parties during the course of a trial. The party bearing the burden of proof will lose unless that party presents evidence in support of the claims or defenses raised in the pleadings. An appellate court will not support the claims of a party appealing an adverse decision by speculating on whether the party could have presented evidence in support of his position. The appellate decision will be based on the record made at trial.

On occasion, a party to a case on appeal will present information to the appellate court that goes beyond the evidence presented at trial. The court will be interested in the effect on future cases of a decision sought by one of the parties. A party can assist the court by presenting empirical data about the likely effect of the proposed decision. The data may establish that a result will be consistent with the public interest or social policy underlying the law that has given rise to the dispute.

This practice does not hold true when the United States Supreme Court decides cases dealing with the constitutionality of state bar regulatory agency rules that restrict lawyers from exercising their right to speak. This article will discuss two such rules. The first set of rules limits the right of attorneys to advertise their services. The second set of rules restricts the right of attorneys to engage in trial publicity, that is, to make public statements about matters in litigation.

A common feature of cases contesting the constitutionality of these rules is that the Supreme Court has not demanded that parties seeking to muzzle lawyers present evidence or empirical data in support of their restrictions. The bar disciplinary agencies that prosecute attorneys for violating these rules offer little data to the Court to justify their restrictions. In the absence of real information about the effect of bar rules that restrict lawyers from speaking, the Court has

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based decisions about attorney speech on the kind of speculation that would not be tolerated in virtually any other field of law. The Court would better serve the public interest, the interest of attorneys and bar disciplinary agencies, and the interest of lower courts by demanding that parties seeking to enforce rules restricting attorneys from speaking present evidence or empirical data justifying the rules.

The failure of the organized bar[1] to justify gag rules for attorneys is two-fold. First, bar disciplinary agencies do not offer evidence that anyone has been injured by the allegedly improper actions of the lawyers they seek to discipline. They do not introduce testimony by parties claiming injury because of an attorney's advertisement or public comment about a trial. The evidence in these cases typically is limited to proof that an attorney published the allegedly unprotected speech in violation of a bar rule. Second, bar agencies do not present sound empirical data in support of their claims that, unless suppressed, the speech somehow will damage the public interest. In fact, virtually all of the empirical evidence available on these issues is inconsistent with claims made by members of the organized bar that attorney advertising and trial publicity are harmful.[2]

State bar disciplinary agencies have a long history of suppressing the First Amendment rights of attorneys. State bar disciplinary agencies also have a long history of losing Supreme Court cases that test whether these restrictive rules violate attorneys' First Amendment right to free speech.[3] Despite their abysmal record in defending their regulations, members of the organized bar persist in trying to limit what attorneys can say when they advertise and what information attorneys can provide to the press when they advocate on behalf of their clients.

The Supreme Court has invited members of the organized bar to substitute rhetoric for evidence in cases dealing with the right of attorneys to speak. In numerous cases, the Court has given thoughtful consideration to unsupported claims by the organized bar that public comment by attorneys presents dangers to the profession. Frequently, the Court has responded to these claims by speculating about whether the dangers are as serious as charged or whether restrictions on speech are necessary to protect against the alleged dangers.[4]

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1. The term "organized bar" refers to the various state and local bar agencies and associations that establish and enforce rules of conduct for members of the legal profession.

2. *See infra* §§ IV, V.A.

3. *See infra* §§ IV, V.D.

4. *See, e.g., In re* R.M.J., 455 U.S. 191, 200-06 (1982) (upholding lawyer advertising); Bates v. State Bar of Arizona, 433 U.S. 350, 372-75 (1977) (same).

The majority, concurring, and dissenting opinions in these cases appear to reflect the opinions of individual Supreme Court Justices about whether, as a matter of policy, the profession ought to permit lawyers to speak. The opinions expressed by the Justices mirror the debate within the organized bar about whether lawyers should advertise or speak publicly about matters in litigation. Just as the organized bar advances arguments based on assumption and opinion, so do the Justices support their decisions based on unsubstantiated speculation regarding the consequences of speech by attorneys.

There are two problems with permitting litigation about attorney speech to proceed without requiring bar disciplinary agencies to present empirical data or other evidence to support claims that restrictions on attorney speech are necessary. First, the history of bar association restrictions on attorney speech should make us skeptical that the bar rules are based on lofty ideals about protection of the public. The restrictions began as rules promulgated by elite corporate lawyers whose effect was to limit the activities of their less affluent brethren who were representing criminal defendants and other impoverished clients.[5] The purpose of the rules was to enhance the image of the corporate lawyers not to protect the public. Fostering the image that members of the bar are gentlemen is not a sufficient reason for suppressing speech.

Second, the clients pay the ultimate price when attorney speech is excessively surpressed. The price is too high to permit a decision about the constitutionality of suppression to be made without evidentiary support. Excessive suppression of attorney advertising prevents consumers from being able to obtain information about how to get legal assistance at an affordable price.[6] Excessive restriction on trial publicity prevents clients from being able to respond adequately to false or damaging information reported in the press.[7] The Supreme Court should not decide cases about rules restricting attorney speech that have the potential to threaten the welfare of clients, without demanding proof that the rules are necessary to protect against real harm.

One of the few justifications for relieving a party of its obligation to present evidence in support of a claim is that it would be difficult or burdensome for the party to do so.[8] A court may deal with this problem by shifting the burden of proof from one party to the other. A

5. *See infra* notes 18-31 and accompanying text.

6. BARLOW F. CHRISTENSON, LAWYERS FOR PEOPLE OF MODERATE MEANS 160-72 (1970).

7. *See* Max D. Stern, *The Right of the Accused to a Public Defense*, 18 HARV. C.R.-C.L. L. REV. 53 (1983).

8. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 48 (2d ed. 1987).

court can also recognize a presumption that permits the party to establish a claim or defense by presenting a limited amount of evidence.[9] In the cases involving restrictions on attorney speech, it is neither burdensome nor difficult for a bar disciplinary agency to offer evidence or empirical data in support of its desire to restrict speech. In 1989, the fifty-three lawyer disciplinary agencies that reported their activities to the American Bar Association ("A.B.A.") averaged 1,845 complaints per agency and conducted 1,240 investigations per agency.[10] Surely if consumers were complaining about lawyer advertising or trial publicity, the bar disciplinary agencies receiving client complaints would have ample evidence of the substance of client complaints.

In addition to consumer complaints, there are numerous studies about lawyer advertising and about trial publicity conducted by lawyers. The A.B.A. Commission on Advertising listed 312 written works about advertising published between 1972 and 1991.[11] Many of these works include empirical studies about advertising. There are also many studies about trial publicity.[12] There is no lack of interest in studying attorney speech. If there are valid grounds for mandating restrictions on attorney speech, data should be available to confirm the need for the restrictions.

The Supreme Court would perform a valuable service by stating clearly and without reservation that speculation, opinion, and rhetoric are insufficient grounds for suppressing the right to speak. Rather than speculate about whether attorney speech is harmful or beneficial, an exercise that encourages the bar to continue to try to restrict attorneys from speaking, the Court should insist that the bar provide specific evidence or empirical data in support of any claims made about the alleged danger of permitting attorneys to speak.

II. HISTORY

A. THE AMERICAN BAR ASSOCIATION'S ROLE IN THE ESTABLISHMENT OF RULES OF CONDUCT FOR ATTORNEYS

The American Bar Association ("A.B.A.") has assumed a leading role in establishing standards of conduct for lawyers. The A.B.A. is a

9. For example, a party can prove notice by showing that a written notice was sent by mail in a properly stamped and addressed envelope. A court will presume delivery of notice without the necessity of proof about the progress of the letter through the postal system.

10. *Survey on Lawyer Discipline Systems—1989 Data* (A.B.A. Center for Professional Responsibility 1991).

11. JAY W. STEIN, ADVERTISING IN THE LEGAL PROFESSION, A DESCRIPTIVE BIBLIOGRAPHY AND REFERENCE GUIDE (1993).

12. *See infra* notes 134-50 and accompanying text.

national organization for lawyers, and has no direct authority to set standards of lawyer conduct or to discipline attorneys who break the rules. Standard setting and disciplinary authority rest with the state bar agencies that license attorneys. The A.B.A. exercises substantial influence over the state agencies by promulgating and promoting model standards which serve as the basis for the standards adopted by the state agencies.

In 1908, the A.B.A. drafted the Canons of Professional Ethics ("Canons"). The A.B.A. adopted the Canons to "celebrate the ancient lineage of the bar's professional stature" rather than to serve as a vehicle for disciplining shady attorneys.[13] Nevertheless, for the next sixty years, the Canons served as the primary source of standards followed by state bar disciplinary agencies in defining acceptable and unacceptable behavior by attorneys.[14] In 1969, the A.B.A. promulgated the Code of Professional Responsibility (subsequently renamed the Model Code of Professional Responsibility and referred to in this article as the "Model Code") to replace the Canons of Professional Ethics. Unlike the Canons, the Model Code established standards of conduct in a set of disciplinary rules with the express recognition that attorneys who violate those standards should be subject to disciplinary action.[15] In short order every state adopted standards of conduct for attorneys based on the standards set forth in the Model Code.[16]

In 1983, the A.B.A. approved the Model Rules of Professional Conduct ("Model Rules") to replace the Model Code. The states did not line up to establish state bar codes based on the Model Rules with the same enthusiasm they had evidenced in favor of the Model Code fourteen years earlier. Some states rejected the Model Rules. Other states adopted the Model Rules with substantive changes in specific provisions. At the present time, some sixty-five percent of the states have codes for attorneys that are based primarily on the format and substantive rules set forth in the Model Rules.[17]

To understand the role of the A.B.A. in establishing standards of conduct for attorneys, it is necessary to go back to the formation of the organization. The A.B.A. was founded in 1878 in Saratoga Springs, New York. Saratoga Springs was a summer vacation spot for wealthy

13. CHARLES WOLFRAM, MODERN LEGAL ETHICS § 2.6.2, at 54 (1986) [hereinafter WOLFRAM].

14. *Id.* at 55-56.

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (Preliminary Statement 1983).

16. Wolfram, *supra* note 13, at 56-57.

17. *See* LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) ¶ 01:3 (listing those states which have adopted standards based on the format and substantive rules of the Model Rules of Professional Conduct).

Americans, and many of the nation's most influential lawyers visited there.[18] These lawyers formed the core of the association.

The A.B.A. evolved during the era when large law firms developed to serve the needs of America's expanding corporate interests. The members of these law firms exerted significant influence on the legal profession, in part, because the members of these firms were the people who became members and leaders of the A.B.A. As historian Jerold Auerbach explained, "Bar associations were not the exclusive preserve of corporate lawyers, but lawyers whose practices provided them with a sufficient margin of wealth and leisure to pay fees, attend conventions, and participate in committee work were bound to predominate."[19]

Throughout its early history, the A.B.A. was an elitist organization. To become a member, a lawyer had to be nominated by an attorney from the applicant's state and approved by the A.B.A. membership.[20] The leadership intended to restrict membership "to leading men or those of high promise."[21] In 1908, when the A.B.A. promulgated the Canons, only three percent of the nation's lawyers belonged to the organization.[22]

The elitist character of the A.B.A. is reflected in the 1908 Canons. When the gentlemen who ran the A.B.A. drafted the rules, they did not obtain data or undertake efforts to determine the need for them. The draftsmen also did not write rules that regulated the full range of services provided by attorneys. Instead, they merely cobbled together the Canons from previously drafted rules of other states.[23] Most of the provisions in the Canons restricted the actions of sole practitioners in urban areas who hustled for clients in a competitive climate.[24] Restrictions against advertising and solicitation,[25] for example, hardly diminished the ability of the major law firms to become known to corporate clients.[26] These restrictions significantly limited the ability of lawyers to make their names known to people of modest means who might need legal assistance, including immigrants, blue collar workers, and the urban poor.[27]

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18. *See* EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK (1953) [hereinafter SUNDERLAND] (tracing the history of the creation of the American Bar Association); GERALD CARSON, A GOOD DAY AT SARATOGA (1978) (same).
19. JEROLD S. AUERBACH, UNEQUAL JUSTICE 63 (1976) [hereinafter AUERBACH].
20. SUNDERLAND, *supra* note 18, at 19.
21. SUNDERLAND, *supra* note 18, at 19.
22. WOLFRAM, *supra* note 13, at 54 n.23.
23. WOLFRAM, *supra* note 13, at 54 n.21.
24. AUERBACH, *supra* note 19, at 42.
25. *See infra* note 36.
26. AUERBACH, *supra* note 19, at 42.
27. AUERBACH, *supra* note 19, at 42.

Similarly, restrictions on trial or litigation publicity had little impact on corporations. Often the leaders of powerful corporate enterprises did not want their conduct to be widely publicized. However, when they did want publicity, corporate leaders were well able to hire flacks who could whisper sympathetic information in the ears of friendly reporters. Attorneys could advise their corporate clients about when and how to generate favorable publicity without speaking to reporters personally. In contrast, a lawyer representing an individual client who lacked wealth and power would not be likely to arrange for the client to talk to a reporter in order to get a favorable story in print. Even if there was a reporter willing to talk to the client, the lawyer would have reason to fear that the client would do more harm than good by discussing sensitive legal matters in casual conversation with the reporter. This fear of accidental disclosure would be particularly great when the client had little education or little understanding of the legal system.

Essentially, the Canons instructed the hoi polloi of the legal profession how to practice law like gentlemen.[28] It mattered little to the drafters of the Canons that criminal defense lawyers and those who represented the lower classes were not likely to meet their clients at the country club, or at Saratoga Springs.

Those sympathetic to the Code contended that "[b]y raising and maintaining high professional standards, the organized Bar has endeavored to take preventive measures to keep in its ranks only those who have the integrity and training to give clients and the public adequate service."[29] Less sympathetic commentators have asserted that "the established bar adopted educational requirements, standards of admission, and 'canons of ethics' designed to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession."[30] Whatever may have been the purpose behind the Canons, it is clear that the focus was on matters relating to the courtroom practices of attorneys who represented people of modest means rather than the conduct of lawyers practicing corporate law.[31] The

28. Philip Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 245-46 (1968).

29. M. LOUISE RUTHERFORD, THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION 86 (1937).

30. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 3 (1990).

31. Much of the practice of corporate attorneys consisted of advising clients, negotiating agreements, and drafting documents. Of the thirty-two original Canons of Professional Ethics, thirteen dealt primarily with courts and litigation and only two (Canon 8, advising upon the merits of a client's case, and Canon 9, negotiations with opposite party) dealt in any way with the work of corporate attorneys. *See* HENRY S. DRINKER, LEGAL ETHICS 309 (1953) [hereinafter DRINKER] (containing an annotated version of the Canons of Professional Ethics).

focus on courtroom practices can still be seen in the Model Code and the Model Rules.[32] Although the current rules have changed in format and style, they still deal primarily with the same subject matter as the Canons and pay relatively little attention to corporate practice.

The failure of the Canons to address the conduct of attorneys representing corporate clients was not an oversight. Henry St. George Tucker, when addressing the A.B.A. convention in 1905, noted President Theodore Roosevelt's criticism of wealthy, influential attorneys who helped corporate clients evade the public interest.[33] Tucker urged the members of the association to take President Roosevelt's charges against the ethics of the profession seriously.[34] Subsequently, Tucker chaired the committee that drafted the Canons.[35] In that capacity, he oversaw the adoption of a set of rules that largely ignored the conduct of wealthy, influential attorneys. He did so in spite of his admonition to the members of the bar to carefully consider President Roosevelt's critical remarks.

