Order in the Courtroom, Silence on the Courthouse Steps: Attorneys Muzzled by Ethical Disciplinary Rules

INTRODUCTION

Speech encourages action and change; silence creates stagnation and oppression.[1] Unlimited sources of speech effectuate the search for truth and enlighten society.[2] Sophisticated tech-

---

[1] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884-85 (1963). Suppression of speech prevents change and, contrary to its intended effect, suppression neither eliminates the thoughts behind the speech nor fosters "loyalty and unity." *Id.* at 884. *See* Irwin P. Stotzky, *A Gathering of Legal Scholars to Discuss "The First Amendment: A Special Privilege for the Press?" — Forward: The First Amendment and the Press*, 34 U. MIAMI L. REV. 785 (1980). In analyzing the essential nature of free speech in a democratic society, Stotzky quoted John Stuart Mill's condemnation of restraints on free expression:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race . . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Id. at 786 n.5 (quoting John S. Mill, *On Liberty*, *in* SELECTED WRITINGS OF JOHN STUART MILL 135-36 (M. Cowling ed., 1968)). Stotzky also quoted literary artist John Milton's recognition of the necessity of speech:

> [A]ll opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest . . . . And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?

Id. at 786 n.4 (quoting John Milton, *Aeropagitica*, *in* AEROPAGITICA AND OTHER PROSE WRITINGS BY JOHN MILTON 19-20, 59 (W. Haller ed., 1927). *See also* COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, 1791-1991: THE BILL OF RIGHTS AND BEYOND 17 (Herbert M. Atherton & J. Jackson Barlow eds., 1991) [hereinafter COMMISSION ON THE BICENTENNIAL] (people must have the right to speak freely because only "informed and involved citizens" can ensure the success of a democratic America); Thomas R. Nilsen, *Free Speech, Persuasion, and the Democratic Process*, *in* PERSPECTIVES ON FREEDOM OF SPEECH 229, 230 (Thomas L. Tedford et al. eds. 1987) (democracy requires that ideas are expressed, evaluated, utilized and "translated into policies"); Rene' L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1188 (1990) (the power to govern belongs to the people and governance can only be successful if the people gain "intelligence, integrity, sensitivity, and generous devotion to the general welfare") (quoting Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 253 (1961)).

[2] Pennekamp v. Florida, 328 U.S. 331, 354 n.2 (1946) (Frankfurter, J., concurring). Justice Frankfurter emphasized that uninhibited speech required varying opinions and a diversity of sources for those opinions. *Id.* *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (Holmes established the marketplace of ideas theory with his statement that free trade in ideas was essential

nology and rapid communication have made the press an inexorable force in the modern legal arena,[3] informing society with a

to democracy and "the best test of truth [w]as the power of the thought to get itself accepted in the competition of the market"); MARTIN H. REDISH, FREEDOM OF EXPRESSION, A CRITICAL ANALYSIS 46 (1984) [hereinafter REDISH, FREEDOM OF EXPRESSION] (claiming that the marketplace of ideas theory originated not with Justice Holmes, but with John Stuart Mill who analogized speech to commodities, i.e., good products are sold while bad products remain on shelves and competing ideas will similarly be tested in the public market); Jeffrey Cole and Michael I. Spak, *Defense Counsel and the First Amendment: "A Time to Keep Silence, and a Time to Speak,"* 6 ST. MARY'S L.J. 347, 353 (1974) (unlimited sources for speech, rather than silencing particular sources, remedies the evil of harmful speech); Emerson, *supra* note 1, at 881 (in the search for knowledge an individual must be permitted to analyze all sides of an issue, gather information from all available sources and then "sift the true from the false"); NILSEN, *supra* note 1, at 240 (constraining the availability of sources weakens democracy by preventing citizens from becoming fully informed); Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003, 1006, 1012 n.58 (1984) [hereinafter Swift, *Model Rule 3.6*] (an understanding of the judicial system requires exposure to "more than one voice" and Disciplinary Rule 3.6's substantial likelihood standard impermissibly reduces the sources of information that contribute to the free flow of information regarding the judicial process) (quoting United States v. Dougherty, 473 F.2d 1113, 1135 (D.C. Cir. 1972)); Martha E. Johnston, Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671, 692 (1979) (the public has a compelling interest in receiving from all sources as much information regarding the judicial process as possible to protect the accused's right to a fair trial).

[3] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 548 (1976). Justice Burger acknowledged that modern technology increased the problems associated with selecting an impartial jury. *Id.* *See* Fred Graham, *Keynote Address: The Impact of Television on the Jury System: Ancient Myths and Modern Realism*, 40 AM. U. L. REV. 623, 628 (1991) (television does not have an inordinate effect on jurors because jurors do not concentrate so intensely on any one "channel" to so solidly fix one point of view in their minds which could not be influenced by new or different information); *Panel Discussion on Fair Trial and Freedom of the Press*, 19 F.R.D. 16, 42 (1955) (freedom of the press was never intended to "give such multiple distraction [through television] entree to a court" because the framers did not anticipate the power of media coverage available today); Nancy Blodgett, *Equal Access Report: Let the Defense Tell Its Story*, A.B.A. J., Sept. 1, 1987, at 29 [hereinafter Blodgett, *Equal Access*] (prosecutorial media use has greatly increased and defense counsel should have equal ability to use the media to preach to the public); Priscilla A. Schwab, *Talking to the Press*, LITIGATION, Summer 1986, at 26 (society has "progressed geometrically" in regard to media and communication methods; use of those methods, however, has not progressed to a balance between over-use and under-use of the media and remains caught in a state of "reactive extremism" characterized by sensationalism at one extreme and rigid no comment rules at the other).

See also Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631 (1991). Minow and Cate referred to Mark Twain's humorous but enlightening comment on the impact that advancing media technology, even a century ago, had on the judicial system, as compared to the time of Alfred the Great:

> [N]ews could not travel fast, and hence [Alfred] could easily find a jury of honest, intelligent men who had not heard of the case they were called to try — but in our day of telegraph and newspapers his

voice that cannot be ignored.[4] But while public and media attention monitor the judicial system, publicity may also infringe on the rights of individuals participating in that system.[5] Thomas Jefferson cautioned, however, that publicity is "an evil for which there is no remedy" because First Amendment rights "cannot be limited without being lost."[6] The United States Supreme Court and many state legislatures and bar associations have chosen to ignore Jefferson's warning.[7]

---

plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.

Id. at 634 (quoting MARK TWAIN, ROUGHING IT 307 (Iowa Center for Textual Studies ed. 1972) (1871)).

[4] MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02[D] (1984) (only speech conveyed through the mass media effectively reaches the majority). *See Pennekamp*, 328 U.S. at 354-55 (Frankfurter, J., concurring) ("Without free press there can be no free society. Freedom of press, however, is not an end in itself but a means to the end of a free society."); Saxbe v. Washington Post, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (to gather the information needed to exercise its voting responsibilities, the public must rely on the press).

[5] Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1, 3 (1989) (detailing the history of the troublesome results of trial press coverage). *See* Bridges v. California, 314 U.S. 252, 260 (1941) (the competing interests of free press and fair trial are difficult to prioritize); STANDARDS FOR CRIMINAL JUSTICE § 8-1.1 commentary at 8.9 (pure speech regarding the judicial system "enjoys the strongest possible presumption of First Amendment protection").