B. The First Amendment and Attorney Conduct

When drafting standards of conduct for lawyers, the A.B.A. has shown a consistent pattern of subordinating First Amendment values to the interests of the organized bar. A.B.A. standards have prohibited or restricted advertising and client solicitation by attorneys under

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32. Wolfram, *supra* note 13, at 60, 61-63.

33. Report of the Twenty-Eighth Annual Meeting of the American Bar Association 383 (1905) [hereinafter A.B.A. Report]. Henry St. George Tucker quoted Roosevelt as follows:

> We all know that, as things actually are, many of the most influential and most highly remunerated members of the Bar in every center of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth. Now, the great lawyer who employs his talent and his learning in the highly remunerative task of enabling a very wealthy client to override or circumvent the law is doing all that in him lies to encourage the growth in this country of a spirit of dumb anger against all laws and of disbelief in their efficacy.

Id.

34. *See* A.B.A. Report, *supra* note 33, at 384. After noting Roosevelt's remarks, Tucker stated:

> The serious charge made by the President in the above against some of the members of our profession must give us pause; his recognized position in the country in stimulating lofty ideals in life, as well as his recognition of the position of our profession in moulding public sentiment in the country, forces upon us, willingly or unwillingly, as an Association, the inquiry, not only whether the charge be true, but also the broader inquiry whether the ethics of our profession rise to the high standard which its position of influence in the country demands; surely no more important question than this can be forced upon the profession.

A.B.A. Report, *supra* note 33, at 384.

35. Drinker, *supra* note 31, at 24.

the guise of protecting professional values. The drafters of the Canons asserted that it was unprofessional to solicit clients by advertising.[36] The Model Code continued the policy of the Canons of barring virtually all forms of advertising.[37] The Model Rules, although permitting attorneys to advertise, restricted the type of information that lawyers could include in advertising material[38] as well as the methods by which attorneys could advertise.[39]

Over the years, attorneys have contested many of these rules claiming that the rules interfere with their First Amendment right to free speech. In defending the rules, attorneys representing the A.B.A. and state bar associations have presented surprisingly little evidence to support the evils allegedly prevented by these restrictive code provisions.

The organized bar has been singularly unsuccessful in defending First Amendment challenges brought by attorneys. The Supreme Court repeatedly has supported attorneys claiming that the state bar restrictions on their rights to advertise and solicit clients conflicted with the United States Constitution.[40]

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36. *See* CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). The drafters of the Canons of Professional Ethics stated:

> It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyers position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Id.

37. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1969). The Code of Professional Responsibility, as promulgated in 1969, provided:

> A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id.

38. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1(b)-(c) (1983). The 1983 Model Rules of Professional Conduct prohibited false and misleading advertising, and defined such conduct to include a communication that "is likely to create an unjustified expectation about results the lawyer can achieve" or that "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." *Id.*

39. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983) (prohibiting attorneys from seeking clients by telephone, telegraph, or direct mail).

40. *See* Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) (striking down restrictions on assertions about certification of specialized skills); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (striking down restrictions on targeted direct mail advertising); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)

In response to court decisions striking down restrictions on advertising, the A.B.A. has amended the Model Code and its successor, the Model Rules, numerous times. The common pattern has been for the A.B.A. to modify its standards to permit advertising in accord with the most recent Supreme Court decisions, while retaining restrictions about advertising practices not yet considered by the Court. The A.B.A. amended DR 2-101 of the Model Code in the years 1974, 1975, 1977, and 1978.[41] The A.B.A. approved rules 7.1 through 7.4 dealing with advertising when the association promulgated the Model Rules in 1983 and then amended these rules in 1989.[42]

The A.B.A. has a similar history of limiting the comments attorneys may make to the public while representing clients during litigation. The Canons condemned public comment by attorneys about pending cases.[43] The Model Code severely restricts public comment about pending cases. While generally denying attorneys the right to comment on matters in litigation, the Model Code includes detailed exceptions describing limited information that an attorney can provide to the media without fear of discipline.[44] The Model Rules restrict an attorney from publicizing information about pending cases if the information "will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[45] The Model Rules specify some statements that are generally improper, and echo the Model Code by citing certain information that is deemed to be permissible under this standard.[46]

At the Supreme Court level, there have been fewer constitutional challenges to restrictions on attorney speech than challenges to advertising restrictions. In the few cases decided by the Court, the organ-

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(striking down restrictions on use of illustrations and on use of truthful, non-deceptive information in newspaper advertisements); *In re* R.M.J., 455 U.S. 191 (1982) (striking down restrictions on use of truthful, non-deceptive information in advertising); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (striking down ban on advertising by attorneys).

41. SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 265 (John E. Djienkowski, ed. 1994).

42. *Id.* at 109, 111, 112, 117.

43. CANONS OF PROFESSIONAL ETHICS Canon 20 (1908). The Canons of Professional Ethics stated:

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

Id.

44. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1969).

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1983).

46. *Id.* Rule 3.6(b)-(c).

ized bar has not been successful in imposing discipline on attorneys for their conduct.[47]

III. FREE SPEECH DOCTRINE

A. Commercial Speech Standards

Freedom of speech is guaranteed by the First Amendment to the United States Constitution.[48] This protection does not mean that the right to speak is absolute; nor does it mean that there can be no circumstances in which speech may be limited. A frequently invoked standard for justifying restrictions on the right to speak is the clear and present danger test. The United States Supreme Court has held that the right to speak may be infringed when speech creates a clear and present danger of an evil that the government has a right to protect against.[49] A party arguing in favor of a provision infringing on the right to speak has the burden of proving that the provision is necessary to protect against the clear and present danger and that the questioned provision is no broader than needed to protect against the danger.[50]

The First Amendment does not protect all forms of communication. The Supreme Court has held that obscene forms of communication are outside the boundaries of constitutionally protected speech.[51] Early Court doctrine supported the view that the Constitution also denied protection to commercial speech. In *Valentine v. Chrestensen*,[52] the Court held that purely commercial speech had no informational value, and therefore was not covered by the First Amendment's guarantee of the right of free speech.[53]

In 1976, the Supreme Court reconsidered whether or not commercial speech was protected by the First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[54] Specifi-

47. *In re* Sawyer, 360 U.S. 622 (1959); Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

48. U.S. Const. amend. I. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition for a redress of grievances." *Id.*

49. Pennekamp v. Florida, 328 U.S. 331, 335 (1946); Schenck v. United States, 249 U.S. 47, 52 (1919).

50. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-45 (1978) (stating that a legislative finding of clear and present danger does not relieve party from establishing the existence of such danger in a particular instance).

51. Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 484-85 (1957).

52. 316 U.S. 52 (1942).

53. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

54. 425 U.S. 748 (1976).

cally, the Court examined the constitutionality of a state law that prohibited advertising the price of drugs. The Court held that such advertisements, despite the fact that they were forms of commercial speech, were protected by the First Amendment. The Court explicitly declined to state whether the decision applied to advertisements by attorneys.[55] In *Bates v. State Bar of Arizona*,[56] the Court extended the decision in *Virginia State Board of Pharmacy* to lawyer advertisements.

The Supreme Court has not applied the clear and present danger test to all forms of protected speech. The Court has established alternative tests for determining the validity of restrictions against certain forms of protected speech. In some cases, the restrictions are less protective of the right to speak than the protection afforded under the clear and present danger test. After extending the reach of the First Amendment to commercial speech, the Supreme Court, in *Central Hudson Gas v. Public Service Commission*,[57] set forth the way the Court would evaluate regulations governing advertising:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[58]

The *Central Hudson* test is not merely a reformulation of the clear and present danger test. The Court made clear that "[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[59] If commercial speech involves unlawful activity or is misleading then, like obscenity, such speech is wholly outside the protection of the First Amendment. Commercial speech that is about lawful activity and is not misleading is protected. The government may restrict such speech only by establishing a substantial interest that justifies suppression. Any regula-

55. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 n.25 (1976).

56. 433 U.S. 350 (1977).

57. 447 U.S. 557 (1980).

58. Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

59. *Id.* at 562-63.

tion restricting speech must be tailored to serve the interest that justifies restriction, and must be limited to that purpose.[60]

The Court has held that the *Central Hudson* test is also less protective of commercial speech than other forms of speech when determining whether a state restriction is limited to the purpose for which it has been established. In *Board of Trustees v. Fox*,[61] the Court held that the state can justify a restriction on commercial speech by showing a reasonable fit between the ends sought by the state and the means chosen to obtain those ends.[62] The state need not show that it has chosen the least restrictive measure necessary to achieve its interest.

Supreme Court doctrine on the nature of constitutional protection for commercial speech is still developing.[63] How far the courts will go in protecting commercial speech is not clear. What is clear is that commercial speech shares some of the features of traditionally protected speech. Non-deceptive commercial speech about lawful activity is subject to restriction only when the state can show a substantial justification for the restriction and only if the particular restriction is limited in a reasonable way to the justification.

B. Trial Publicity Standards

The Supreme Court also has established a standard different from the clear and present danger test for determining the constitutionality of restrictions on public statements by attorneys about pending litigation. Press coverage involving pending litigation comes within the ambit of the First Amendment.[64] In *Gentile v. State Bar of Nevada*,[65] the Supreme Court held that attorney comment about matters in litigation also is protected under the First Amendment. The Court, in a five to four decision, established the standard for determining the constitutionality of a restriction on trial publicity by an attorney repre-

60. *See, e.g.*, Edenfield v. Fane, 113 S. Ct. 1792, 1804 (1993) (striking down state prohibition against in-person solicitation of clients by certified public accountants); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 75 (1983) (striking down statute prohibiting mailing of unsolicited advertisements regarding contraceptives).

61. 492 U.S. 469 (1989).

62. Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

63. *Compare* Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) (holding unconstitutional an ordinance banning distribution of commercial publications from sidewalk vending machines while permitting distribution of newspapers from vending machines) *with* United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993) (upholding federal regulation banning lottery advertising by radio stations located in states where lotteries are illegal).

64. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (striking down gag order on press in anticipation of a pending trial); Bridges v. California, 314 U.S. 252, 278 (1941) (striking down limits on public comment about pending cases).

65. 501 U.S. 1030 (1991).

senting a party in the trial. The Court held that the First Amendment permits states to bar attorney speech that creates a substantial likelihood of material prejudice to the trial.[66]

Prior to the *Gentile* decision, some commentators contended that the substantial likelihood of material prejudice standard was another formulation of the clear and present danger test applied to trial publicity.[67] The Supreme Court's decision clarified that this test establishes a less exacting standard for parties attempting to suppress speech by trial counsel than the clear and present danger test.[68] Although the standard is less rigorous than the clear and present danger test, the *Gentile* standard does recognize that trial publicity cannot be suppressed absent evidence that the speech will prejudice the trial, that the harm will be material, and that the likelihood of harm will be substantial rather than speculative.

The majority decision in *Gentile* justified the less exacting standard for restricting trial publicity by attorneys than for restricting other forms of speech by asserting that trial publicity can jeopardize the fair administration of justice.[69] The right to a fair trial is protected by the Fourteenth Amendment's guarantee of due process of law and the Sixth Amendment's guarantee of specific protections for defendants in criminal cases. The free press — fair trial dichotomy raises the problem of balancing the constitutionally protected right of a lawyer to speak while a trial is pending against the constitutionally protected right of the litigants to a fair trial.[70]

C. Free Speech, Lawyers, and Evidence

These Supreme Court decisions suggest a way to approach disputes about the right to speak. The Constitution creates a bias in favor of speech that comes within the ambit of the First Amendment. A party attempting to exercise the right to speak need not present evidence to establish that the speech will be useful or worthy. The Constitution relieves the speaker from bearing the burden of justifying the speech. If the contents or subject matter of one speaker's message is hurtful or inimical to the public interest, the preferred so-

66. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1063 (1991).

67. *See* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 397 (1985).

68. *Gentile*, 501 U.S. at 1074-75.

69. *Id.*

70. This is referred to as a free press — fair trial issue, because the primary concern of the organized bar has been that the press will report information provided by attorneys and others and the broadcasting of the information will interfere with the right of a defendant to a fair trial. *See* Report of the Committee on the Operation of the Jury System on the "Free Press — Fair Trial" Issue, 45 F.R.D. 391 (1968).

lution is to invite other speakers to respond and correct the record, not to prohibit the speech altogether.

A party attempting to suppress protected speech bears a heavy burden. The party must justify a restriction on speech by showing that the speech creates a "clear and present danger" of harm, or that the government has a "substantial interest" in restricting the speech, or that the speech creates a "substantial likelihood of material prejudice." Although the burden on the party attempting to restrict protected speech may be somewhat greater or less depending on the type of speech at issue, there must always be a substantial justification for any limitation placed on the exercise of rights protected by the First Amendment.

The party attempting to restrict speech must further prove that suppression of speech is necessary to protect against the established danger. If there are means available other than suppression of speech to protect against the danger, then the Constitution will not tolerate the restraint of speech. The party also must prove that the restrictions imposed are not broader than what is absolutely necessary to prevent the danger. Here also, the burden imposed on the party seeking to restrict speech may be greater or lesser depending upon the type of speech. In commercial speech cases, for example, the standard is whether there is a reasonable fit between the rule limiting speech and the interest being protected by the rule. Whatever the specific test, the underlying principle is that any restriction on speech must be justified by proof that the restriction is limited to the evil it seeks to remedy.

Some commentators have suggested that there is an additional justification for permitting restrictions on speech by attorneys, a justification that supports imposing restrictions that would not be constitutional if applied to others. These commentators contend that attorneys give up some of their rights under the First Amendment as a price for being admitted to the bar and made an officer of the court.[71] This rationalization is not a reasoned principle that can justify denying First Amendment rights to attorneys that are granted to other citizens. This blanket rationalization is tossed in to add heft to other arguments for restricting lawyer speech, but the rationale does not add substance to those arguments. There is no logical reason why the right to speak should be less respected for those who choose to practice law. The focus should be on the speech, not the speaker. If speech by a lawyer creates a threat of harm that the state may protect against, then the state may act whether or not the speaker is an attorney. If

71. *See* Louis Jaffe, *Trial by Newspaper*, 40 N.Y.U. L. REV. 504, 520 (1965).

the speech does not create such a threat, the fact that the speaker is an attorney should not justify suppression.

Lawyers exercise First Amendment rights when they advertise and when they engage in trial publicity. In both situations, the Supreme Court has recognized the constitutional dimension of the rights, but has articulated rationales for affording the rights less protection than for other First Amendment activity. It is not my purpose in this article to argue that the Court is necessarily wrong in establishing less exacting standards for testing bar restrictions on attorney speech in these areas. My contention is that by whatever standard it chooses to test restrictions on attorney speech, the Court should demand explicit evidence of injuries caused to some party by the speech or evidence of specific dangers inherent in the speech before approving any restrictions.

Typically, cases dealing with the right of attorneys to advertise arise when a bar disciplinary agency accuses an attorney of violating a state restriction on advertising. The cases do not arise because an injured client has demanded that the state bar take action against an offending attorney. The disciplinary agency comes across the offending advertisement either because one of the members of the agency sees the advertisement or because another attorney reports the advertisement to the bar agency.[72]

A bar agency considering whether to discipline an attorney for an improper advertisement usually has no more evidence to consider than the advertisement itself and a copy of the state's advertising rules. In the absence of a complaining consumer, the bar agency will have no evidence of anyone who has been injured by the questioned advertisement; nor will the state disciplinary agency have data establishing a factual foundation for the advertising restriction. If the attorney should argue that the restriction is unconstitutional, the state bar will respond with rhetorical arguments in favor of the rule. As we shall see, bar agencies have not submitted empirical evidence to support the claims they have made to justify their restrictions. The history of the establishment of the restrictions by the American Bar Association justifies skepticism about the underlying rationale for the restrictive advertising rules.

Disciplinary cases involving trial publicity have a similar pattern. A complaint comes, not from an injured client, but from a bar disciplinary agency or another attorney. Proof of a violation consists of a comparison of the offending remarks by the attorney with the bar rules. There is a dearth of empirical data justifying the restrictive

72. *See infra* notes 123-24 and accompanying text.

rules. The bar disciplinary agency supports restrictive trial publicity rules with rhetoric rather than data.

The Court errs by not stating clearly that the organized bar cannot impose restrictions on attorney speech without presenting evidence of actual injury by the attorney's conduct or empirical evidence of dangers that justify restrictive rules. By whatever standard the Court chooses to test the restrictions on attorney speech, the Court must test that standard by evidence of what goes on in the real world, rather than by the unsupported flights of rhetoric presented in the arguments of state bar agencies. The Constitution's bias in favor of free speech requires this, at least.

IV. RESTRICTIONS ON ADVERTISING BY ATTORNEYS

In *Bates v. State Bar of Arizona*,[73] the United States Supreme Court held that the Constitution protects the right of attorneys to advertise. In *Bates*, counsel for the Arizona State Bar made several arguments to support the contention that the State Bar's prohibition against lawyer advertising was justified. The State Bar claimed that: (1) advertising has an adverse effect on professionalism; (2) advertising is inherently misleading; (3) advertising has an adverse effect on the administration of justice by stirring up litigation; (4) advertising has an undesirable economic effect on the profession by increasing the overhead costs of practicing law; (5) advertising has an undesirable effect on the quality of legal services; and (6) restrictions on misleading and deceptive lawyer advertising short of an overall ban are difficult to enforce.[74]

The Arizona State Bar provided no empirical data or other evidence to support its arguments. Counsel submitted no information to the Court indicating that the world outside the courtroom conformed to the view of the world described to the Justices by the State Bar. Despite the absence of evidence in support of the State Bar's position, the Court did not dismiss these arguments out of hand. The members of the Court took the arguments seriously, and responded to them as if responses were necessary to justify the Court's decision.

In response to the charge that advertising would adversely affect professionalism, the Court stated that, "we find the postulated connection between advertising and the erosion of true professionalism to be severely strained."[75] In the majority decision, Justice Harry Blackmun opined that most clients recognized that attorneys do not work for free and noted that the American Bar Association ("A.B.A.") urged

73. 433 U.S. 350 (1977).
74. Bates v. State Bar of Arizona, 433 U.S. 350, 368-79 (1977).
75. *Id.* at 368.

attorneys to establish a clear agreement about fees early in the attorney-client relationship. For these reasons, the majority contended that disclosing the price of legal services in an advertisement would not adversely affect professionalism.

The Arizona State Bar argued that attorney advertising is inherently misleading for three reasons: (1) legal services are so individualized that comparisons cannot be made; (2) consumers do not know prior to talking to an attorney what services they need; and (3) advertising will highlight irrelevant factors to the exclusion of such factors as skill.[76] The Court responded to these arguments by simply disagreeing with them. The opinion asserted that some services are routine, citing as examples uncontested divorces, simple adoptions, uncontested personal bankruptcies, and name changes. Justice Blackmun declared it unlikely that many people go to an attorney without having a specific task in mind, and he rejected the idea that because advertising may not provide all relevant information about selecting an attorney, the courts should be permitted to bar lawyers from providing any relevant information to the public.[77]

The State Bar argued that advertising would have an adverse impact on the administration of justice by stirring up litigation. The Court rejected the notion that it is improper to inform people about the availability of legal services, on the ground that more people will take advantage of the availability of the services.[78]

In response to the charge that advertising would impact on professionalism by diminishing the reputation of attorneys in the community, the Court noted that "bankers and engineers advertise, and yet these professions are not regarded as undignified."[79]

The State Bar also argued that advertising would drive up the costs of legal services and inhibit young attorneys from entering the profession. The Court responded by citing studies showing that the costs of eyeglasses and drugs were reduced where advertising for those goods was permitted. In this instance, empirical data not only failed to support the State Bar's arguments, but refuted its claim about the evils of advertising. The Court also surmised that advertising could help young attorneys gain entry to the profession as an efficient way to make their names known to potential clients.[80]

The State Bar asserted that advertisements would have an adverse effect on the quality of legal services by inducing attorneys to

76. *Id.* at 372.
77. *Id.* at 372-75.
78. *Id.* at 376.
79. *Id.* at 369-70.
80. *Id.* at 378.

provide standard services rather than services tailored to the needs of the individual clients. The Court rejected a ban on advertising as a way to prevent "shoddy work" and suggested that streamlining procedures in routine matters might minimize errors and improve service.[81]

The State Bar claimed that limits on advertising short of a total ban would be difficult to enforce, and would be particularly harmful to consumers who are unsophisticated in legal matters. Justice Blackmun rejected the notion that permission to advertise would lead to substantial abuse by members of the profession.[82]

The Court gave respectful consideration to the arguments presented by the Arizona State Bar and responded with counter arguments or studies suggesting that the State Bar's position lacked merit. The Court never said that in addition to the fact that the State Bar's contentions were dubious or unpersuasive, the Bar had submitted no data to support them.

The effect of the decision in *Bates* was to recognize that the First Amendment protected advertisements by lawyers. It is understandable that the Court, in overturning regulations against lawyer advertising that had been in effect for almost seventy years, would respond to every argument raised in support of the ban. In order to justify extending the reach of the Constitution to lawyer advertisements, the Court may well have been justified in responding to the contentions of the organized bar about the evils of advertising with more than a recognition that the defenders of the restrictions had not provided empirical data to support the restrictions. What is not so understandable is that the Court did not state what information would be necessary in future cases to justify restrictions on lawyer advertisements. In subsequent cases about attorney advertisements, the Court has also declined to demand more of the organized bar than speculation and rhetoric.

Following the decision in *Bates*, the A.B.A. approved revisions to the Model Code of Professional Responsibility ("Model Code"). The revised rules contained a list of specific information that attorneys would be permitted to include in advertising. The Model Code revisions barred attorneys from disclosing any information other than what was specified in the revised code. The A.B.A. drafted the revi-

81. *Id.* at 378-79. Although the Court cited no support for this proposition, studies subsequent to the *Bates* decision confirm that the quality of legal services need not deteriorate and, indeed, may improve in a legal clinic that maintains a high volume caseload of standard cases generated by advertising. *See* Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 781-86 (1988) (discussing studies affirming that the quality of legal services may improve with advertising).

82. *Bates*, 433 U.S. at 379.

sions to the Model Code without conducting any empirical research or seeking data to support the need for the restrictions contained in the new rule.

Many states, including Missouri, adopted revisions to their advertising rules similar to those provided in the A.B.A.'s Model Code. In *In re R.M.J.*,[83] the Supreme Court considered the provisions of Missouri's rules that had been revised in light of *Bates*. The attorney who was disciplined in Missouri violated the revised rules by stating that his practice included personal injury law and real estate law. The Missouri rules required him to use the terms tort law and property law. The attorney's advertisement also announced that he practiced in the areas of contract, zoning and land use, communication, and pension and profit sharing law. Missouri's rules did not authorize the use of these terms or any analogous terms describing these areas of practice. The attorney further violated the state rules by stating that he was admitted to practice in Missouri and Illinois and by stating that he was admitted to practice in the United States Supreme Court. The Missouri rules did not authorize these assertions.

The United States Supreme Court reversed the Missouri Supreme Court's decision to discipline the attorney for making these unauthorized disclosures in his advertisements. The Court concluded that disclosure of the various areas of practice was not misleading, even though not specifically authorized by the Missouri rules.[84] The Missouri Advisory Committee[85] could not identify any substantial interest in denying an attorney the right to state where he is licensed to practice law.[86]

Justice Powell, authoring the majority opinion, recognized that an attorney's advertisement that included the fact that the attorney is admitted to practice before the Supreme Court "could be misleading to the general public unfamiliar with the requirements of admission to the bar of this Court."[87] However, the decision noted that there had been no such finding by the Missouri Supreme Court when it approved the attorney's discipline, and that there was nothing in the record to indicate that the information was misleading.[88] In the absence of proof that the information was misleading, the Supreme Court was correct in rejecting the state's attempt to discipline the attorney for

83. 455 U.S. 191 (1982).

84. *In re* R.M.J., 455 U.S. 191, 205 (1982).

85. The Advisory Committee is a standing committee of the Missouri Supreme Court and is responsible for prosecuting disciplinary cases. *In re R.M.J.*, 455 U.S. at 194 n.5.

86. *In re R.M.J.*, 455 U.S. at 205.

87. *Id.*

88. *Id.* at 205-06.

his advertisement. The decision should have stated clearly that such proof would be required in the future.

Missouri also disciplined the attorney for sending announcements about his practice to persons other than lawyers, clients, former clients, personal friends, and relatives. The Supreme Court rejected this justification for discipline. The Missouri Supreme Court had offered no reason for restricting the parties who could receive the attorney's announcements. Furthermore, the Missouri Advisory Committee did not attempt to show that the absolute prohibition on sending announcements to people other than friends, relatives, and clients was necessary to serve any legitimate interests of the state. In the face of a silent record, this restriction could not stand.[89]

In *In re R.M.J.*, the organized bar continued with the pattern that began with *Bates*. The Missouri Bar sought to prohibit advertising practices by speculating that evils would arise unless the Court approved strict limits on the content of ads. In making such an argument, the Missouri Bar did not go to the trouble of seeking empirical evidence to support the claim that evil lurked in the ads; nor did the Bar produce evidence that a ban on attorney speech would prevent the alleged evils.

In the decision in *In re R.M.J.*, the Supreme Court had an opportunity to spell out the type of evidence that would be required in order to justify restrictions on attorney advertising. The Court noted the failure of the Missouri Bar to make a record that supported the bar's claims about the reasons for the restrictions. However, the Court used the failure of the Missouri Bar merely as a reason for rejecting the bar's position in the case, not as a flaw that would cause the Court to reject restrictions on advertising in future cases. Rather than informing state disciplinary agencies what would be required in the future to justify advertising restrictions, the decision did no more than tell the Missouri Bar that one reason it had not prevailed was that it had not supported its arguments in that case adequately.

This pattern continued in the case of *Zauderer v. Office of Disciplinary Counsel*.[90] In *Zauderer*, Ohio sought to discipline an attorney for including information in a newspaper advertisement that dealt with a specific legal dispute, the claims of numerous women who had been injured by using the Dalkon Shield Intrauterine Device as a contraceptive. The advertisement included a line drawing of the device and described injuries it had allegedly caused to women. In response to articles indicating that the statute of limitations had run on suits

89. *Id.* at 206.
90. 471 U.S. 626 (1985).

related to the Dalkon Shield, the advertisement asserted that women should not assume that it is too late to take legal action.

Ohio justified the attempt to discipline Zauderer by claiming that, although his advertisement may have been harmless, the State's ban on advertising related to specific legal problems was necessary as a prophylactic device to prevent other attorneys from using false and misleading advertising to stir up frivolous litigation.[91] The Supreme Court rejected this argument, stating:

> We do not believe that the State has presented a convincing case for its argument that the rule before us is necessary to the achievement of a substantial governmental interest. The State's contention that the problem of distinguishing deceptive and nondeceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive. . . .
>
> * * *
>
> Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail.[92]

The State raised similar arguments for the claim that it should be able to bar attorneys from using illustrations in advertisements. The Court rejected this claim, saying:

> The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combatted by any means short of a blanket ban.[93]

Once again, the Court rejected a justification by a bar disciplinary agency for its restrictions on advertising. Once again, the Court cited the failure of the State to produce evidence in support of its justification for the restriction. And, once again, the Court failed to tell the states that they could not expect to prevail in advertising cases in the future if they do not provide some evidence to support their arguments for the restrictions they seek to impose.

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91. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 643 (1985).
92. *Id.* at 644-46.
93. *Id.* at 648.

The Court in *Zauderer* departed from its approach to advertising restrictions in one respect. Zauderer's advertisement stated that clients would owe no legal fees if there were no recovery. The State argued that it had the right to demand that the advertisement also include a statement that the client would be subject to litigation costs even if there was no recovery. Zauderer argued that the State could not sustain such a rule absent evidentiary support that the rule was necessary to serve a substantial government interest. The Court refused to require such evidence in cases involving additional disclosure requirements. Although burdensome or unnecessary disclosures would violate the First Amendment, the Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[94]

This element of *Zauderer* provided the Court with an opportunity to explain why states must provide evidence to support restrictions on attorney advertisements. Reasonable disclosure requirements permit an attorney to publish a commercial message while protecting the public from potentially misleading information. So long as the additional disclosure requirement is not burdensome, the attorney is able to convey the message. A rule suppressing speech prevents the public from receiving the attorney's message. Because the consequences of suppression of speech are more extreme than the consequences of requiring additional disclosures, the party seeking to suppress speech should bear the burden of supporting the need for suppression with empirical data or other evidence of harm to consumers occasioned by the speech. Unfortunately, the Court failed to articulate this distinction or to establish any method for determining the need for restrictions on speech.

Why has the Court been reluctant to articulate a standard requiring States to introduce empirical evidence when they seek to restrict commercial speech by lawyers? One answer is suggested by *Shapero v. Kentucky Bar Ass'n*.[95] The issue in *Shapero* was whether the constitutional protections afforded lawyer advertising apply to targeted direct mail solicitation sent by lawyers to potential clients.

Prior to the *Shapero* decision, the Court had ruled, in *Ohralik v. Ohio State Bar Ass'n*,[96] that a state could ban direct face-to-face solicitation of potential clients by attorneys. The Court justified the direct solicitation ban as a prophylactic measure to protect against the potential for abuse inherent in such solicitations. In *Shapero*, the Ken-

94. *Id.* at 651.
95. 486 U.S. 466 (1988).
96. 436 U.S. 447 (1978).

tucky Bar Association argued that direct mail solicitation should be barred under the rationale of the *Ohralik* decision. Shapero contended that direct mail solicitation should be protected as a form of speech similar to newspaper and other media advertising.[97]

The Supreme Court, in a split decision, ruled that under the First Amendment a state may not categorically prohibit lawyers from soliciting business by sending truthful, nondeceptive letters to potential clients known to face particular legal problems. The Court analogized targeted direct mail solicitation to advertising, rather than to personal solicitation.

The dissent in *Shapero* by Justice Sandra Day O'Connor, joined by Chief Justice Rehnquist and Justice Antonin Scalia, is instructive. Justice O'Connor would have approved much greater deference to the opinions of state bar officials about the propriety of ads. The dissent contended that "the [s]tates should have considerable latitude to ban advertising that is '*potentially* or demonstrably misleading,' *as well as* truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession."[98]

The dissenters would have approved, for example, a ban on attorney advertisements that announced the price for routine services.[99] It is just this kind of basic information that the Court approved in *Bates* when it held that the Constitution prohibited a total ban on attorney advertising. If the majority had been willing, as were the dissenters, to defer to the judgment of state bar officials on the propriety of basic factual information in lawyer ads, then states could have banned advertisers from providing almost any useful information to consumers.