[6] *Nebraska Press Ass'n*, 427 U.S. at 548 (quoting 9 PAPERS OF THOMAS JEFFERSON 239 (J. Boyd ed., 1954)). *See* NIMMER, *supra* note 4, at § 1.02[B] (if the "truth" is not the guaranteed result of publicity the actual product of speech will bring society as close to truth as humanly possible); Emerson, *supra* note 1, at 886 (unrestrained expression may delay problem resolution and threaten unrest but society cannot always be totally controlled because "[c]hange is inevitable"; free speech ensures "rational, orderly adjustment" more effectively than suppression and the risks accompanying free speech are "the lesser evil"); Paul Marcus, *The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases*, 57 IND. L.J. 235, 236 (1982) (discussing the American citizens' acceptance and protectiveness of their freedom to express themselves). *But see* William H. Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485, 495 (1977) (blind adherence to Jefferson's admonition against limiting speech and press may lead to evils just as harmful as limiting speech); Valerie P. Hans, *Law and the Media, An Overview and Introduction*, 14 LAW AND HUMAN BEHAVIOR 399, 400 (1990) (one of the dangers of unrestrained press is that the media "actively constructs social and political reality").

[7] *See, e.g.*, Hirschkop v. Snead, 594 F.2d 356, 370 (4th Cir. 1979) (finding no constitutional bar to attorney speech restraint); *see also infra* notes 109-113 and accompanying text for discussion of *Hirschkop*. For other courts that have rejected the more protective clear and present danger test in favor of the reasonable likelihood test, despite First Amendment concerns, see generally Gentile v. State Bar, 111 S. Ct. 2720 (1991); The News-Journal Corp. v. Foxman, 939 F.2d 1499 (11th Cir. 1991); Stretton v. Disciplinary Board, 944 F.2d 137 (3d Cir. 1991); United States v. Bingham, 769 F. Supp. 1039 (N.D. Ill. 1991); *In re* Eisenberg, 423 N.W.2d 867 (Wis. 1988); *In re* Lasswell, 673 P.2d 855 (Or. 1983); *In re* Hinds, 90 N.J. 604, 449 A.2d 483 (1982); *In re* Rachmiel, 90 N.J. 646, 449 A.2d 505 (1982).

When analyzing the conflict between free speech and impartial trials, the Supreme Court has consistently required a clear and present danger before justifying speech restraint.[8] Recently, however, in *Gentile v. State Bar*,[9] the Court withdrew this protection, adopting a substantial likelihood of material prejudice standard for attorney comment regulation.[10] In doing so, the Supreme Court devalued attorneys' First Amendment rights[11] by validating vague disciplinary rules that attempted to silence prejudicial speech.[12]

---

[8] *See, e.g., Bridges*, 314 U.S. at 268 (declaring that states would not be permitted, through the use of the contempt power, to infringe "historic constitutional meaning" of free speech); *Pennekamp*, 328 U.S. at 335 (mandating that only speech posing a clear and present danger to the judicial process justified restraint); *Nebraska Press Ass'n*, 427 U.S. at 562-63 (only clear and present danger to fair trial warranted gag orders). For discussion of these cases *see infra* notes 20-41 and accompanying text.

For discussion of the clear and present danger test, see Schenck v. United States, 249 U.S. 47, 52 (1919) (Justice Holmes, articulating the clear and present danger test, stated: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"); DAVID S. BOGEN, BULWARK OF LIBERTY, THE COURT AND THE FIRST AMENDMENT 31-42 (1984) (history and application of clear and present danger test); H. L. POHLMAN, JUSTICE OLIVER WENDALL HOLMES, FREE SPEECH AND THE LIVING CONSTITUTION 65-70 (1991) (analyzing the *Schenck* opinion in which Justice Holmes articulated the test). *But see* Cole & Spak, *supra* note 2, at 369 (some speech is "inherently prejudicial" and therefore warrants regulation under attorney comment restrictions regardless of clear and present danger).

[9] 111 S. Ct. 2720 (1991).

[10] *Id.* at 2745.

[11] The First Amendment to the United States Constitution provides: "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 the Government for a redress of grievances." U.S. CONST. amend. I.

[12] *See infra* note 81 (suggesting that the standards do not clearly delineate specific prohibited comments but rather express broad classifications leaving attorneys to blindly interpret them). The structuralist interpretation of the First Amendment asserts that "all other values assume and depend upon unfettered communication." Joseph F. Kobylka & David M. Dehnel, *Toward a Structuralist Understanding of First Amendment and Sixth Amendment Guarantees*, 21 WAKE FOREST L. REV. 363, 366 (1986). The functionalist interpretation, however, opines that the First Amendment is beneficial to society provided that it encourages the "proper functioning of political institutions" and must be viewed together with other interests, such as a fair trial, national security and public welfare. *Id.* One commentator, comparing the First Amendment to other constitutional provisions, posited that the First Amendment was more precise than most of the other primary restrictions on the power of government and was "of exceptional crispness and clarity." WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 22 (1984). For example, the Fourth Amendment restricts searches and seizures when they are unreasonable, the Fifth Amendment requires due process before rights may be taken away, and the Eighth

In endorsing this less stringent standard, the Court abandoned traditional First Amendment protection[13] and condoned

---

Amendment prevents the imposition of excessive bail and cruel and unusual punishment. *Id.* These provisions all guarantee a right but only a qualified or limited right. *Id.* The First Amendment includes no limiting or qualifying language and therefore must be unequivocal and absolute. *Id.*

For additional discussion of the broad nature of First Amendment protection, see *Bridges*, 314 U.S. at 263 (the First Amendment does not equivocally protect speech but broadly forbids the enactment of any law which infringes on the freedoms of speech and press); NIMMER, *supra* note 4, at § 4.02 (defining the abridgement of speech and postulating that the First Amendment forbids restraint before speech and punishment after speech); Anthony Lewis, *Keynote Address: The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793, 806 (1980) (the First Amendment must include the right to monitor or "scrutinize government"); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, *reprinted in* FREEDOM OF EXPRESSION, A COLLECTION OF BEST WRITINGS 63, 75 (Kent Middleton & Roy M. Mersky Eds., 1981) (the First Amendment does not simply encompass the freedom to speak but protects "the freedom of those activities of thought and communication by which we 'govern' " and involves a public power and a government responsibility); Stotzky, *supra* note 1, at 785 (the First Amendment "is more than a rule of law; it is an honored tradition within our society").

For discussion on limitations on First Amendment protection, see *Bridges*, 314 U.S. at 282-83 (Frankfurter, J., dissenting) (free speech is not an absolute right or an "irrational" theory which requires the "paralysis" of all other rights included in the Bill of Rights when they clash with the First Amendment: "[a] trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.' "). Alexis De Tocqueville claimed that First Amendment protection, in practice rather than in theory, was not sufficient:

> I know of no country in which there is so little independence of mind and real freedom of discussion as in America. . . . In America the majority raises formidable barriers around the liberty of opinion; within these barriers an author may write what he pleases, but woe to him if he goes beyond them.

ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 263-64 (Francis Bowen trans. & Phillips Bradley ed., 1984).

One commentator noted that there were two polar interpretations of the scope of speech rights under the First Amendment. Cal M. Logue, *Free Speech: The Philosophical Poles in* Perspectives on Freedom of Speech, Selected Essays From the Journals of Speech Communication Association 69, 70 (Thomas L. Tedford et al. eds. 1987). Favoring limitations on First Amendment rights, Thomas Hobbes claimed that security is more desirable than liberty and therefore society should advocate more control and regulation of speech and less freedom. *Id.* at 70, 76. Adopting an opposite view, John Stuart Mill emphasized the necessity for freedom and the accompanying principle that the government should not be permitted to infringe upon a man's liberty unless others are harmed. *Id.* at 74.

[13] *See* Marcus, *supra* note 6, at 240 ("When the claim of restrictions on the substantive news is raised, the press normally prevails."); *infra* notes 20-41 and accompanying text (discussion of the Supreme Court's consistent protection of First Amendment speech rights under the clear and present danger test). *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 557 (1976) (the First Amendment prevents prior restraints which had been used by other governments); Sheppard v. Maxwell, 384 U.S. 333, 349-50 (1966) (in effectuating the theory that "justice can-

censorship.[14] The *Gentile* holding therefore denigrated First Amendment rights to express opinions, gather information, advocate reform, and publicly refute accusations.[15] Effectively divested of First Amendment rights, attorneys must compromise their professional obligations.[16]

Part I of this comment explores *Gentile*'s departure from the United State Supreme Court's consistent protection of free speech during criminal trials. Part II contrasts the harmful impact of these speech limitations with the negligible evidence that the speech would affect juries. Part III proposes alternative methods of protecting fair trials without inhibiting expression.

PART I

A. *History of Free Speech and Criminal Trials*

1. The United States Supreme Court

Traditionally, the United States Supreme Court limited speech narrowly and only when absolutely necessary.[17] Even

---

not survive behind walls of silence," the press is the "handmaiden of effective judicial administration"); Craig v. Harney, 331 U.S. 367, 383 (1947) (Murphy, J., concurring) ("any inroad made upon the constitutional protection of a free press tends to undermine freedom of all men to print and read the truth").

[14] The *Gentile* holding and current disciplinary rules lack clear guidance, threaten attorneys with disciplinary sanctions and therefore encourage self-censorship. *See infra* notes 162-76 and accompanying text (discussing the impact these rules have on attorneys and the satisfaction of their professional obligations).

[15] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 648 (1977) ("[S]ociety must, I think, preserve a climate in which citizens can seriously consider the option to engage in civil disobedience as a means of combatting abuses of official power."); *see infra* notes 148-61 and 177-99 and accompanying text for discussion of the impairment of societal interests that attorney comment rules create.

[16] Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411, 1422-23 (1990) (attorneys, fearing disciplinary action, will remain silent and neglect their obligation to expose injustice and vigorously advocate on behalf of their client). *See infra* notes 162-76 and accompanying text for discussion of the effect of disciplinary rules on attorneys.

[17] *See, e.g.*, Bates v. State Bar, 433 U.S. 350 (1977) (First Amendment protected attorney advertising); Cohen v. California, 403 U.S. 15 (1971) (individual wearing jacket declaring "Fuck the Draft" was protected by First Amendment); Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ku Klux Klan freedom of expression protected unless threat of violence was substantial and imminent); New York Times v. Sullivan, 376 U.S. 254 (1964) (police official's libel award for disparaging advertisement placed in New York Times by opponents was reversed as violating free speech rights); Near v. Minnesota, 283 U.S. 697 (1931) (striking down statute prohibiting press from publishing malicious and scandalous defamatory papers). This protection of free speech rights began as early as John Peter Zenger's trial for libel, in 1735, in which a jury acquitted him despite the fact that jurors were instructed only to determine whether Zenger printed the alleged comments, which he admitted,

when First Amendment rights clashed with other constitutional rights, the Court consistently protected speech unless it posed a clear and present danger to the government or society.[18] Applying the clear and present danger analysis to the judicial forum, the Court proclaimed that the First Amendment protects public access to criminal trials, the right to gather information from those attending trials and the ability to criticize the judicial process.[19]

---

and not whether the comments were libelous or untrue. COMMISSION ON THE BICENTENNIAL, *supra* note 1, at 14. Zenger's attorney, Andrew Hamilton, commended the jury for its recognition of the sacredness of free speech: "You have laid a noble foundation for securing to ourselves that to which Nature and the Laws of our country have given us a Right — The Liberty — both of exposing and opposing arbitrary Power by speaking and writing Truth." *Id. See* Todd, *supra* note 1, at 1207 (primary purpose of the First Amendment is protection and encouragement of "unfettered interchange of ideas for the bringing about of political and social change;" protection extends to communication process as a whole); REDISH, FREEDOM OF EXPRESSION, *supra* note 2, at 175-86 (history of clear and present danger test); WARREN FREEDMAN, PRESS AND MEDIA ACCESS TO THE CRIMINAL COURTROOM 92 (1988) [hereinafter FREEDMAN, PRESS AND MEDIA ACCESS] (the reasonable likelihood standard fails to adequately protect freedom of speech).

[18] *See supra* note 17 for discussion of First Amendment protection in various circumstances.

[19] For examples of cases in which the Court found that public access rights either did not conflict with or outweighed interests in protecting the trial process from interference see Butterworth v. Smith, 110 S. Ct. 1376 (1990) (holding unconstitutional a statute prohibiting a witness from revealing testimony before a grand jury after grand jury terminated the investigation); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (a First Amendment right of access to criminal proceeding transcript could be limited only narrowly and when essential to the preservation of a higher interest); Globe Newspaper v. Superior Court, 457 U.S. 596 (1982) (statute prohibiting press access to testimony of minor victims of sex offenses found unconstitutional); Richmond Newspapers v. Virginia, 448 U.S. 555, 564 (1980) (noting that a significant factor in evaluating speech rights in judicial contexts was that "throughout its evolution, the trial has been open to all who cared to observe"); Landmark Communications v. Virginia, 435 U.S. 829, 845 (1978) (reversing criminal sanctions for divulging information regarding state review of judicial misconduct because "solidity of evidence" was not offered to show that a clear and present danger existed); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (restraints on access to information were only justified when a clear and present danger to fair judicial processes existed); NAACP v. Button, 371 U.S. 415 (1963) (restriction on attorney speech justified only if compelling interest exists); Wood v. Georgia, 370 U.S. 375 (1962) (reversing conviction of a sheriff for criticizing actions of trial judge because conviction violated First Amendment protection because comment did not present a clear and present danger to the administration of justice); *In re* Sawyer, 360 U.S. 622 (1959) (attorney's allegations of partiality in a trial were protected); Craig v. Harney, 331 U.S. 367, 374 (1947) (finding no clear and present danger to administration of justice and, therefore, newspaper article allegedly unfairly reporting events in a trial and attacking trial judge did not warrant conviction of newsman; "[w]hat transpires in the courtroom is public property"); Pennekamp v. Florida, 328 U.S. 331 (1946) (protecting newspaper cartoons criticizing events in non-jury proceedings); Bridges v. California, 314 U.S. 252

In *Bridges v. California*,[20] the Supreme Court applied the clear and present danger test to protect media criticism of judicial conduct during a criminal trial.[21] Applying free speech protection to the states under the Due Process clause of the Fourteenth Amendment,[22] the majority posited that the First Amendment was intended to afford the broadest scope of protection possible in an "orderly society."[23] Justice Black, writing for the Court, stated that evaluating the potential threat of a particular comment required consideration of the attendant circumstances and the likelihood of actual harm.[24] The Court, noting that neither an inherent nor a reasonable tendency to cause harm justified speech restraint, concluded that the harm must not merely be likely but virtually certain.[25]

The Supreme Court continued strict protection of judicial criticism in *Pennekamp v. Florida*.[26] The Court again mandated the clear and present danger test to determine an expression's capacity for danger.[27] On behalf of the Court, Justice Reed reiterated the recommendation in *Bridges* that free expression be given the broadest protection without jeopardizing the administration of justice.[28] The Court also cautioned against prohibiting expression, noting that once the door to free expression was closed, "it close[d] all doors behind it."[29]

(1941) (reversing the conviction of newspaper publisher, protecting the right to criticize judicial actions); Patterson v. Colorado, 205 U.S. 454 (1907) (articles and cartoons regarding judge and impartial administration of justice were protected by the First Amendment).