The dissenters in *Shapero* clearly were hostile to lawyer advertising. The dissenters surmised that attorneys would not be able to maintain high professional standards while advertising prices for routine services:

> Furthermore, such advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the world that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the com-

97. Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 469-72 (1978).

98. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 485 (1987) (O'Connor, J., dissenting) (citation omitted) (quoting *In re R.M.J.*, 455 U.S. at 202 (emphasis in original)).

99. *Id.*

> plexities that would lead a conscientious attorney to treat some clients' cases as anything but routine.[100]

The dissenters cited no evidence or data in support of this assertion. In fact, the available evidence refutes this claim. A study comparing the quality of services rendered by a legal clinic to that of traditional law firms found the ratings for the clinics to be superior in all categories.[101] The same study reviewed the results obtained by attorneys in divorce cases and concluded that the quality of legal representation by attorneys in the legal clinic was equal to or better than that of traditional law firms.[102]

This study explained these conclusions as follows:

> As firms have larger planned volumes, they can lower their per-unit costs and, accordingly, their prices. Costs drop because large-volume production techniques are different from small-volume ones. This phenomenon apparently applies to "the last of the cottage industries," the delivery of legal services to individuals. By greater use of specialization, paralegals, and systems management as well as by the substitution of capital for labor, the costs of providing routine services such as divorce can be reduced significantly. These low-cost techniques appear to explain the ability of the legal clinic to reduce prices. Further, the techniques reveal why quality need not drop and may even increase. Since the clinic does not drop prices by reducing the amount of care on each case, quality need not decline. To the extent that, for example, the clinic increases specialization and better controls its caseload, quality may improve, as is apparently the case with Jacoby & Meyers.[103]

A survey of malpractice claims in Florida provides some additional support for the proposition that advertising does not adversely affect the quality of legal services. The survey indicated that law firms that advertise were not more likely than other firms to be charged with legal malpractice.[104]

The dissenters in *Shapero* also repeatedly speculated about the dangers of targeted direct mail advertising without citing one piece of evidence in support. Justice O'Connor stated:

> First, a personalized letter is somewhat more likely "to overpower the will and judgment of laypeople who have not

100. *Id.* at 485-86 (O'Connor, J., dissenting).

101. Fred McChesney & Timothy Muris, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1 AM. B. FOUND. RES. J. 179, 193-201 (1979).

102. *Id.* at 201-06.

103. *Id.* at 207 (citation omitted).

104. *See* Scott Slonum, *Survey: Ads not Drawing Malpractice Claims*, 67 A.B.A. J. 25 (1981).

> sought [the lawyer's] advice." For people whose formal contacts with the legal system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and their officers, may therefore find it much more difficult to ignore an apparently "personalized" letter from an attorney than to ignore a general advertisement.
>
> Second, "personalized" form letters are designed to suggest that the sender has some significant personal knowledge about, and concern for, the recipient. Such letters are reasonably transparent when they come from somebody selling consumer goods or stock market tips, but they may be much more misleading when the sender belongs to a profession whose members are ethically obliged to put their clients' interests ahead of their own.
>
> Third, targeted mailings are more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer.[105]

In the dissenting opinion in *Shapero*, three Justices of the Supreme Court appraised the potential of targeted direct mail advertising to deceive the public without so much as a scintilla of evidence for support.

Perhaps the dissent in *Shapero* explains why the Court has not been willing to tell the organized bar that states have an obligation to present evidence in support of claims that various attorney advertising practices are harmful and should be prohibited. At least three of the Justices were willing to engage in speculation about the dangers of advertising, and to defer to the speculation of state bar representatives about such dangers, without considering the available evidence.

With such a divided Court, it may be that the majority could not have come together on a decision instructing states to provide proof of allegations about the alleged harms caused by attorney advertisements. But, this failure has not served the organized bar or the Court well. Decisions like *Shapero* do little more than encourage states to continue restricting advertising hoping that with a little more extravagant rhetoric or a little more speculation they can win over another Justice or two at the next argument.

The Court revisited the issue of state bar restrictions on advertising in the case of *Peel v. Attorney Registration and Disciplinary Comm'n*.[106] In that case, the State of Illinois disciplined an attorney

105. *Shapero*, 486 U.S. at 481-82 (O'Connor, J., dissenting) (quoting *Zauderer*, 471 U.S. at 643).

106. 496 U.S. 91 (1990).

for stating on his letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy.

Again, the State tried to justify disciplining the attorney without offering any evidence that any person had been or was likely to be misled or deceived by the statement. Once again, the State argued that the advertisement's potential for deception justified a blanket ban on announcing certification of a specialty. And, once again, the Supreme Court refused to accept such a broad restriction on speech in the absence of any evidence supporting the need for the restriction.

The *Peel* decision also reinforced the standard for imposing additional disclosure requirements articulated in *Zauderer*. The majority opinion, written by Justice John Paul Stevens, as well as a concurring opinion by Justice Thurgood Marshall, and a dissenting opinion by Justice Byron White, agreed that the assertion of a certification of expertise had the potential to mislead some consumers.[107] The majority and concurring opinions recognized that, under the Constitution, Illinois could have reduced this potential by enacting reasonable regulations requiring additional disclosures.[108]

In *Peel*, as in *Shapero*, Justices O'Connor, Rehnquist, and Scalia dissented.[109] Justice O'Connor noted that although there was no evidence that the certification of specialization actually misled anyone, the Court should nonetheless defer to the Illinois Supreme Court which found that the statement was "inherently likely to deceive."[110]

Why should the Supreme Court defer to state supreme courts in making this judgment? The state supreme court justices had no evidence and no empirical data from which to make such a judgment. They had no reports of individuals who were, in fact, deceived. As is typical in these cases, a state disciplinary official, not a complaining client, charged Peel with violating state standards on advertising.[111]

Justice O'Connor relied on an assumption of expertise by the state courts to substitute for the lack of evidence:

> Charged with the duty of monitoring the legal profession within the State, the Supreme Court of Illinois is in a far better position than is this Court to determine which statements are misleading or likely to mislead. Although we are the final arbiters on the issue whether a statement is misleading as a

107. Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 106 (1990); *id.* at 111 (Marshall, J., concurring); *id.* at 118 (White, J., dissenting).

108. *Peel*, 496 U.S. at 100, 111 (Marshall, J., concurring).

109. *Id.* at 119 (O'Connor, J., dissenting); *see Shapero*, 486 U.S. at 485 (O'Connor, J., dissenting).

110. *Peel*, 496 U.S. at 120-21 (O'Connor, J., dissenting) (quoting *In Re* R.M.J., 455 U.S. 191 (1982)).

111. *Peel*, 496 U.S. at 97.

> matter of constitutional law, we should be more deferential to the State's experience with such statements.[112]

Justice O'Connor suggested in her dissent that the states have considerable experience in assessing the subtleties of the English language to determine what statements bear such a high risk of deceiving the public that they may be prohibited. But the organized bar has no such experience. The bar's experience is a relentless hostility to all forms of advertising first formalized in 1908 and extending until the *Bates* decision in 1976. Following that, the bar's experience has been to engage in repeated attempts to minimize the information attorneys may provide to consumers without so much as a whisper by consumers that the restrictions were needed. Indeed, one of the few agencies that has had any experience at determining what kinds of assertions in advertising are likely to mislead the public is the Federal Trade Commission. That agency is mandated by law to establish rules for the prevention of deceptive advertising.[113] The Federal Trade Commission filed an amicus brief in *Peel* asserting that the likelihood that a lawyer's notification of certification would deceive the public is minimal.[114]

Justice O'Connor clearly disclosed how far she would go in deferring to a claim that an assertion by an attorney is potentially misleading. She speculated that "the meaning underlying a claim of [National Board of Trial Advocacy] certification is neither common knowledge nor readily verifiable by the ordinary consumer."[115] She stated that "certification is tantamount to a claim of quality and superiority and is therefore inherently likely to mislead."[116] She alleged that the statement of certification coupled with a statement of the states in which an attorney is licensed to practice "leads to the conclusion that the State licenses the lawyer's purported superiority."[117] She opined that "[a]s it is common knowledge that [s]tates police the ethical standards of the profession, that inference is likely to be especially misleading."[118]

How do we know whether these claims are true? There is not one shred of evidence in the record to support any of them. They are true only in the sense that a number of people with strong views about attorney advertising believe them to be true. They are true in the sense that an attorney who, for whatever reason, wanted to prevent

112. *Id.* at 121 (O'Connor, J., dissenting).
113. *See* 15 U.S.C. § 57a (1993).
114. *Peel*, 496 U.S. at 104-05.
115. *Id.* at 122 (O'Connor, J., dissenting).
116. *Id.* at 123 (O'Connor, J., dissenting).
117. *Id.*
118. *Id.* at 123-24 (O'Connor, J., dissenting).

disclosure of certification of specialization by other attorneys, could allege that they are true without appearing to be foolish. They are rhetorical truths. They are opinions. But they are not descriptions of the real world based upon anything found in the record of the case before the Court. In the absence of any information more substantial than these opinions, the Court was correct in refusing to permit the State of Illinois to discipline attorney Peel for his publication of the truth that he was certified as a civil trial specialist by the National Board of Trial Advocacy.

Why would three members of the Court argue that they should defer to state supreme court justices to decide whether lawyer advertising is potentially misleading? Why should the dissenters contend that the states should be able to bar such advertisements in the absence of empirical evidence justifying such drastic action? The answer can be found in the culture of the legal profession.

There is ample evidence that lawyers generally have significantly different opinions about lawyer advertising than consumers. The evidence is gathered in a recent review of fifteen studies on opinions about such advertising.[119] The studies are of three types, reports of attorneys' opinions, reports of consumers' opinions, and comparisons of attitudes of attorneys and consumers. Various investigators conducting the studies between 1978 and 1991 found that consumers generally had positive attitudes about lawyer advertising, while attorneys generally had negative attitudes. Comparative studies disclosed a consistent pattern of attorneys holding opinions that are less favorable to advertising than the opinions of consumers.

There are many reasons why lawyers have negative attitudes about advertising. According to a study by Cutler, Javalgi, and Schimmel the negative tone begins in law school with its emphasis on law as service and deemphasis of law as a profit making venture.[120] The "corporate cultures" of the law firms perpetuate the negative attitude. Attorneys, particularly those who entered the profession prior to the *Bates* decision, "have internalized and made cultural the belief that advertising is akin to selling unneeded products and is therefore undignified and demeaning to the firm."[121]

Consumers have a significantly different perspective on advertising:

119. Robert Cutler et al., *The Advertising of Legal Services: Attorneys Versus Consumers*, J. PROF. SERV. MKTG. (forthcoming), *reviewed by*, LAWYER ADVERTISING NEWS, Feb. 1993, at 3 [hereinafter LAWYER ADVERTISING NEWS].

120. LAWYER ADVERTISING NEWS, *supra* note 119, at 8.

121. LAWYER ADVERTISING NEWS, *supra* note 119, at 9.

> Consumer attitudes toward legal services advertising tend to the positive because of the consumers' felt need for information prior to making a decision. Word-of-mouth referrals are valued for important decisions like this—but many times the consumer needing an attorney has no source for such referrals. The observation and reading of advertisements by legal service providers are valued because: (1) advertisements may be the only source of information, and (2) advertisements are a time-efficient method for obtaining information.[122]

These studies demonstrate that the negative attitude many attorneys have about advertising is unrelated to the value of advertising to the public. That attitude is related to the image lawyers have of themselves and their profession.

Angry clients do not generate complaints about attorney advertising. It is rare for clients to initiate grievances about advertising.[123] State disciplinary agencies generate these complaints.[124] Although these agencies couch their complaints in terms of concern about deception of the public, it is evident that the real concern is about self-image rather than the public interest. Surely if their concerns were for the interest of consumers, members of the organized bar would be willing and able to produce evidence of injury to the public from the forms of lawyer advertising they disapprove. In the absence of such evidence, the Supreme Court should continue to give broad latitude to lawyers to advertise their services.

V. RESTRICTIONS ON TRIAL PUBLICITY

The American Bar Association ("A.B.A.") also has imposed significant restrictions on the right of attorneys to speak about matters that

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122. LAWYER ADVERTISING NEWS, *supra* note 119, at 10.

123. Indeed, it is rare for anyone to complain about lawyer advertising. Quarterly reports of grievances filed against attorneys in Ohio between 1988 and 1991 report that grievances about advertising and solicitation constituted 1.2% of all grievances. State reports submitted to the American Bar Association Center for Professional Responsibility in the years 1990-1992 reveal either that the states do not report complaints about advertising as a separate category, or that the advertising complaints amount to 1%-2% of the total complaints about attorney conduct (reports available at the office of the author).

124. *See Survey on Lawyer Discipline Systems* Chart X, (A.B.A. Center for Professional Responsibility Standing Committee on Professional Discipline 1989). The cases on advertising also make clear that advertising complaints are generated by state disciplinary personnel rather than consumers. *See Zauderer*, 471 U.S. at 629-32 (discussing an advertising complaint generated by staff attorney of the Office of Disciplinary Counsel). No court decision about attorney advertising has reported that the action resulted from a complaint registered by a client or potential client.

are or likely will be in litigation.[125] Despite extensive discussion about the rules in this area, the organized bar has offered little empirical data in support of the claim that these restrictions are necessary to satisfy a legitimate governmental interest.

Why should there be any restrictions on what an attorney may say to a reporter about a pending case? The traditional answer is that the information may be published by the reporter and become known to members of the jury sitting on the case. If the jurors decide the case based on information other than the evidence presented in the courtroom, then the defendant has been denied the Sixth Amendment's guarantee of a trial by an impartial jury.[126]

As was true about restrictions on lawyer advertising, restrictions on lawyer comment about matters in litigation stem from the 1908 Canons of Professional Ethics ("Canons").[127] The effect of the Canons was to prevent attorneys for small businesses and individual clients from talking to reporters about their clients' cases. The rule had little impact on large corporations who could hire public relations specialists to speak to reporters on behalf of the corporation. But the real impetus for maintaining strict limits on what attorneys may say to the press about litigation matters arose from two events, the assassination of President John F. Kennedy in 1963, and the Supreme Court's reversal of Sam Sheppard's murder conviction in 1966.

These events gave rise to an effort by the A.B.A. to resolve what came to be known as the free press — fair trial dilemma. Curiously, the Oswald affair, stemming from President Kennedy's assassination, did not involve disclosure of information to the press by attorneys; and, in the Sheppard case, the disclosure of information by attorneys was a relatively minor part of the Supreme Court's concern when it reversed Sam Sheppard's conviction.

The news media gave massive coverage to the assassination of President Kennedy. Shortly after the assassination, President Lyndon Johnson appointed a commission, chaired by Chief Justice Earl Warren, to investigate, evaluate, and report to the President about "all the facts and circumstances surrounding [the] assassination."[128] The Warren Commission report included the opinion that it would

125. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1981).

126. U.S. CONST. amend. VI. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." *Id.*

127. *See* CANONS OF PROFESSIONAL ETHICS Canon 20 (1908); *see supra* note 43.

128. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 471 app. I (1964).

have been difficult for Lee Harvey Oswald to have received a fair trial. The report stated:

> A fundamental objection to the news policy pursued by the Dallas police, however, is the extent to which it endangered Oswald's constitutional right to a trial by an impartial jury. Because of the nature of the crime, the widespread attention which it necessarily received, and the intense public feelings which it aroused, it would have been a most difficult task to select an unprejudiced jury, either in Dallas or elsewhere.[129]

Note that the Warren Commission's report suggested that impanelling a jury would be difficult because of the disclosures of information by the police, not disclosures by attorneys. Note also that the commission's opinion could not have been tested because Oswald had been killed two days after the assassination of the President.

There is an air of unreality about the report's concern for Mr. Oswald's constitutional rights. Did the members of the Warren Commission truly believe that the assassination of a President would not trigger a tremendous amount of news coverage? It is inconceivable that the coverage would not have included rumor, gossip, and surmise, some of which would subsequently prove to have been inaccurate. Moreover, under any circumstances, it would be difficult to seat an unbiased jury in the murder trial of a person charged with killing the President of the United States. It is pure conjecture to assume that the problem of seating an unbiased jury would be substantially more difficult because the police (or attorneys) provided some of the information and misinformation reported in the immediate aftermath of an assassination.

The second event triggering increased concern about litigation disclosures by lawyers was the Supreme Court's reversal of the murder conviction of Sam Sheppard. In *Sheppard v. Maxwell*,[130] the Court held that extensive prejudicial press coverage surrounding the trial and the failure of the trial judge to prevent the press from turning the trial into a "Roman holiday" where "bedlam reigned" denied Sheppard the right to a fair trial.[131] While some of the information provided to the press about the case came from attorneys, including the prosecutor, much of it also came from other sources including witnesses, family members, and "especially the Coroner and police officers."[132]

129. *Id.* at 238.
130. 384 U.S. 333 (1966).
131. Sheppard v. Maxwell, 384 U.S. 333, 354-63 (1966).
132. *Id.* at 360.

Thus, there were two problems that had a significant impact on the Sheppard trial. The first was the court's failure to prevent reporters from virtually taking over the courtroom and turning the trial into a spectacle. This problem had nothing to do with the source of information provided to reporters. The second problem, the extensive prejudicial coverage by the press, involved lawyers among a large number of people who spoke to reporters. In light of the history of the case, it is difficult to believe that the level of prejudice or the result in the case would have been different even if neither the prosecutor nor defense counsel had spoken a word to any reporter.[133] There were too many sources of information for reporters and too much public interest in the case for the amount of news coverage to have been influenced by whether attorneys were or were not an additional source of information.

There is a significant difference between the bar rules restricting attorney comment about disputes in litigation and the rules restricting attorney advertisements. In the advertising cases, the bar could cite no constitutional interest that might be compromised by permitting attorneys to speak. In the trial publicity cases, the bar has framed the issue as a balance between the need to protect a defendant's right to a fair trial guaranteed by the Sixth Amendment to the Constitution and the need to protect the rights of free speech and press.[134] If publication of information about the subject matter of a trial threatens the right of a defendant in a criminal case to a fair trial, then there is a clear, substantial government concern that may require restrictions on speech. Moreover, because the clash involves two constitutionally protected rights, it would arguably be legitimate for a body such as the A.B.A. to make considered judgments about how to balance the two rights without requiring the empirical evidence demanded in the advertising cases.

Despite its surface appeal, this rationale for restricting trial publicity is flawed. Placing restrictions on the right of attorneys to talk to journalists about cases does not protect a defendant's right to a fair trial. Analyzing this question involves looking at three issues. First, what is the scope of the problem of prejudicial trial publicity? Second, what impact does restricting the right of attorneys to speak have on the problem? Third, are there other adequate alternatives to restrict-

133. *See* PAUL HOLMES, THE SHEPPARD MURDER CASE 45-62 (1961).

134. *See* ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS (REARDON COMMITTEE), STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 16-18 (Approved Draft, 1968); SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (MEDINA COMMITTEE), FREEDOM OF THE PRESS AND FAIR TRIAL, Introduction (1967).

ing the right of attorneys to speak that can protect defendants from being prejudiced by trial publicity?

A. The Scope of the Problem of Prejudicial Trial Publicity

Prejudicial trial publicity arises, not because lawyers decide to talk to representatives of the press, but because the media chooses to cover a case that is or will be coming to trial. How frequently does this problem arise?

Empirical data reveals that the incidence of prejudicial news reporting interfering with the right of defendants to get fair trials is rare. In a 1970 study funded by the Twentieth Century Fund, investigators compared federal felony cases in the District of Columbia with news stories in the *Washington Post*.[135] Of the 1,509 defendants indicted in the District of Columbia, only twenty percent were ever mentioned at any time in the press.[136] Only two percent of the cases involved sufficient publicity to raise the possibility of prejudice.[137] The outcome of those cases was about the same statistically as the outcome of the other cases.[138] This indicates that prejudice did not poison those cases in which publicity created the theoretical possibility of prejudice.

That the reporting of "prejudicial" information does not necessarily deny a defendant the right to a fair trial is confirmed by a second study of newspaper accounts of criminal cases. In a review of the coverage of criminal cases in a midwestern state, the investigators found potentially prejudicial information in a substantial number of cases. But, they found no correlation between the potentially prejudicial reports and guilty verdicts.[139]

Another study reported that prejudicial press coverage of criminal cases is rare. That study indicated that pretrial publicity is a potential issue in one out of 10,000 cases.[140] This is due to the small number of felony cases that are reported by the media coupled with the even smaller number of these cases that proceed to trial.

That prejudicial press coverage in criminal trials is rare is further supported by a study conducted by Richard Cardwell, counsel for the

135. *See* A. Friendly & R. Goldfarb, Crime and Publicity (1967) [hereinafter Friendly & Goldfarb].
136. *Id.* at 61.
137. *Id.* at 63.
138. *Id.* at 66.
139. Thomas Eimermann & Rita Simon, *Newspaper Coverage of Crimes and Trials: Another Empirical Look at the Free Press-Fair Trial Controversy*, 47 Journalism Q. 142 (1970).
140. Ralph Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 Judicature 162, 169 (1988).

Hoosier State Press Association. Cardwell found that between 1963 and 1965, only sixty-nine appellate decisions dealt with claims of prejudicial pretrial publicity. The claims prevailed in a mere five percent of these few cases. Prejudicial news coverage during trial was discussed in thirty-two cases between 1963 and 1965. In only three of these cases did a court find that prejudicial publicity warranted granting relief.[141]

Data gathered from judges, attorneys, and prisoners also generally support the view that prejudicial press coverage is not considered to be a significant problem by the people who are most intimately involved in the criminal system.[142] A commentator who reviewed these studies on the incidence of press-induced prejudice concluded that "[t]aken together, the research suggests that in an absolute, quantitative sense, prejudicial publicity is a small problem."[143]

There are two studies that claim to support the theory that prejudicial trial publicity is a serious problem. The first is a report sponsored by the A.B.A. The A.B.A. established the Advisory Committee on Fair Trial and Free Press in 1964. The Committee came to be known as the Reardon Committee, named after its chairman Paul C. Reardon, an Associate Justice of the Supreme Judicial Court of Massachusetts.[144] The Reardon Committee concluded that excessive trial publicity was prejudicing a growing number of defendants. However, the Reardon Committee's conclusions are seriously flawed.

Among its shortcomings, the Reardon Committee failed to obtain professional researchers. Rather than secure a social scientist to oversee empirical research, the Committee entrusted its research to a law school student who took a leave of absence from his legal studies.[145] Moreover, the Reardon Committee failed to take advantage of one of the most useful ways to assess the affect of out of court commentary on the deliberations of juries, reviewing actual jury deliberations. The organized bar traditionally has considered jury deliberations to be sacrosanct, and has frowned on efforts by investigators to witness the process. When the University of Chicago Jury Project recorded the deliberations of a civil jury trial in 1954, the furor generated by the

141. FRIENDLY & GOLDFARB, *supra* note 135, at 58.

142. *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, 16-19 (1989). *See* Fred S. Siebert, Trial Judges' Opinions on Prejudicial Publicity in Free Press and Fair Trial, *in* FREE PRESS AND FAIR TRIAL 1 (Chilton R. Bush ed., 1970) [hereinafter FREE PRESS AND FAIR TRIAL].

143. Drechsel, 18 HOFSTRA L. REV., at 16.

144. PAUL C. REARDON, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, VII (1966) [hereinafter REARDON].

145. ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS (REARDON COMMITTEE), STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS ix (Tentative Draft 1966).

Project was great enough to result in a congressional investigation.[146] There have been few attempts to invade the jury room since then. As might be expected, the researcher for the Reardon Committee steered clear of any attempts to look at actual jury deliberations.

The Reardon Committee recognized that the problem of prejudicial news coverage, while difficult to quantify, was not massive in scope:

> Any effort to assess the magnitude of the problem — the number of cases in which serious questions of possible prejudice are raised by news coverage and public statements — is bound ultimately to rest in some degree on inference. It is certain that in relative terms, when compared with the total number of crimes or even the total number of criminal proceedings, the problem is of limited proportions.[147]

The Reardon Committee came to this conclusion in part because the problem of prejudicial news coverage primarily applies in jury cases and the Committee found that in 1964 only eight percent of criminal cases in federal courts proceeded to jury trial.[148] Nonetheless, the Reardon Committee concluded that prejudice was a substantial problem in the few instances where it was found.

The research methodology used by the Reardon Committee is problematic. The Committee based its conclusion on three sources: (1) a survey of defense lawyers; (2) a survey of judges; and (3) an analysis of criminal reporting in a number of newspapers. Conclusions derived from these sources are suspect. Journalism Professor Robert C. Drechsel critiqued the finding of the Reardon Committee:

> There are reasons to question the validity of the Committee's data. The fifty-four defense attorneys who responded to the survey constituted only twenty-seven percent of the 200 who received questionnaires — a very poor response rate that makes generalization risky. Nor is it clear how representative the fifty-four were or whether they may have simply represented the most disgruntled of the lawyers surveyed. Three respondents alone accounted for 186 of the 300 troublesome cases mentioned. Further, defense attorneys would seem to be an inherently biased source on whom to base a generalization about the impact of prejudicial publicity — a possibility made even more plausible by examination of the committee's data from trial judges.

146. Walter Wilcox, *The Press, the Jury, and the Behavioral Sciences, in* FREE PRESS AND FAIR TRIAL, *supra* note 142, at 63.

147. REARDON, *supra* note 144, at 22.

148. REARDON, *supra* note 144, at 22. *See also* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 17 (1971) (stating that about 15% of all state felony cases proceed to jury trial).

> Unfortunately, the Committee did not ask judges precisely the same questions as defense attorneys. The judges were asked how often they had reprimanded the media about reporting that occurred before or during trial. Thirty-nine said never, only two said occasionally, and apparently the remainder did not respond directly. Twenty-seven judges said they occasionally requested reporters to withhold information from publication. Of those twenty-seven, twenty-two reported having generally or always received compliance and only one reported having such requests refused. In other words, the picture painted by the judges — the judicial actors most likely to have an objective view of the situation — is far less severe than that painted by defense attorneys.
>
> The Committee's content analysis of newspapers is also less than convincing since, as the Committee conceded, it did not determine how many of the cases it considered actually went to trial. Perhaps the best argument — and one made by the Committee — is that the magnitude of the problem is qualitative rather than quantitative. In other words, even if the problem occurs in a relatively small number of situations, these are precisely the cases that most severely test the fairness of the judicial process.[149]

Thus, the Reardon Committee took three positions on the scope of the problem of prejudicial news coverage of criminal cases. First, it recognized that the problem was relatively small in scope. Second, it attempted to show that, although relatively small in scope, the problem still arose in enough cases to be problematic. But, its research methods were inadequate to support that claim. Third, the Reardon Committee contended that even if the problem were rare, the Committee was justified in recommending restrictions in order to assure fairness in those infrequent cases in which the problem arose.

The studies indicating that there is no statistical variation in the outcomes of cases receiving trial publicity compared to the outcomes of cases receiving no publicity suggests that the Reardon Committee's fears were not well-founded.[150] Moreover, there is also anecdotal information that refutes the claim that publicity is likely to prevent a defendant from getting a fair trial, even in highly charged cases. Defendants have prevailed in many high profile cases that have received significant press coverage.

An early example of a defendant prevailing in spite of allegedly prejudicial trial publicity is the treason case against Aaron Burr.[151]

149. Drechsel, 18 HOFSTRA L. REV., at 12-14.

150. *See supra* notes 135-39 and accompanying text.

151. United States v. Burr, 25 F. Cas. 49 (1807).

Despite the notoriety of the case Burr still managed to secure an acquittal.

More recently, defendant John Hinckley, Jr. successfully raised the defense of not guilty by reason of insanity at his trial for attempting to murder former President Ronald Reagan.[152] Despite the massive amount of publicity generated by the shooting of the President and his press secretary, James Brady, this did not prevent the jury from accepting Hinckley's insanity defense. Additionally, the recent acquittal of defendant William Kennedy Smith and the state court acquittals of the police officers charged with beating Rodney King attest to the fact that even massive amounts of publicity do not assure conviction.

What accounts for the success of these defendants in the face of massive trial publicity? Perhaps trial publicity does not have the detrimental impact we assume. Perhaps trial publicity in high profile cases can backfire against the prosecution if the evidence is not as strong as the news accounts suggest. Even some criminal defense attorneys, who maintain that publicity is usually bad for defendants, recognize that trial publicity can actually be helpful when the evidence at trial is less harmful than what could be anticipated from extensive prior press coverage.[153]

This anecdotal evidence does not prove that pretrial publicity in a high profile case has no effect on trials, any more than anecdotal evidence from cases like the Sheppard murder trial proves that pretrial publicity is likely to prevent fair trials. These cases, along with the studies establishing that there is no statistical difference between the results of cases accompanied by publicity and cases that are not publicized, show that the relationship between pretrial publicity and trial outcomes is not readily predictable. In the absence of empirical data establishing circumstances under which pretrial publicity is likely to have an adverse impact on a trial, we should be skeptical about the need for restrictive trial publicity rules that apply to all trials, or even to all high profile trials.

The second study that supports the theory that prejudicial trial publicity is a problem was made by the Medina Committee. At about the same time that the Reardon Committee was conducting its research, the Association of the Bar of the City of New York established the Medina Commitee, a special committee on radio and television,

152. Stewart Taylor, Jr., *Hinckley is Cleared But is Held Insane in Reagan Attack*, N.Y. TIMES, June 21, 1982, at A1; Laura A. Kiernan & Eric Pianin, *Hinckley Found Not Guilty, Insane*, WASH. POST, June 22, 1982, at A1.

153. Andrew Blum, *Trade Center Case Turns on Forensics*, NAT'L L.J., Oct. 25, 1993, at 8. The article stated that "there is the danger the prosecution may fail to deliver and wind up helping the defense." *Id.*

chaired by Judge Harold R. Medina. The research assistant for the committee was a recent law school graduate.

The Medina Committee issued its report in 1965.[154] This report, like the report of the Reardon Committee, is of little value in assessing the extent to which adverse publicity threatens fair trials. The report is a compilation of incidents in which the broadcast media disclosed information about crimes and criminal proceedings. The incidents occurred in various cities around the country. In some cases, the defendants entered guilty pleas to the charges.[155] In other cases, the report did not state what happened in the criminal cases.[156] The Medina Committee did not limit the incidents reported by time or place, limits that would have enabled the Committee to establish the percentage of cases in the areas studied that may have been influenced by pretrial publicity. The Committee made no attempt to determine whether the defendants mentioned in the reported cases had jury trials, whether they claimed any prejudice from the publicity, or even whether the defendants ultimately were convicted. The report was nothing more than a compilation of news reports in which reporters disclosed some information about alleged crimes.