20 314 U.S. 252 (1941).

21 *Id.* at 262-63. The Supreme Court reversed the contempt convictions of a newspaper publisher and editor for out-of-court statements regarding a judge's actions in a pending case. *Id.* at 258, 270.

22 *Id.* at 268. The Court acknowledged that *Bridges*, for the first time since 1925, presented the Court with the constitutionality of a state's use of the contempt power. *Id.* The Court declared that state decisions would not be permitted to "destroy the historic constitutional meaning of freedom of speech and of the press." *Id.*

23 *Id.* at 265. The Court paralleled the scope and purpose of speech rights to that of freedom of religion and assembly. *Id.*

24 *Id.* at 271. Justice Black warned that all utterances cannot be deemed prejudicial to trials. *Id.*

25 *Id.* at 262-63, 272-73.

26 328 U.S. 331 (1946). The Supreme Court reversed the contempt convictions of a publisher and an editor for publishing cartoons and editorials which criticized actions of state circuit courts and judges in non-jury proceedings. *Id.* at 333, 350.

27 *Id.* at 335.

28 *Id.* at 347. The Court advised that in "borderline instances" the freedom of speech outweighs the possibility of prejudice. *Id.*

29 *Id.* at 350. The Court recognized, however, that such a right is not absolute

Focusing specifically on attorney speech rights in *In re Sawyer*,[30] the Supreme Court addressed the constitutionality of disciplinary restraints on extrajudicial comment.[31] Writing for the Court, Justice Brennan stated that an attorney should be permitted to attack improper judicial administration despite personal involvement.[32] The Justice declared that trial participation does not render attorneys' extrajudicial comments more censurable.[33] Recognizing the importance of governmental scrutiny, the Court noted that effective criticism of abuse must inform the lay person as well as the professional.[34]

In *Nebraska Press Ass'n v. Stuart*,[35] the Supreme Court considered the regulation of trial participants' speech via specifically

---

and must be weighed against the necessity for control over the administration of justice in a particular case. *Id.* at 349-50. The right to speak must yield when the danger to fair adjudication is clear, immediate and substantial. *Id.* Justice Frankfurter, concurring, stated that keeping the door of public comment open is essential to safeguarding society's and the accused's rights. *Id.* at 354-57 (Frankfurter, J., concurring).

30 360 U.S. 622 (1959).

31 *Id.* at 623-25. The Bar Association of Hawaii brought charges against Sawyer for questioning the impartiality and fairness of a trial judge in a highly publicized Smith Act trial. *Id.* at 623-24. The defense attorney criticized the FBI's investigation, the insufficiency of evidence and the youth of the defendants. *Id.* at 629. Defense counsel was sanctioned for violating Canons 1 and 22 of the ABA Canons of Professional Ethics. *Id.* at 625. Canon 1, entitled "The Duty of the Lawyer to the Courts," required the attorney to maintain a respectful attitude towards the court. *Id.* n.3. Canon 22, entitled "Candor and Fairness," mandated that an attorney's conduct be "characterized by candor and fairness" and that a lawyer should not attempt to improperly influence the court. *Id.*

32 *Id.* at 636. The Court noted that no distinction should be drawn between an attorney involved in a case and an attorney uninvolved. *Id.* Justice Brennan asserted that attorney comment should not be restricted for attacking the credibility or honesty of the judiciary because appellate courts often disparage other courts without any "disgrace" to the judiciary: "The public attribution of honest error to the judiciary is no cause for professional discipline in this country." *Id.* at 635.

33 *Id.* at 636. The Court condemned any restriction on an attorney's out-of-court remarks solely on the basis of his involvement in litigation. *Id.* The majority asserted that such comments should not be deemed any more "censurable" than similar remarks made by a different source. *Id.* Justice Frankfurter, dissenting, argued that granting attorneys free reign jeopardized their responsibilities to the bar and encouraged the trial of cases in the press rather than the courtroom. *Id.* at 649 (Frankfurter, J., dissenting). Justice Frankfurter also declared that an attorney participating in a trial was no longer an ordinary citizen but "an intimate and trusted and essential part of the machinery of justice" and must forgo the opportunity to speak immediately and wait until a more appropriate time or simply make his claims to the court. *Id.* at 668 (Frankfurter, J., dissenting).

34 *Id.* at 632. The Court opined that "oftentimes the law is modified through popular criticism." *Id.*

35 427 U.S. 539 (1976).

tailored gag orders.[36] Although recognizing the constitutionality of gag orders in exceptional cases, the Court noted that only where a clear and present danger exists is speech restraint justified.[37] Chief Justice Burger mandated that gag orders restrict speech narrowly and only to protect more compelling interests.[38]

---

[36] *Id.* at 541. The Supreme Court held unconstitutional a gag order that restrained the press from reporting accounts of the accused's confession, or information implicating the accused in a murder, despite the fact that all the parties consented to the order. *Id.* at 541-42, 570. For analysis of the *Nebraska Press* holding and its implications, see Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977) (analyzing *Nebraska Press* holding and doctrine of prior restraint with respect to gag orders and discussing subsequent punishment and prior restraint); James C. Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Association v. Stuart, 29 STAN. L. REV. 497 (1977) (concluding that the *Nebraska Press* opinion is a major victory for the press); Robert D. Sack, *Principle and* Nebraska Press Association v. Stuart, 29 STAN. L. REV. 411 (1977) (criticizing *Nebraska Press* holding for failing to protect the press's constitutional rights); Benno C. Schmidt, Jr., Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431 (1977) (analyzing the *Nebraska Press* opinion and cases leading up to it and assessing *Nebraska Press*'s impact on the free speech and fair trial issue); Richard M. Schmidt, Jr. & Ian D. Volner, Nebraska Press Association: *An Open or Shut Decision?*, 29 STAN. L. REV. 529 (1977) (questioning whether courts will actually heed the Court's *Nebraska Press* ruling or disregard it and continue to infringe speech rights); Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977) (broad gag orders are unnecessary since juries are able to put aside knowledge gained from the media and look only to the evidence presented in court when reaching a verdict); Diane Pappas, Comment, *First Amendment Protection of Criminal Defense Attorney's Extrajudicial Statements in the Decade Since* Nebraska Press Association v. Stuart, 8 WHITTIER L. REV. 1021 (1987) (analyzing the different standards incorporated in gag orders by federal courts of appeals); Swartz, *supra* note 16, at 1420-21 (analyzing *Nebraska Press*'s endorsement of gag orders and the appropriateness of such orders under the First Amendment); Todd, *supra* note 1, at 1175-81 (analyzing the use and appropriateness of gag orders in general). *See also* Paul J. Rudinsky, Note, *Finding the Path Between An Attorney's First Amendment Right to Free Speech and A Client's Sixth Amendment Right to a Fair Trial*: Levine v. U.S. District Court, 22 WILLAMETTE L. REV. 187 (1986) (comparing *Nebraska Press Ass'n* with Levine v. United States District Court, 764 F.2d 590 (9th Cir. 1985), in which the Ninth Circuit struck down a court order that precluded attorney comment even before jury selection).

[37] *Nebraska Press Ass'n*, 427 U.S. at 563, 570. The trial judge could only speculate on the effect publicity would have on jurors not yet chosen and so could conclude only that a clear and present danger might exist. *Id.* at 563. *See* Pappas, *supra* note 36, at 1025.

[38] *Nebraska Press Ass'n*, 427 U.S. at 566. The Court included in those interests the impartiality of jurors. *Id.* In protecting the impartiality of jurors, however, the Court mandated consideration of the unpredictable impact of information on jurors and the possibility that the publicity would not bias the jurors. *Id.* at 567. *See* Joel H. Swift, *Restraints on Defense Publicity in Criminal Jury Cases*, 1984 UTAH L. REV. 45, 53-54 (1984) [hereinafter Swift, *Restraints*] (the *Nebraska Press* test measures the gravity of evil and the probability of harm occurring and requires that these factors justify imposing prior restraints as necessary).

Acknowledging the finely drawn distinction between productive and destructive speech, the Court demanded that a comment create such a clear and present threat to the impartiality of potential jurors that twelve could not be found capable of rendering a fair verdict.[39] The Court recommended consideration of three factors before issuing gag orders: a) the nature and extent of the pretrial publicity; b) the availability of other measures to alleviate the effects of unrestricted pretrial publicity; and c) the restraining order's ability to prevent the threatened danger.[40] The majority concluded that when the impact of publicity was speculative, when alternate methods to mitigate the harm existed and when the success of a restraining order was unpredictable, an order would not escape the presumption of unconstitutionality.[41]

The Supreme Court also acknowledged the dangers created by unrestricted pretrial publicity in *Sheppard v. Maxwell*.[42] A circus of media attention engulfed the murder trial in *Sheppard* which the trial judge neglected to monitor or control.[43] The judge failed to sequester the jury,[44] order a change of venue or delay trial until publicity receded.[45] Justice Clark, writing for the majority, burdened the trial judge with the primary responsibility

---

39 *Nebraska Press Ass'n*, 427 U.S. at 567, 569. The Court also noted that the temporary nature of a gag order's burden on speech did not lessen the government's burden of proving that the restraint was necessary. *Id.* at 559. Justice Powell, concurring, recognized that gag orders must be based on a "high likelihood" of harm to the judicial system. *Id.* at 571. The Justice explained that the proponent of a restriction must show: a) that a clear threat to fair judicial processes existed; b) that the threat was posed by the particular publicity to be restricted; and c) that no other less restrictive means existed to prevent the harm. *Id.* at 571 (Powell, J., concurring). Justice Brennan, also concurring, noted the democratic preference for punishing First Amendment abuses only after the abuse occurred and not restraining a wider range of speech in order to prevent the abuse from occurring. *Id.* at 589 (Brennan, J., concurring).

40 *Id.* at 562. The Court emphasized Learned Hand's warning that the gravity of the harm must be "discounted by its improbability." *Id.*

41 *Id.* at 569. The Court enumerated the alternatives to gag orders discussed in *Sheppard*: change of venue, postponement, voir dire, jury instructions and sequestration. *Id.* at 563-64.

42 384 U.S. 333 (1966).

43 *Id.* at 338-49. *See infra* note 46 for details of the publicity sanctioned by the trial judge. *See also* Sheldon Portman, *The Defense of Fair Trial from* Sheppard *to* Nebraska Press Association: *Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 404 (1977) (judge did nothing to monitor publicity or to instruct jurors primarily because he thought he was powerless to act).

44 *Sheppard*, 384 U.S. at 345, 349. The judge only sequestered the jury during deliberations, not during the trial itself. *Id.* at 349.

45 *Id.* at 352-53. The Court declared that "the arrangements made by the judge with the news media caused Sheppard to be deprived of that 'judicial serenity and calm to which [he] was entitled.'" *Id.* at 355.

to mitigate the egregious effects of rampant media attention.[46] Unfortunately, the *Sheppard* holding spawned restrictions on attorney comment as bar associations and courts misinterpreted *Sheppard* as an endorsement of the reasonable likelihood standard for attorney speech restriction.[47] Although the Court recommended attorney speech restraints, that suggestion was limited to the specific circumstances in *Sheppard*.[48]

---

[46] *Id.* at 363. The Supreme Court in *Sheppard* overturned a murder conviction, finding overwhelming evidence of prejudicial pretrial publicity that the trial judge failed to control by any of the traditional methods. *Id.* at 335. A doctor was convicted for murdering his wife. *Id.* The uncontrolled press activity surrounding the trial consisted of the following abuses: the press reported in detail a "re-enactment" that the defendant was coerced into performing for the coroner and a police officer without the presence of counsel; the press made a live broadcast of an inquest in which the coroner, prosecutor, detectives and hundreds of spectators attended, but in which the defense counsel was not permitted to participate and from which he was forcibly removed when attempting to defend his client; newspaper reports detailing the proceedings from the date of the murder until the defendant's conviction occupied five volumes; press and other media were given free reign in the court house during the trial and allowed to set up broadcasting equipment in a room next to the jury room to broadcast during trial and juror deliberations; no restraints were issued regarding photography except during actual sessions at court; movement by the press within the courtroom was loud and often disturbed the proceedings; crowding within the bar of the courtroom prohibited confidential conversations between defendant and his counsel; press reported on the jurors, detailing the home life of an alternate juror; a day before the verdict was delivered the jurors, who had been sequestered for their lunch break, were separated into two groups and photographed for pictures later published in the newspaper; and jurors, who were not sequestered during the body of the trial, were allowed to make daily telephone calls while sequestered during deliberation. *Id.* at 338-349. The Court relied on a New Jersey case in which the New Jersey Supreme Court advocated restraint of trial participants' speech. *Id.* at 361 (citing State v. Van Duyne, 43 N.J. 369, 204 A.2d 841, *cert. denied*, 380 U.S. 987 (1964)).

[47] Courts have relied on *Sheppard* when endorsing standards for attorney comment that are less protective of attorney speech. *See, e.g.*, Gentile v. State Bar, 111 S. Ct. 2720, 2741 (1991) (endorsing the substantial likelihood test for attorney disciplinary rules); Hirschkop v. Snead, 594 F.2d 356, 369 (4th Cir. 1979) (validating the reasonable likelihood standard); *In re* Hinds, 90 N.J. 604, 619, 449 A.2d 483, 491 (1982) (upholding the reasonable likelihood test). Many drafting committees claimed that *Sheppard* endorsed a lower standard of protection for attorney comment. *See, e.g., Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391, 401 (1968) [hereinafter Kaufman Committee Report] (committee, chaired by Judge Irving R. Kaufman, recommending restrictions on attorney comment and citing *Sheppard*). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-1-7 (1980) (recommending the "reasonable likelihood" standard). *See infra* notes 57-83 and accompanying text for a discussion of these committees.