Despite the reports of the Reardon and Medina Committees, empirical data on the issue of the extent of potentially prejudicial press coverage confirms that the problem is exceedingly rare. The facts in those cases in which trials have been tainted by press coverage can be quite compelling, as the opinion in *Sheppard v. Maxwell*[157] demonstrates.[158] But that should not blind us to the recognition that cases like *Sheppard* are exceptional. The only reports that suggest that the problem of trial publicity is not minimimal are the reports of the Reardon and Medina committees which were sponsored by the organized bar. These reports contain such serious flaws that one cannot be confident about their conclusions.[159]

B. The Impact of Restricting Attorney Speech Based on the Possibility of Prejudicial Trial Publicity

Attorneys have little control over the amount or kind of publicity generated by the cases they are trying. In criminal cases, the cases in which claims of prejudicial trial publicity are most likely to be raised,

154. Radio, Television, and the Administration of Justice, The Special Committee on Radio and Television of the Association of the Bar of the City of New York (Medina Committee 1965).
155. *Id.* at 32.
156. *Id.* at 4.
157. 384 U.S. 333 (1966).
158. Sheppard v. Maxwell, 384 U.S. 333, 349-63 (1966).
159. *See supra* notes 144-49 and accompanying text.

there are many sources of information exclusive of attorneys that is available to reporters. These sources include police and other law enforcement personnel, health care and emergency medical treatment providers, coroners, and witnesses, as well as friends and relatives of defendants and alleged victims. There is no logical reason to assume that the amount of prejudicial information made available to reporters would increase significantly if attorneys were permitted to speak to reporters directly.

A review of articles about the highly publicized cases that periodically appear in the news confirms that attorneys have little impact on the type and amount of information that is published in press reports. At any given time, there will be one or two cases that receive widespread notoriety. The articles about these cases invite readers to make judgments about the parties involved. It is difficult to read news reports about high profile cases without making an assessment about the guilt of the persons involved. The reader's assessment of the parties occurs despite current bar rules that prohibit attorneys from engaging in trial publicity. Consider two of the more sensational cases to be decided recently, the Lorena Bobbitt trial in Manassas, Virginia, and the trial of the Branch Davidians in Waco, Texas.

Lorena Bobbitt was charged with malicious wounding following an incident in which she cut off her husband's penis with a kitchen knife. She claimed that the attack was a response to years of spousal abuse, including a rape the evening of the attack. Her case created enormous publicity. A LEXIS search of news articles about the Bobbitt case discloses that more than one thousand articles were written between the date of the incident in June, 1993 and the end of 1994.[160] The publicity included much commentary by journalists as well as news reporting about the case.[161] It is difficult to believe that the amount of publicity surrounding this case could have been influenced by whether Ms. Bobbitt's attorney chose to talk to reporters about the matter. Clearly, the cause of the interest was the bizarre nature of the attack and its relation to claims of spouse abuse. It is also interesting that Ms. Bobbitt was not prejudiced by the inordinate amount of press devoted to the case. The jury accepted her attorney's argu-

160. The NEXIS news library has more than one thousand documents about John and Lorena Bobbitt during this time.

161. *See* Judy Mann, *Beyond the Bobbitts' Battle*, WASH. POST, Aug. 13, 1993, at E3; Alice Kahn, *The Bobbitts: Post-Freudian Sex Symbols?*, SAN FRAN. CHRON., Oct. 27, 1993, at E7; Pete Dexter, *Disturbing Message in Feminist Gesture*, SACRAMENTO BEE, Nov. 8, 1993, at A2.

ment that the assault was the product of a brief psychotic breakdown, and found her not guilty by reason of insanity.[162]

The Branch Davidian case arose as the result of a deadly confrontion between agents of the Federal Bureau of Alcohol, Tobacco, and Firearms ("A.T.F.") and members of the Branch Davidian religious cult. In February, 1993 A.T.F. agents attempted to enter the Branch Davidian compound in Waco, Texas to search for weapons. The leader of the sect refused entry. During the standoff a gun battle broke out leading to the death of four A.T.F. agents and six Branch Davidian members. Numerous other persons on both sides were injured. Following the gun battle, A.T.F. laid siege to the compound. In April, 1993 the compound burned to the ground after federal agents smashed holes in the building with an armored vehicle and pumped tear gas in through the holes.[163]

The United States prosecuted eleven members of the Branch Davidians for numerous crimes including murder and conspiracy. This case, as did the Bobbitt case, generated a great deal of publicity. A LEXIS search disclosed more than one thousand news reports about the case from the date of the first confrontation in February, 1993 to the end of 1994.[164] Many of these stories appeared during the siege of the Branch Davidian headquarters, prior to the time that the defendants had been charged with a crime and obtained counsel.[165] Obviously, the publicity about this case came about because of the spectacular events surrounding the deaths of the A.T.F. agents and not because of the actions of the attorneys who represented the members of the cult charged with the crimes. Also similar to the Bobbitt case is the fact that publicity did not appear to prejudice the rights of the defendants, who were acquitted of the most serious charges brought against them, murder and conspiracy.[166] Some of the defendants were convicted of lesser offenses involving firearms violations.[167]

The current case that has captured public attention is the murder trial of O.J. Simpson. That case is pending as this article is being written. Although Mr. Simpson's attorney, Robert Shapiro has ac-

162. Bill Miller & Marylou Tousignant, *Bobbitt Acquitted in Attack on Husband; Woman is Found Not Guilty by Reason of Insanitiy*, WASH. POST, Jan. 22, 1994, at A1.

163. J. Michael Kennedy, *Waco Cultists Perish in Blaze*, L.A. TIMES, April 20, 1993, at A1.

164. More than one thousand documents exist in the NEXIS news library containing the terms "Branch Davidians" and "Koresh" (the leader of the sect was David Koresh).

165. As of the publication of this article, the NEXIS news library contained 573 stories about the Branch Davidian confrontation published during the week after the gun battle.

166. Sam Howe Verhovek, *Eleven in Texas Sect Are Acquitted Of Key Charges*, N.Y. TIMES, Feb. 27, 1994, at A1.

167. *Id.*

tively engaged in providing information to the press,[168] there has been a virtual mountain of information written and broadcast about the case apart from the information provided by defense counsel. Again, it is difficult to see how Mr. Shapiro's refusal to talk to the press would have significantly reduced the press coverage of this case.

How can reporters write articles that invite judgments about the guilt or innocence of defendants, despite bar rules prohibiting lawyers from engaging in trial publicity? Either lawyers are violating trial publicity restrictions with impunity, or reporters are gathering sufficient information to write detailed articles about criminal cases in the absence of the assistance of lawyers. One study indicates that it is unlikely that lawyers are or could be an important source of information for reporters trying to gather material for a story about a crime. A study of news reporting about felonies in Detroit disclosed the fact that sixty percent of the stories were reported at the time of the commission of the crime, during the investigation, or at the time of arrest.[169] At these stages, it is unlikely that a suspect would have an attorney, let alone that the attorney would have much information to tell a reporter about the alleged crime. Reporters are perfectly capable of preparing news items about criminal conduct early in a criminal case and without the assistance of members of the bar.

The cases that are most likely to be the subject of extensive publicity are cases in which there is "a note of the extraordinary, the bizarre, the especially frightening, or the humorous — or, to get down to it, the interesting."[170] These extraordinary cases are exactly the kinds of cases in which reporters are likely to be able to dig up information whether or not they are able to talk to lawyers.

If lawyers are but one source of the information that may prejudice a jury in the course of a trial, then a restriction on trial publicity that is limited to lawyers cannot be effective in preventing prejudice. A more effective rule would reach beyond lawyers and cover reporters directly, thus barring the publication of prejudicial information no matter who provided the information. The United States Supreme Court, however, has taken a dim view of attempts to reduce press coverage by placing restrictions on the media.

In a series of decisions, the Supreme Court established that states cannot hold members of the media in contempt of court for criticizing judges about pending matters, absent proof that the criticism raised a

168. Jim Newton and Shawn Hubler, *Simpson Held After Wild Chase*, L.A. TIMES, June 18, 1994, at A1.

169. George Hough III, *Felonies, Jury Trials, and News Reports*, in FREE PRESS AND FAIR TRIAL, *supra* note 142, at 39.

170. FRIENDLY & GOLDFARB, *supra* note 135, at 61-66.

clear and present danger to the administration of justice. In *Bridges v. California*,[171] the Court reversed a finding of contempt against the *Los Angeles Times*.[172] The *Los Angeles Times* had published an editorial which criticized a judge for considering sentencing two men to probation after they had been convicted in criminal trials.[173]

In *Pennekamp v. Florida*,[174] the Court reversed a finding of contempt against a newspaper and its publisher for criticizing state court judges about their treatment of defendants in pending cases.[175] The Court accepted the findings of the Florida court that the newspaper did not publish the full truth about pending matters; that the paper did not state objectively the attitude of the state judges; that the actions taken by the judges were required under state law; that the newspaper willfully, wantonly, or recklessly withheld the truth from the public; and that the motive of the newspaper was to destroy the efficiency of the courts.[176]

Despite accepting these findings, the Court held that the State of Florida violated the United States Constitution's First Amendment guarantee of freedom of the press by holding the newspaper and its publisher in contempt. The State could not find the parties in contempt in the absence of proof that the editorials had created a clear and present danger to the fair administration of justice.[177]

In *Craig v. Harney*,[178] the Court reversed a state court decision holding representatives of a newspaper in contempt of court for reports published about a pending legal matter.[179] Neither inaccuracies in reporting nor strong, intemperate, and unfair criticism of the trial judge sufficed to convince the Court that the newspaper had created an imminent and serious threat to the ability of the court to administer justice fairly.[180] The imminent threat to justice standard is the standard required by the Court to justify a trial court taking action against a newspaper in response to published articles about a trial.

The Supreme Court has also refused to permit states to issue gag orders prohibiting the media from reporting about pending cases. In *Nebraska Press Ass'n v. Stuart*,[181] the Court overturned a gag order issued by a judge prior to a murder trial barring the news media from

171. 314 U.S. 252 (1941).
172. Bridges v. California, 314 U.S. 252, 272-73 (1941).
173. *Id.* at 271-72.
174. 328 U.S. 331 (1946).
175. Pennekamp v. Florida, 328 U.S. 331, 333, 350 (1946).
176. *Id.* at 344-45.
177. *Id.* at 348.
178. 331 U.S. 367 (1947).
179. Craig v. Harney, 331 U.S. 367, 375-77 (1947).
180. *Id.*
181. 427 U.S. 539 (1976).

publishing or broadcasting accounts of confessions or admissions made by defendant.[182] While not absolutely foreclosing the possibility of such orders restraining the press in the future, the Court held that there is a presumption against the validity of such orders, and the party seeking to restrain the press bears a heavy burden of justifying the need for the restraint.[183]

In *Landmark Communications, Inc. v. Virginia*,[184] the Court held that the First Amendment barred the State of Virginia from imposing a criminal sanction against a newspaper that disclosed the confidential proceedings of a judicial review commission's investigation of complaints about a state judge.[185] Whatever interest Virginia had in preserving the confidentiality of the commission's investigations of judges, this interest could not outweigh the First Amendment right of the newspaper to report about those investigations.

The Court also has rejected attempts by states to prevent the press from disclosing the names of minors involved in juvenile court proceedings.[186] These cases demonstrate the unwillingness of the Court to permit states to interfere with the right of the news media to report on legal proceedings.

If the state may not directly bar the press from reporting on matters taking place in court, can the state bar the public from attending court proceedings in order to avoid publication of information? The Court has refused to permit judges to close court proceedings for this purpose.[187]

The Court also has refused to permit trial courts to punish public officials or interested parties, other than attorneys, for criticizing judges publicly about pending matters. In *Wood v. Georgia*,[188] the Court reversed the Georgia Court of Appeals decision holding a sheriff in contempt of court for publicly criticizing State judges for impanelling a grand jury to investigate bloc voting patterns by African-Ameri-

182. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).

183. *Id.*

184. 435 U.S. 829 (1978).

185. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 833-34 (1978).

186. Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).

187. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-06 (1982) (holding that a trial judge cannot close trial during testimony of juvenile); Press Enter. Co. v. Superior Court, 464 U.S. 501, 510-13 (1984) (holding that the trial court could not constitutionally close voir dire to protect privacy interests of prospective jurors without considering alternatives to closure and without articulating findings to support the broad order); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558, 581 (1980) (holding that the public and the press have a Constitutional right to attend criminal trials).

188. 370 U.S. 375 (1962).

can voters.[189] The State of Gerogia charged that the sheriff's criticism amounted to an attempt to obstruct and to interfere with the grand jury investigation, that the criticism "imputed a lack of judicial integrity" to the judges who impanelled the grand jury, and that the criticism created a clear and present danger to the administration of justice.[190]

The Court rejected the allegation that the sheriff's criticism created a clear and present danger to the administration of justice. In his opinion, Chief Justice Earl Warren reviewed the facts and found no such danger; the Court was particularly skeptical of the charges against the public official in view of the fact that the case involved a grand jury investigation, rather than a trial in which the rights of a party were at stake.[191] The Court held that the state court's actions violated the sheriff's rights under the First Amendment.[192]

In *Bridges v. California*,[193] an officer of a union that was involved in a representation dispute sent a telegram to the Secretary of Labor in which he threatened that his union would strike if a judge recognized a rival union in a case pending before that judge.[194] The union officer caused or acquiesced in the publication of the telegram in newspapers.[195] The California Supreme Court had held the union in contempt of court on the ground that the union's actions tended to interfere with the fair and orderly administration of justice in a pending case.[196] The United States Supreme Court reversed the California Court's decision finding it to be unconstitutional.[197] The Supreme Court rejected the contention that the union's telegram constituted an attempt to intimidate the trial judge.[198]

The *Wood* and *Bridges* cases do not reject the proposition that trial courts can prohibit interested parties from speaking about individual cases in appropriate circumstances. These cases make clear that the Court will look closely at the facts of each case to determine whether an attempt to punish criticism of a trial court is justified. The cases also make clear that a state court must meet a heavy burden to justify punishing a person who publishes critical remarks.

Thus far we have seen that the problem of prejudicial trial publicity arises in a very small percentage of cases that come to trial. Law-

189. Wood v. Georgia, 370 U.S. 375, 386-87, 395 (1962).
190. *Id.* at 380-87.
191. *Id.* at 389.
192. *Id.* at 385.
193. 314 U.S. 252 (1941).
194. *Bridges*, 314 U.S. at 275-77.
195. *Id.* at 276.
196. Bridges v. Superior Court, 14 Cal.2d 464, 488 (Cal. 1939).
197. *Bridges*, 314 U.S. at 258-59, 278.
198. *Id.* at 278.

yers are but one source of the many sources of information published by the news media about trials. The Court has rejected attempts to restrict trial publicity by punishing public officials or other interested parties who have made public comments about pending cases. The Court also has rejected direct methods of restricting the press from either gaining access to information at court proceedings or publishing information about trials. In sum, trial publicity by attorneys is a very small part of a very small problem. Attempts to solve this problem by gagging lawyers are doomed to fail because of the many other sources of information available to the media. Attempts to solve the problem by gagging the press or other interested parties are also doomed to fail because the First Amendment to the Constitution will not tolerate such restraints on speech except in very narrow circumstances.