[48] *See* Scott M. Matheson, Jr., *The Prosecutor, The Press and Free Speech*, 58 FORDHAM L. REV. 865, 925 (1990) (since *Sheppard* mandated that a trial judge take measures to protect the trial, some justifications for no comment rules disappear and are only needed when the judge cannot or will not restrain prejudicial speech); Portman, *supra* note 43, at 393 n.4 (an attorney who witnessed the trial analyzed *Sheppard* and

Various authorities misinterpret the *Sheppard* Court's intent.[49] Although Justice Clark suggested that an attorney collaborating with the media should be disciplined, the Court did not advocate restraining attorneys in general.[50] The Justice instead warned that collusion which threatened the administration of justice would not be tolerated as an expression of free speech.[51]

Similarly, the Court's suggested that trial courts control participants' statements.[52] This suggestion did not advocate restrictions on all attorney commentary but merely endorsed explicit orders restraining participants in a specific trial.[53] The Court referred to a reasonable likelihood test only with respect to a particular trial judge's obligation to alleviate prejudice.[54] The Court's decision, therefore, cannot be removed from the circumstances of the *Sheppard* trial.[55] Discussion of publicity's evils and the methods available to mitigate these evils was ancillary to the Court's holding that the trial judge improperly neglected his duties.[56]

---

detailed the judge's neglect, attributing it partially to the judge's mistaken belief that the court lacked the power to do anything); Max D. Stern, *The Right of the Accused to a Public Defense*, 18 HARV. C.R.-C.L. L. REV. 53, 84-85 (1983) (*Sheppard* did not present facts on which to assess the impact of defense comment but, unfortunately, the Court's dictum established a basis for restraints by suggesting that the speech of all trial participants interfered with trial).

49 These authorities quote statements in the Court's opinion out of context. *See, e.g.*, Hirschkop v. Snead, 594 F.2d 356, 370 (4th Cir. 1979) (stating that, if not expressly, the *Sheppard* Court implicitly endorsed attorney speech restraint). For other misinterpretations of the *Sheppard* holding, see cases cited *supra* note 47.

50 *Sheppard*, 314 U.S. at 363. The Court noted that the cure for publicity "lies in those remedial measures that will prevent the prejudice at its inception." *Id.*

51 *Id.* The Court warned that "collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Id.*

52 *Id.* at 359. The Court recommended that trial judges "control the release of leads, information, and gossip to press by police officers, witnesses, and the counsel for both sides." *Id.*

53 *Id.* This description implicates methods such as gag orders which restrict all participants.

54 *Id.* at 363. The Court argued that a trial judge in circumstances such as those in the *Sheppard* trial should have recognized the harm caused by the extensive publicity and taken measures to mitigate the harm. *Id.* at 362-63. Such measures included continuing the case until publicity and public outcry abated, transferring the case to another court, sequestering jurors during the trial, and ordering a new trial if publicity could not be resolved in the current trial. *Id.* at 363.

55 *See supra* note 47 for discussion of authorities taking the *Sheppard* holding out of context. *See also*, Swift, *Restraints*, *supra* note 38, at 49-50 ("*Sheppard* was clearly not about defense publicity" but about a trial judge who believed he was powerless to control the publicity and allowed the press to monopolize the courtroom and interfere with the trial process).

56 Swift, *Restraints*, *supra* note 38, at 50 (the *Sheppard* Court devoted 12 pages and

2. Disciplinary Comment Rules

The misreading of *Sheppard* yielded a debate among courts and bar associations regarding the proper standard for attorney comment rules.[57] The American Bar Association's continually changing codes and rules of conduct generated most of the litigation.[58] In 1908, the American Bar Association developed the Ca-

---

3200 words to describing the rampant publicity unchecked by the trial judge, which did not include a single example of defense attorney comment, and only 19 words regarding statements by the accused). *See* Swift, *Model Rule 3.6*, *supra* note 2, at 1045 (the constitutionality and propriety of attorney comment regulations was neither briefed nor argued in *Sheppard*); Comment, *supra* note 36, at 1031 (the *Sheppard* Court did not address the constitutionality of the reasonable likelihood standard or any other standard for attorney speech restraints); Matheson, *supra* note 48, at 917 ("Because no comment rules apply generally to extrajudicial lawyer speech, their enforcement is at least a step removed from the *Sheppard* trial court's fair trial management function.").

[57] For courts endorsing the clear and present danger standard, see *In re* Oliver, 452 F.2d 111 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); United States v. Garcia, 456 F. Supp. 1354 (D.P.R. 1978); *In re* Lasswell, 673 P.2d 855 (Or. 1983). For courts adopting the reasonable likelihood test see United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *In re* Eisenberg, 423 N.W.2d 867 (Wis. 1988); National Broadcasting Co. v. Cooperman, 501 N.Y.S.2d 405 (App. Div. 1986); *In re* Keller, 693 P.2d 1211 (Mont. 1984); *In re* Rachmiel, 90 N.J. 646, 449 A.2d 505 (1982); People v. Dupree, 388 N.Y.S.2d 203 (1976); Younger v. Smith, 106 Cal. Rptr. 225 (Ct. App. 1973). *See also infra* notes 95-120 and accompanying text for detailed analysis of four notable cases examining the conflicting standards.

[58] *See* Robert H. Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 319 (1976) (the constantly changing ethical standards recommended by the ABA have resulted in "a set of ambiguous and contradictory rules" and the "inability to impose discipline effectively in all but instances of the most egregious misconduct"). These abundant variations of the rules have resulted from their lack of success in actually resolving ethical dilemmas. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 642 (1981). Abel detailed the various rules, focusing on the faults of the Kutak Commission and the Model Rules of Professional Conduct. *Id.* at 639-52. The ABA, according to Abel, simply restated the dilemma in "mystifying language that obscures the issues through ambiguity, vagueness, qualification; and hypocrisy" so they must be constantly revised to renew their force. *Id.* at 686. For a critical analysis of Professor Abel's allegations, see Marvin E. Frankel, *Why Does Professor Abel Work at Such a Useless Task?*, 59 TEX. L. REV. 723, 725 (1981) (criticizing Abel for failing to propose alternative solutions).

For a thorough analysis of the ABA disciplinary standards and their implications, see 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§ 201-205 (2d. ed. 1990) (concise chronology and description of the various rules); FREEDMAN, PRESS AND MEDIA ACCESS, *supra* note 17, at 88-92 (analyzing the evolution and changing standards of the ABA rules and discussing rules governing contact and communication with jurors, witnesses and officials); Stern, *supra* note 48, at 84-95 (detailing the various committees and reports on defense lawyer comment and the litigation following each committee's recommendations); Reed E. Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 323 (1987) (comparison of the Model Code of Professional Responsibility and

nons of Professional Ethics.[59] Canon 20 specifically addressed out-of-court statements by attorneys.[60] The Canons, however, were unable to address the growing scrutiny of the criminal justice system by the press or to eliminate disruptions in the trial process.[61] The conflict between the public's right of access and the government's interest in administering justice without interference climaxed with the investigation of the Kennedy assassination.[62] The Warren Commission, conducting a highly publicized inquiry, expressed the need for ethical restraints to ensure that public curiosity would not impair an accused's rights.[63]

In response to the Warren Commission's recommendations,

---

the Model Rules of Professional Conduct, classifying the latter as more descriptive yet "seek[ing] too much and too little"). *Cf.* ABA COMMISSION ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 6-7 (1986) (the rules encourage minimum standards of conduct but fail to encourage lawyers to achieve higher ethical standards).