There is yet another reason to reject the notion that a broad rule restricting attorneys from disclosing information about trials is a reasonable solution to the problem of prejudicial trial publicity. Rules that restrict lawyers from talking to reporters prevent attorneys from balancing prejudicial information provided to the press by other sources. The press may report false or misleading information provided to the media by police, witnesses, and other parties not subject to regulation by the organized bar. Permitting lawyers to talk to the press may reduce prejudicial trial publicity in these cases. There are no studies that have tested this thesis, but there are cases that provide stark evidence of the value of permitting lawyers to respond to adverse publicity.[199] Consider the following two examples.

Ironically, the first example occurred in a suburb of Cleveland, Ohio, as did the Sam Sheppard case, and shares other similarities with that case. At approximately 12:30 a.m. on the morning of September 14, 1990, sixteen-year-old Lisa Pruett was stabbed to death in Shaker Heights, Ohio. The police focused their investigation on Kevin Young, a Shaker Heights resident who was the son of a prominent Cleveland attorney.

The Pruett murder case had all the elements of a sensational crime. The victim was a young woman who lived in a quiet suburban community. The accused came from a wealthy, prominent family. The investigators had a difficult time finding physical evidence to link the accused to the crime, causing the investigation to stretch out and the news stories to pile up while the public debated whether Young had committed the crime and whether the wealth of his family was protecting him from a prosecution that a less-privileged person would have had to endure.

199. Max D. Stern, *The Right of the Accused to a Public Defense*, 18 HARV. C.R.-C.L. L. REV. 53 (1983) (noting a powerful example of the value of defense publicity).

During the investigation, a Cleveland newspaper printed a story about the case that contained the following statements:

> The main suspect in the unsolved slaying of Shaker Heights resident Lisa Pruett had threatened to kill the 16-year-old and was seen near the site of the killing 90 minutes before it happened, according to an affidavit for a search warrant unsealed yesterday at the request of The Plain Dealer.
>
> Kevin Young, 19, of Shaker Heights also knew details of the killing known only to investigators, the affidavit says. Young was seen "walking towards South Woodland Rd., the scene of the homicide, at approximately 11 p.m. Sept. 13, 1990," the affidavit says.
>
> Pruett's partially clothed body was found by Shaker Heights police in the back yard of a house at 16401 S. Woodland Rd. about 1:05 a.m, a half-hour after they had responded to a report of a woman screaming at S. Woodland and Lee Rds. Police had been unable to find anyone at that time and left.[200]

The article contained a substantial amount of information that implicated Young in Pruett's murder. The following day the newspaper printed another article, one that included comments by Young's attorney relating to the previous day's story. The article stated:

> The lawyer for the lead suspect in the unsolved slaying of 16-year-old Shaker Heights resident Lisa Pruett reacted angrily yesterday to a search warrant affidavit that said his client threatened to murder Pruett and was seen near the site of the killing 90 minutes before it happened.
>
> Lawyer Mark DeVan demanded that police release the results of laboratory tests that he said would clear his client, Kevin Young.
>
> "It is clear that the hard evidence is non-existent in terms of his involvement with this matter," DeVan said. "Of course, he was seen at 11 p.m. in the area of the murder, but it has no bearing since he lives in the neighborhood and was home by 11:10 p.m., nearly an hour and a half before the homicide."
>
> * * *
>
> "My client was home from 11:10 p.m. throughout the night," DeVan said. "The police were told this by my client's father. They were told this by his mother and by the client himself. I invited the police to interview (them) and to inspect the house and see how it was impossible for him to leave without his parents knowing. His mother offered to

200. Christopher Evans, *Pruett Affidavit Unsealed Tells of Suspect's Threats, Sighting*, CLEV. PLAIN DEALER, Aug. 2, 1991, at 1A.

> take a polygraph in regards to her statement about his alibi. The Shaker police have ignored my invitation and her offer."
>
> In the affidavit, the police said Young knew facts about the killing known only to investigators.
>
> "The police claim that he said that she had not been raped, and therefore, he had knowledge that only the killer would know," DeVan said. "However, early on the morning of the murder, there was a general conversation in the community as well as a media broadcast that she had not been sexually assaulted. So the police have their facts in error."
>
> DeVan denied that Young carried a switchblade, as police stated in the affidavit. He said most of the statements police made about Young were based on "third-hand, out-of-context statements which were coffeehouse conversations a month before the killing. They are inaccurate."[201]

Young's attorney, Mark DeVan, performed a valuable service for his client by responding to the adverse statements about the client as soon as they appeared in the newspaper. His response diminished any prejudicial effect of the information provided by the police officers investigating the case. The effect of the response was to make it more likely that Young could receive a fair trial by an impartial jury in the Cleveland community.

The history of the case bears this out. The trial judge denied a motion by Young's attorney seeking a change of venue for the trial.[202] The trial resulted in a jury verdict of acquittal.[203]

There are several points worth noting about this case that bear directly on the issue of whether the bar should prohibit attorneys from speaking publicly on behalf of their clients. First, it is difficult to see how any rules or laws that could withstand a constitutional challenge could have prevented the initial article quoted above. As we have seen, the Supreme Court has struck down prohibitions against newspapers reporting news about criminal matters.[204] The Court also has barred attempts to muzzle law enforcement personnel who speak out about pending cases.[205]

Second, it would not have been in the public interest for the police to have avoided providing information about the case. The Pruett murder caused a sensation in the Shaker Heights community. People

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201. Christopher Evans, *Lawyer Disputes Police Account of Pruett Case*, CLEV. PLAIN DEALER, Aug. 3, 1991, at 1B.

202. James F. McCarty, *Shaker Murder Trial to Begin Tomorrow*, CLEV. PLAIN DEALER, June 20, 1993, at 1B.

203. James F. McCarty, *Young Acquitted in Pruett Killing*, CLEV. PLAIN DEALER, July 22, 1993, at 1A.

204. *See supra* notes 171-86 and accompanying text.

205. *See* Wood v. Georgia, 370 U.S. 375 (1962).

criticized the police throughout the investigation either for protecting Young because of his father's prominence or for focusing the investigation on Young in the absence of any direct evidence linking him to the crime. In that atmosphere, the police had little choice but to present the information they had to the public and to defend the way they handled the investigation. Silence likely would have encouraged the rumor mill and increased the attacks on the police investigation.[206]

Third, the specific information that gave rise to the article in the *Young* case came from an affidavit prepared by the prosecutors in support of a request for a search warrant. Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct permit an attorney to state information contained in the public record of a case.[207] Under these exceptions, an attorney can skirt restrictions on trial publicity by inserting in briefs, pleadings, and other court documents information about the case that is primarily intended for public consumption rather than for the court. While there is no evidence that the prosecution in the *Young* case deliberately included adverse information about the defendant in the affidavit in order to publicize that information, it is quite apparent that any attorney seeking to publicize information about a case could do so by filing documents containing adverse information.[208]

The information provided by the police to the public, while important for the community, put Young in a precarious position. If DeVan had chosen not to respond to the statements in the paper, his ability to defend Young in court would have been compromised. But no competent attorney would have permitted Young to call a press conference to respond personally to the charges. There is too great a risk that through error, nervousness, or lack of skill in dealing with the media, the client would have made a statement that could have been used to his disadvantage at trial. Perhaps the Young family could have hired a public relations firm to present Young's position, but that is hardly a realistic possibility in most criminal cases, and probably would not have been helpful to the accused in this case. Doing so would have provided fuel for those who charged that Young's parents were able to secure preferred treatment for their son by dint of their wealth and prominence.

206. Grant Segall, *Prosecutor Waits on FBI for Tests in Girl's Slaying*, CLEV. PLAIN DEALER, Mar. 1, 1991, at 3B.

207. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(C)(9) & DR 7-107(D) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c)(2) (1989).

208. *See* GERALD M. STERN, THE BUFFALO CREEK DISASTER 104-16 (1976) (stating that the plaintiffs' attorney filed two telephone book-sized volumes of information with the court and made the material available to a newspaper reporter interested in the case).

In this case, as in most cases, the one person who had the relevant information and the skill with which to present that information for the benefit of the accused was defense counsel. It is absurd to have a system in which public officials, such as police officers, may make public statements about criminal investigations, while at the same time, bar disciplinary rules prevent the person most capable of speaking effectively on behalf of the defendant from doing so. Muzzling the attorney in these cases does not prevent prejudicial publicity, it prevents the defendant from being able to respond to the prejudicial publicity. The rule maximizes the harm that arises when the media broadcasts prejudicial information about a pending case.

The second case bearing on the adverse consequences of rules restricting attorneys from speaking about pending matters is a case that came before the United States Supreme Court. In *Gentile v. State Bar of Nevada*,[209] the Supreme Court heard an appeal from an attorney who was disciplined by the Nevada State Bar for holding a press conference to respond to charges leveled against his client by Nevada police officers.[210]

The Las Vegas Police Department charged Gentile's client, Grady Sanders, the owner of Western Vault Corporation, with stealing drugs and money that the police department had stored at Western Vault.[211] The police first reported the theft in January of 1987. Gentile's client was indicted in February of 1988.[212] In the interim, the media in Las Vegas reported a number of stories about the theft, many containing police statements that reflected adversely on Gentile's client.

When Sanders was indicted, Gentile held a press conference charging that the party most likely responsible for the theft from the vault was a police officer who had access to the vault. Gentile asserted his client's innocence and claimed that the police were covering up corruption in the department. He compared the case to cases in other cities in which police officers had been indicted for illegal, corrupt conduct. Gentile urged the Nevada Police Department to follow the example of the enlightened departments in other cities.[213]

Gentile held this press conference to counter prejudicial publicity presented against his client and to overcome efforts that he believed were taken by law enforcement officials to poison the prospective pool of jurors. Apparently Gentile's efforts were successful. Grady Sand-

209. 501 U.S. 1030 (1991).
210. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1033 (1991).
211. *Id.* at 1039-40.
212. *Id.*
213. *Id.* at 1037.

ers had a jury trial six months after the press conference, and the jury acquitted him on all counts.[214]

The *Gentile* case is similar to the *Young* case. Gentile had seen newspaper reports that were highly prejudicial to his client. Those reports could have made it difficult for his client to get a fair trial before an impartial jury. The attorney provided information to the press to counteract the adverse publicity about his client. In so doing, he made it more likely that his client could obtain a fair trial.

The Nevada State Bar disciplined Gentile for making a public statement about his client's criminal case in violation of a Nevada Supreme Court Rule.[215] The rule was virtually identical to the trial publicity restrictions set forth in Rule 3.6 of the Model Rules of Professional Conduct.[216] The United States Supreme Court, in a five to four decision, held that the Nevada State Bar could not discipline the attorney for his comments, because the rule under which he was disciplined was too vague to inform the attorney what information could and could not be disclosed to the public by the attorney.[217] Turning to the second issue of the case, Chief Justice William Rehnquist delivered a five to four opinion declaring that the standard by which to assess the constitutionality of a rule barring an attorney from public comment about a case is whether the rule protects against the substantial likelihood that the comment would materially prejudice the trial of the client.[218]

The *Young* and *Gentile* cases by themselves do not establish a need to permit attorneys to talk about cases publicly any more than the *Sheppard* case by itself could justify rules prohibiting attorneys from talking. These cases are important because they represent cases that have received widespread press coverage. Consider any of the infamous cases of the past several years, the Mike Tyson rape case, the William Kennedy Smith trial, the Rodney King trials, the O.J. Simpson case, or any other court case of similar notoriety. Is there one case that has had less publicity adverse to the defendant because the current codes establishing standards of conduct for the legal profession bar attorneys from responding to public accusations against their clients? Is there one in which the defendant's position was enhanced because the attorneys could not respond to allegations, whether true or not, broadcast by the media? In a high profile case, the defendant's position is no worse, and, in fact, may be much improved if defense counsel is willing and able, as were Young's and

214. *Id.* at 1033.
215. *Id.*
216. *Id.*
217. *Id.* at 1048-51.
218. *Id.* at 1062-63.

Sanders' counsel, to respond to adverse statements in a timely fashion. Muzzling attorneys not only does little to reduce the problem of prejudicial pretrial publicity but, in some cases, actually exacerbates the problem.

C. Solutions for Protecting Parties from the Adverse Effects of Prejudicial Trial Publicity

Whatever else may be said about trial publicity, it is clear that there will be some cases in which the amount and type of publicity will threaten the ability of the parties to obtain a fair trial before an impartial jury. Courts have a number of tools available to minimize the risk that news stories will prevent fair trials, even in high publicity cases. These tools include closely questioning potential jurors about prejudice during voir dire, sequestering the jury, granting a continuance to allow the effect of adverse publicity to dissipate, granting a change of venue to a place where the defendant is less likely to be affected adversely by news reports, instructing the jurors to avoid press reports about the trial and to avoid consideration of any information about the case other than what has been presented in court, and setting aside a verdict when evidence is presented that the jury's decision was tainted by prejudicial news reports. In an extreme set of circumstances, the trial judge may issue gag orders prohibiting persons who have an interest in the litigation, including attorneys, from discussing the case with outside parties including representatives of the media.

To be sure, there may be problems with some of the individual techniques employed to assure impartial juries. Commentators do not agree on the effectiveness of voir dire in preventing prejudiced jurors from being seated.[219] Sequestering the jury, granting a continuance, or granting a change of venue can be costly and inconvenient. Instructing the jurors to avoid press reports about the trial and to avoid consideration of any information about the case other than what has been presented in court relies on the good faith of the jurors for enforcement. However, it is also true that the jury enterprise generally relies on the good faith of jurors and their willingness to follow instructions. Setting aside a verdict when evidence is presented that the jury's decision was tainted by prejudicial news reports is not only time consuming and costly, but is unlikely to be a realistic possibility

219. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503, 505 (1965) (stating that voir dire is grossly ineffective at weeding out unfavorable jurors or eliciting data on which jurors were likely to be unfavorable); Alice M Padawer-Singer et al., *Voir Dire By Two Lawyers: An Essential Safeguard*, Judicature 386, 389 (1974) (stating that voir dire by trial counsel can reduce prejudice caused by pretrial publicity).

in all but a handful of cases because of the difficulties of proof. For example, in *Mu'Min v. Virginia*,[220] the Supreme Court held that the trial court sitting in the location of the controversey was in the best position to determine the depth and extent of the potential injury.[221] As such, the trial court would enjoy great latitude to determine whether or not a fair trial was jeopardized.[222]

These procedures for reducing prejudice from trial publicity are inconvenient, and may be costly and time consuming as well. But, we have seen that the incidence of prejudicial press coverage is rare.[223] We have also seen that restricting attorneys from providing information about cases in litigation can have little effect on the incidence of prejudicial publicity.[224] Because the problem is rare, it is not excessively costly to the judicial system to rely on these techniques to overcome prejudicial trial publicity. Because blanket restrictions on attorneys have no impact on the amount of prejudicial publicity generated by non-lawyers, it is likely that the traditional techniques for reducing the effects of prejudice will have to be the primary techniques for dealing with the problem in any event.