59 FREEDMAN, PRESS AND MEDIA ACCESS, *supra* note 17 at 88. The first code of legal ethics formulated in this country was created in 1887 in Alabama. *Gentile v. State Bar*, 111 S. Ct. 2720, 2740 (1991). That Code warned attorneys to avoid media comment because such publicity tended to prejudice the administration of justice. *Id.* Until the nineteenth century, attorney conduct was governed by the common law and by unofficial and advisory compilations based on principles of legal ethics. 1 HAZARD & HODES, *supra* note 57, § 201. State bar associations began adopting advisory codes of ethics based on these compilations. *Id. See also* Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective On Professional Codes*, 59 TEX. L. REV. 689, 693 (1981) (noting that in the early 1900's an "influx of new practitioners" required disciplinary rules which were previously unnecessary).

60 Canon 20, entitled "Newspaper Discussion of Pending Litigation," stated:

> Newspaper publications 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.

AMERICAN BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 15 (1957). Opinion 199 stated that although the committee "doubt[ed] that the effect of public opinion would sway or bias the judgment of the trial judge in an equity proceeding," the defendant should not have to risk prejudice to his case. ABA Comm. on Professional Ethics and Grievances, Formal Op. 199 (1957).

61 *See* Paul C. Reardon, *The Fair Trial—Free Press Standards*, 54 A.B.A. J. 343 (1968) (pretrial publicity was a concern of trial judges and the bar and many advocated restrictions); Matheson, *supra* note 48, at 873 (Canon 20 was too vague to provide adequate guidance for attorneys and was rarely enforced).

62 Matheson, *supra* note 48, at 873.

63 *Id.* The Warren Commission published the Report of the President's Commission on the Assassination of President John F. Kennedy (1964), which suggested that Lee Harvey Oswald could not have been given a fair trial due to all the media attention surrounding the assassination. *Id.* at n.36.

the American Bar Association appointed The Advisory Committee on Fair Trial and Free Press, in 1964, to revise the Canons.[64] That Committee proposed the Model Code of Professional Responsibility, applying the less protective "reasonable likelihood of material prejudice" standard which was quickly adopted in

---

64 *Gentile v. State Bar*, 111 S. Ct. 2720, 2740 (1991). The Advisory Committee on Fair Trial and Free Press, chaired by Paul C. Reardon of the Massachusetts Supreme Judicial Court, was a special committee to the Committee on Minimum Standards for the Administration of Criminal Justice, led by J. Edward Lumbard, Chief Judge of the United States Court of Appeals for the Second Circuit. Reardon, *supra* note 61, at 343. The Committee recommended that guidelines for ethical conduct be established to ensure that there would not be any interference with the administration of justice in criminal matters. Kaufman Committee Report, *supra* note 47, at 407. *See also* Drechsel, *supra* note 5, at 8-9 (Reardon Committee and other commissions promulgating rules was a response to the Kennedy assassination and the Warren Commission's report); Portman, *supra* note 43, at 407 (the Reardon Committee, following the *Sheppard* holding, advocated several remedies for trial publicity); Schmidt, *supra* note 36, at 452-55 (Reardon Committee initiated extensive evaluation of the fair trial — free press dilemma).

The American Newspaper Publishers Association also studied the impact of publicity on trials and a committee of newspaper executives issued its report, Free Press and Fair Trial, on January 5, 1967. Kaufman Committee Report, *supra* note 47, at 397 n.6. The Bar of the City of New York also conducted its own investigation under the Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, chaired by Senior Judge Harold R. Medina of the U.S. Court of Appeals for the Second Circuit. *Id.* at 397 & n.7. This Committee, originally composed in 1963, released its first report in 1965, entitled *Radio, Television and the Administration of Justice: A Documented Survey of Materials*, and its final report, entitled *Freedom of the Press and Fair Trial*, in 1967. *Id.* Like the Reardon Committee, the Medina Committee suggested greater restraints on trial participant speech rather than the use of contempt power against the press. Drechsel, *supra* note 5, at 9. The Committee also encouraged the media to voluntarily devise its own code of ethical conduct. *Id.*

Relying on the Reardon and Medina Committee reports, and in response to the Supreme Court's holding in *Sheppard v. Maxwell*, the Judicial Conference of the United States created a committee to study the need for guidelines relating to publicity. *Gentile*, 111 S. Ct. at 2741. The Committee published its recommendations in the *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391, 404-15 (1968) (also known as the Kauffman Report). Stern, *supra* note 48 at 89 n.117. The Committee was chaired by Judge Irving R. Kaufman and limited its study to the effects of pretrial publicity in criminal cases. Kaufman Committee Report, *supra* note 47, at 392-93 (1968). The Kauffman Committee recommended local rules that would control out-of-court statements posing a reasonable likelihood of interfering with or prejudicing the trial process, particularly in highly publicized cases. Stern, *supra* note 48, at 89.

For more information regarding these studies and their recommendations, see Swift, *Model Rule 3.6*, *supra* note 2, at 1033-37 (focusing primarily on the Reardon Committee); Matheson, *supra* note 48, at 873-74 (detailing the history of the rules and early unenforced rules); Portman, *supra* note 43, at 407-08 (detailing the aftermath of *Sheppard* and the steps taken by the A.B.A. Committee); Stern, *supra* note 48, at 88 (discussion of the Medina Committee).

many jurisdictions.[65] The Model Code addressed pretrial publicity and attorney comment in Canon 20, Ethical Consideration 7-33[66] and Disciplinary Rule 7-107.[67] In 1978, however, the American Bar Association adopted the Standards for Criminal Justice,

---

65 1 HAZARD & HODES, *supra* note 58, at § 202. The Model Code of Professional Responsibility, adopted by the ABA in 1969, was organized in three parts: 1) generalized axiomatic principles or Canons; 2) explanatory provisions which were called Ethical Considerations or EC's; and 3) black letter rules called Disciplinary Rules or DR's. *Id.* DR's represented the minimum standard of legal ethics. *Id.* The Canons and Ethical Considerations were intended as guidelines, but all three principles were usually given the same binding effect by the courts. *Id.* For commentary on these rules, see FREEDMAN, PRESS AND MEDIA ACCESS, *supra* note 17, at 89 (DR 7-107 guarantees fair trials by balancing free speech and the need to prevent interference with the trial process); Loder, *supra* note 58, at 331 ("the tripartite structure of the *Model Code* may be unworkable, but it recognizes the complexity" of professional conduct issues); Stern, *supra* note 48, at 88 n.114 (the Reardon Committee advocated attorney restraints without sufficient examination of First Amendment concerns).

66 Ethical Consideration 7-33 provided that:

> A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-33 (1980).

67 Disciplinary Rule 7-107, entitled "Trial Publicity," provided in pertinent part:

> (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
>
> (1) Information contained in a public record.
>
> (2) That the investigation is in progress.
>
> (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
>
> (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
>
> (5) A warning to the public of any dangers.
>
> (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

promulgated by the Goodwin Committee, to regulate prosecu-

---

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

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

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

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

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

. . . .