A court imposed gag order prohibiting persons interested in a matter in litigation from discussing the case in public can be an effective means of reducing the likelihood of trial publicity interfering with the right of litigants to a fair trial. Such an order restricts the right of the gagged persons to speak. If a gag order were improperly imposed, the order could violate the First Amendment rights of the parties as severely as a blanket rule prohibiting attorneys from engaging in trial publicity. There are several factors, however, that make the imposition of a gag order in an individual case a less threatening and more appropriate method of insuring a fair trial than a rule generally limiting attorneys from talking about matters in litigation.

First, individual gag orders would be limited to those few cases in which trial publicity is likely to be a problem. Attorneys would be free in other cases to advocate in public on behalf of their clients without the threat of adverse bar disciplinary action.

Second, a gag order could be tailored to the particular needs of a specific case. If a trial judge determined that certain information was likely to prejudice the rights of a party, the judge could limit the restriction to that information while permitting the parties to discuss other less sensitive matters. If the judge determined that the gag or-

220. 500 U.S. 415 (1991).
221. Mu'Min v. Virginia, 500 U.S. 415, 427 (1991).
222. *Id.*
223. *See supra* notes 135-43 and accompanying text.
224. *See supra* § V.B.

der should restrict persons having information about the case other than lawyers, the order could so specify.

Third, a trial judge would have to take affirmative action to impose a gag order. Bar rules that prohibit lawyers from making public comments about matters in litigation are based on the assumption that such comments inevitably will interfere with the right of the parties to receive a fair trial. The *Gentile* and *Young* cases make clear that in some circumstances this assumption will not be true. When the propriety of a restriction on speech depends upon particular circumstances, a state should be required to take affirmative action to show that those circumstances exist. First Amendment doctrine generally prohibits a state from imposing rules restricting speech that are broader than necessary to resolve the problem for which the rules were imposed.[225]

Fourth, the effect of an improper gag order is less destructive of First Amendment values than is the effect of a general rule prohibiting speech. If a judge were to issue a gag order that did not comply with the requirements of the Constitution, the violation would be limited to the particular case in which the order was issued. The effect of a general restriction on trial publicity by attorneys is to inhibit trial lawyers from exercising constitutionally protected rights in the vast number of cases in which trial publicity does not threaten the fairness of the trials.

Fifth, in order to impose a gag order in an individual case, the party seeking the order would have to introduce evidence to support the need for a restriction on the right of the parties to speak. Justification for the order would be based on a factual record. A party opposing the order would have an opportunity to dispute the claim that conditions in the community required a restriction on speech in order to assure a fair trial. The necessity for the order, when contested, would be subject to the traditional adversary procedure. The procedure would result in the creation of a record for review on appeal. Consequently, an appellate court could establish whether a gag order was necessary based upon a legitimate factual record, rather than upon speculative rhetorical arguments.

225. *See* Texas v. Johnson, 491 U.S. 397, 407-10 (1989) (holding that a statute prohibiting flag desecration was not necessary to prevent breach of peace); Boos v. Barry, 485 U.S. 312, 324 (1988) (holding that a statute prohibiting people from carrying signs critical of a government near the government's embassy is not narrowly drawn to protect the dignity of foreign diplomats).

D. The Courts and Restrictions on Trial Publicity by Attorneys

The Supreme Court has decided considerably fewer cases dealing with the constitutionality of rules restricting attorneys from engaging in trial publicity about pending cases than about restrictions on attorney advertising. An early attempt by the Court to deal with this issue came in 1959 in the case of *In re Sawyer*.[226] Ms. Sawyer was an attorney in Hawaii who was representing defendants in a criminal case. The defendants were on trial for conspiracy to violate the Smith Act. While the trial was pending, Sawyer spoke at a meeting sponsored by a labor union. Several members of the union were defendants in the criminal case. During the course of her talk, Sawyer criticized prosecutions under the Smith Act in general and the prosecution of the case being tried in Hawaii in particular. The Hawaii Bar Association charged the lawyer with violating the Canons of Professional Ethics for her comments in that speech, and the Hawaii Supreme Court ultimately disciplined her for her remarks. The United States Supreme Court reversed the decision to discipline Sawyer.

Justice William Brennan, who wrote the majority decision in *In re Sawyer*, had a significantly different view about the facts than did Justice Felix Frankfurter, who wrote the dissent. Justice Brennan viewed the disciplinary case as a charge that Sawyer had attacked the impartiality and fairness of the trial judge in the Smith Act case. Finding no support for the charge in Sawyer's remarks, the Court reversed the disciplinary action without reaching the question of whether the First Amendment prevented the Hawaii bar from disciplining the attorney.[227]

Justice Frankfurter, writing on behalf of four Justices, viewed the case as a charge that the lawyer had "engaged in a willful attack on the administration of justice in the particular trial in which she was then actively participating, and patently impugned, even if by clear implication rather than by blatant words, the integrity of the presiding judge."[228] Under this view of the facts, the case tested whether the First Amendment protected the attorney from making comments that could have had an effect on the integrity of the trial then taking place.

Justice Brennan's majority opinion construed the remarks given by Sawyer as critical comment about Smith Act prosecutions and conspiracy trials, using the Hawaii trial as a particular example.[229] He

226. 360 U.S. 622 (1959).
227. *In re* Sawyer, 360 U.S. 622, 626-27 (1959).
228. *Id.* at 652 (Frankfurter, J., dissenting).
229. *Id.* at 632-33.

read the record very narrowly to avoid a direct constitutional confrontation between the First Amendment and the obligation of a trial attorney in assuring a fair trial. Justice Brennan also expressed a tolerant attitude toward attorneys who criticize judges about pending matters:

> If Judge Wiig was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed. Petitioner did not say Judge Wiig was corrupt or venal or stupid or incompetent. The public attribution of honest error to the judiciary is no cause for professional discipline in this country.[230]

Justice Potter Stewart filed a concurring opinion, agreeing with the majority that the Hawaii State Bar had not disciplined Sawyer for obstructing or prejudicing the administration of justice. Justice Stewart agreed that that First Amendment issue was not properly before the Court.[231] But, Justice Stewart also made clear that if the State Bar had disciplined Sawyer for that reason, he would have been willing to permit the disciplinary action, despite the constitutional arguments raised on her behalf. Justice Stewart wrote in his concurring opinion "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."[232]

Justice Frankfurter, deciding that Sawyer had interfered with the fair administration of justice, would have sustained the disciplinary action. He expressed an attitude that was particularly sympathetic to the notion that the bar should protect judges from critical comment by trial attorneys:

> Even under the most favoring circumstances — an able, fearless, and fastidiously impartial judge, competent and scrupulous lawyers, a befittingly austere court-room atmosphere — trial by jury of a criminal case where public feeling is deeply engaged is no easy accomplishment, as every experienced lawyer knows, if due regard is to be had to the letter and spirit of the Constitution for such a trial. It is difficult enough to seal the court-room, as it were, against outside pressures. The delicate scales of justice ought not to be willfully agitated from without by any of the participants responsible for the fair conduct of the trial.[233]

230. *Id.* at 635.
231. *Id.* at 646 (Stewart, J., concurring).
232. *Id.* at 646-47 (Stewart, J., concurring).
233. *Id.* at 667 (Frankfurter, J., dissenting).

Justices Frankfurter and Brennan had significantly different attitudes about the plight of judges faced with criticism of their conduct on pending legal matters. If Justice Brennan expected judges to face up to criticism as part of the job of judging, Justice Frankfurter seemed to suggest that judges could not perform their duties without insulation from the criticism.

The debate among the Justices about the effect on judges of permitting critical comment by attorneys in the course of litigation was a peculiar one. It avoided any recognition of the essentially political nature of the legal system. There was no recognition that, under the Constitution, the judiciary is the third branch of government.

Justice Frankfurter's opinion treated judges as scientists who must be free to conduct their experiments in an hermetically sealed laboratory, lest the outside world contaminate the process and destroy the results. It is doubtful that anyone, other than judges and lawyers, could discuss the prosecution of labor leaders for conspiracy to spread the "Communist menace" in the United States without admitting that what was taking place was a political act.

Court decisions are products of their times. The criminal case that gave rise to the charges of misconduct by attorney Sawyer was a case in which the United States was prosecuting union members for engaging in a conspiracy in violation of the Smith Act.[234] The Smith Act made it unlawful for persons to advocate the violent overthrow of the government.[235] The criminal cases involving alleged Communists that arose during the 1950s in the height of McCarthyism is a product of the political climate of that time.[236] Court decisions in Smith Act cases reflect that political climate.[237] To assume that judges somehow render legal decisions without being influenced by events that are taking place outside the courtroom is arrogant. To assume that judges can avoid being influenced by the events of the day, but cannot avoid being influenced by the criticism of attorneys is misguided.

The fractured Court in *Sawyer* does not provide us with guidance about the limits a state may impose on a lawyer's right to speak publically while representing parties at a trial. But, the decision in *Sawyer* does parallel some of the features of Court decisions in the advertising cases. The decision reveals a divided Court whose members held strongly divergent views about the role of attorneys in the legal system. Just as Justice O'Connor suggested that Constitutional consider-

234. *Id.* at 627.

235. 18 U.S.C. §§ 10-11 (1946) (codified as amended 18 U.S.C. § 2385 (1994)).

236. *See* VICTOR S. NAVASKY, NAMING NAMES (1980) (reviewing the climate of the McCarthy era).

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

ations may be subordinated to ethical norms when determining the rights of attorneys to advertise,[238] Justices Stewart and Frankfurter argued that the First Amendment rights of attorneys must bow to ethical norms when determining the right of attorneys to speak out about pending legal matters.

Just as the Court has failed to compel members of the organized bar to provide empirical support for their claims about the evils of lawyer advertising, so did the Court fail to demand data to support claims by the bar that criticism of a judge by an attorney representing parties in trial would interfere with the ability of the judge to conduct a fair trial. The Court did not even discuss the outcome of the criminal case that gave rise to the charges against Sawyer, let alone discuss how her comments may have made the conduct of that case more difficult. And, as in the advertising cases, despite the failure of the Court to issue a ringing endorsement for free speech by attorneys engaged in litigation, the decision overturned the attempt by the Hawaii State Bar to discipline the lawyer for her actions.

The second case decided by the Supreme Court dealing with trial publicity by attorneys was the previously discussed case of *Gentile v. State Bar of Nevada*.[239] Unlike Sawyer, the attorney in *Gentile* attacked neither the conduct of the trial judge, the statute giving rise to the criminal charges, nor the fairness of the procedures in the case giving rise to his comments. Gentile attacked the conduct of the police in bringing charges against his client, Grady Sanders, despite evidence that police officers rather than Sanders had committed the crimes.

In *Gentile*, the Court established a standard for determining the propriety of trial publicity by lawyers. The Court held that a state may discipline an attorney for engaging in trial publicity that creates a substantial likelihood of material prejudice to the administration of justice.[240] It is not clear at this point what effect this standard will have in future cases. The *Gentile* case was decided by a five to four vote on the issue of the standard to be used in determining when a state can discipline an attorney for speaking about a matter in trial. A second decision, by a five to four vote, held that Nevada could not discipline Gentile for his remarks because the disciplinary rule under which the attorney was disciplined was void for vagueness. Adding to the problem of anticipating the future effect of the *Gentile* decision is the fact that the Supreme Court did not advise states what informa-

238. *In re Sawyer*, 360 U.S. at 626-27.

239. 501 U.S. 1030 (1991).

240. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1063 (1991).

tion they would have to provide to establish whether an attorney's comments had created a substantial likelihood of material prejudice.

Much like the advertising cases and the prior decision in *Sawyer*, the split result in *Gentile* appears to be a reflection of the attitude of the justices about how the legal profession should present itself to the public rather than a decision based on evidence about what goes on in the world outside the Supreme Court when an attorney speaks. The decision by the Court did not focus on the fact that Gentile's client was not denied a fair trial because of the attorney's remarks. It did not consider that the attorney was responding to a great deal of adverse publicity that would have gone unchallenged had Gentile not spoken. The decision did not deal with the fact that absent response by Gentile there would have been no practical way for his client, Sanders, to overcome the negative publicity against him advanced by the police statements. In short, the decision failed to recognize that Gentile's conduct was a service to the administration of justice, making it more likely rather than less likely that Grady Sanders could receive a fair trial.

As in previous cases, the decision in *Gentile* prevented a state from disciplining an attorney for exercising rights protected by the First Amendment, while failing to demand that the organized bar provide evidence other than legal rhetoric to support the need for discipline. In so doing, the decision invites the bar to continue to try to muzzle attorneys and to come before the Court in future cases so that the Justices can continue to fight with each other over abstract notions about the need to restrict attorneys from speaking in order to preserve the integrity of the legal system.

VI. CONCLUSION

Both advertising rules and trial publicity rules show the penchant of the bar for dealing with sensitive problems by prohibiting lawyers from speaking. This is a dangerous game that rarely serves the public interest.

Despite evidence that advertising by lawyers reduces the cost of legal services to the public without reducing the quality of services, bar disciplinary agencies continue to argue that they should have the right to restrict advertising severely. The basis for the argument is an abstract claim that some concept of professionalism is being harmed by allowing lawyers to tell potential clients about the services they offer. The alleged injuries to the public from letting lawyers advertise arise, not from evidence about actual injuries, but from rhetorical arguments contained in the briefs of bar association attorneys and in judicial opinions.

Deciding whether to permit lawyers to advertise also determines who will have access to legal services. It is not a coincidence that the growth of legal clinics took place at the same time that lawyers began to advertise. Before the United States Supreme Court struck down prohibitions against legal advertising, it was clear that the restrictions prevented many people from obtaining affordable legal assistance. Restricting advertising in the future means that fewer people will be able to get legal services.

The First Amendment to the United States Constitution should require more than rhetorical arguments. It should, at least, require that those who want to limit advertising talk about what the limits will mean in the real world and explain what real dangers exist out there that justify the proposed limits.

Restrictions on speech by attorneys while representing clients in trial also have significant consequences for the legal system. Trial publicity can be beneficial for clients. By speaking out, attorneys can overcome prejudicial publicity about their clients reported by parties not subject to a gag rule. Attorneys can, as did Mr. Gentile, point out possible cases of corruption or improper activity by police and other government officials. Preventing attorneys from speaking during a pending trial may interfere with the ability of the citizenry to evaluate the conduct of government officials, including judges. Again, the First Amendment should demand more than simple rhetoric to justify the right of a state bar to prevent attorneys from speaking. While the Supreme Court has generally prevented attorneys from being disciplined for speaking through advertisements or trial publicity, the standards issued by the Court have been less than helpful in conveying the heavy burden the bar should be required to bear in order to justify any limits on speech. The Justices of the Supreme Court are lawyers. Many of them have been members and officers of various state and national bar associations. They are likely to be familiar with the policy arguments debated within the legal community about the advisability of bar restrictions on speech by attorneys. Perhaps their familiarity with the disciplinary rules and the debates in the profession about those rules has blinded them to the need for parties litigating the validity of the rules to present evidence or empirical data in court. However, their familiarity with the issues does not justify a refusal to demand the rigorous proof required of other parties who litigate issues of constitutional dimension.

By clearly informing members of state bars that they will have to introduce specific evidence of real harm to justify restrictions on the right of attorneys to speak, the Court would not only be supporting the values contained in the First Amendment, but would also be prevent-

ing the organized bar from fiddling around with the rights of attorneys without having well articulated and supported reasons their actions. It is time to send a clear message to the organized bar that they should have more important things to do than to dream up ways to muzzle attorneys.