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

tion and defense counsel conduct during criminal trials.[68] The standards were proposed following the Supreme Court's recognition in *Nebraska Press Ass'n v. Stuart*[69] that prior restraints on the press violated First Amendment rights.[70] Perceiving that the *Sheppard* holding overvalued fair trial interests to the detriment of free speech, the drafters attempted to redefine the balance of these two equally important rights.[71] Standard 8-1.1,[72] address-

---

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980) (emphasis added) (omitted sections DR 7-107(F)-(H) address professional and juvenile disciplinary proceedings, civil actions and administrative proceedings). Eleven states have adopted Disciplinary Rule 7-107 of the ABA Code of Professional Responsibility and the reasonable likelihood of prejudice test: Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, North Carolina, Ohio, Tennessee and Vermont. *Gentile*, 111 S. Ct. at 2741 n.2.

68 Stern, *supra* note 48, at 92.

69 427 U.S. 539 (1976). *See supra* notes 35-41 and accompanying text.

70 2 ABA STANDARDS FOR CRIMINAL JUSTICE Introduction at 8.45 (2d Ed. Supp. 1986).

71 *See id.*

72 Standard 8-1.1, addressing extrajudicial comments, provided:

> (a) A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication *if such dissemination would pose a clear and present danger to the fairness of the trial.*
>
> (b) Subject to paragraph (a), from the commencement of the investigation of a criminal matter until the completion of trial or disposition without trial, a lawyer may be subject to disciplinary action with respect to extrajudicial statements concerning the following matters:
>
> (i) the prior criminal record (including arrests, indictments, or other charges of crime), the character or reputation of the accused, or any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case;
>
> (ii) the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make statement;
>
> (iii) the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test;
>
> (iv) the identity, testimony, or credibility of prospective witnesses;
>
> (v) the possibility of a plea of guilty to the offense charged, or other disposition; and
>
> (vi) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.
>
> (c) It shall be appropriate for the lawyer, in the discharge of official or professional obligations, to announce the accused's name, age, residence, occupation, family status, and, if the accused has not been apprehended, any further information necessary to aid in the accused's apprehension or to warn the public of any dangers that may exist; to announce the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; to announce the identity of the victim if the release of that information is not otherwise prohibited by law; to announce, at

ing extrajudicial comment, required proof that the comment would create a clear and present danger to judicial administration before restraint was warranted.[73] The Goodwin report left the punishment of attorney comment to a case by case analysis, affording attorney speech rights great deference.[74] Standard 8-1.1 failed to include any guidance, however, in applying the clear and present danger test.[75]

In 1977, examining the Goodwin Committee's suggestions, the ABA proposed a fourth set of standards under the Kutak Commission[76] in response to criticism that the Code of Profes-

---

the time of seizure, a description of any physical evidence (other than a confession, admission, or statement); to announce the nature, substance, or text of the charge, including a brief description of the offense charged; to quote or refer without comment to public records of the court in the case; to announce the scheduling or result of any stage in the judicial process; to request assistance in obtaining evidence; and to announce without further comment that the accused denies the charges.

(d) Nothing in this standard is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him or her.

2 ABA STANDARDS FOR CRIMINAL JUSTICE standard 8-1.1 (1978) (emphasis added).

73 FREEDMAN, PRESS AND MEDIA ACCESS, *supra* note 17, at 92 (offering a thorough analysis of Standard 8-1.1). The change to a clear and present danger analysis reflected the "dramatic upsurge in constitutional law affecting the area, a revolution in media technology, and a growing perception among many lawyers and laypersons that the courts should be opened more fully to public scrutiny." Kenneth J. Hodson, Report No. 1 of the Standing Committee on Association Standards for Criminal Justice, 103 ANN. REP. A.B.A. 680, 680 (1978). The Committee acknowledged, although only in a footnote, that defense counsel's speech was valuable to a defendant's public defense. Stern, *supra* note 48, at 92. The Goodwin Committee stated in its 1978 report that Standard 8-1.1 was based upon the decision in Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), and provided a more specific regulation than the Model Code of Professional Responsibility. Hodson, *supra* at 681.

74 Stern, *supra* note 48, at 93. Statements relating to arrest, seizure of evidence or denial of charges were absolutely protected. *Id.* The Committee adopted the Reardon Committee's recommendations for prohibited speech and added restraints on information which lawyers knew or should have known would be inadmissible at trial. *Id.* at 93 & n.145. The Committee also added standard 3-1.1 specifically addressing prosecutors and their obligation to avoid interfering with fair trials and standard 4-1.3 which delineated defense counsel statements that should be avoided, particularly when intended to generate publicity for the lawyer. FREEDMAN, PRESS AND MEDIA ACCESS, *supra* note 17, at 92.

75 Stern, *supra* note 48, at 93.

76 The committee was also known as the ABA Special Commission on Evaluation of Professional Standards. 1 HAZARD & HODES, *supra* note 58, § 203.

sional Responsibility was constitutionally overbroad.[77] The Kutak Commission recommended the present Model Rules of Professional Conduct, including Rule 3.6[78] governing trial pub-

---

[77] *Id.* § 202. The Code was criticized because it did not recognize conflicts of interest involving past clients, nonlitigation situations and the multifaceted organizations within which attorneys work. *Id.* Moreover, portions of the Code, particularly those that addressed advertising, were held violative of the First Amendment. *Id.*

At the time of the Code's adoption, several representatives of the media opposed it, claiming that free speech did not harm the defendant and that these rules deprived citizens of vital information making it difficult to fight corruption and injustice. Proceedings of the 1968 Midyear Meeting of the House of Delegates, 93 ANN. REP. A.B.A. 109, 118 (1968). Other media representatives argued that editors should decide what information the public received and that the "total import of the Reardon report is to dry up official sources of news and to encourage censorship in all its repugnance." *Id.* Delayed release of information was condemned by these critics who claimed that "[t]o say that in the case of a Lee Harvey Oswald or Richard Speck the fears and confusion of a gravely concerned nation or community could be usefully allayed months after the event rather than at the earliest possible moment cannot be a tenable proposition." *Id.* For current criticism of the Code, see Loder, *supra* note 58, at 313 (criticizing the Code for its limited ability to answer practical questions regarding attorney conduct and for failing to provide clear guidelines). For detailed analysis of the Kutak Commission and its expressed purposes see Abel, *supra* note 58, at 646; Rhode, *supra* note 59, at 689.

[78] The American Bar Association Model Rule of Professional Conduct Rule 3.6 "Trial Publicity" stated:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication *if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.*
>
> (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
>
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
>
> (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
>
> (6) the fact that a defendant has been charged with a crime, unless

licity.[79] The new Model Rules revised the Model Code, adopting a Restatement format[80] and, in Rule 3.6, included a weak attempt

---

there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

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

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

(2) the information contained in a public record;

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

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

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

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

(7) in a criminal case:

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

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

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

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

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1986) (emphasis added).

Thirty-one states have adopted this rule either verbatim or with minimal variations. Gentile v. State Bar, 111 S. Ct. 2720, 2741 n.1 (1991). States adopting Rule 3.6 verbatim include: Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Wyoming. *Id.* States adopting variations of Rule 3.6 include: Delaware, Florida, Louisiana, Montana, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Texas and Wisconsin. *Id.* The New Jersey rule provides in pertinent part: "A lawyer shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." N.J.R.P.C. 3.6(a).

79 1 HAZARD & HODES, *supra* note 58, § 203. Two drafts were released in January 1980 and May 1981 and the Rules were officially adopted in 1983. *Id.* §§ 203, 205. For extensive analysis of Rule 3.6, its history and provisions, see Swift, *Model Rule 3.6*, *supra* note 2, at 1028-54; 1 HAZARD & HODES, *supra* note 58, §§ 3.6:200-3.6:401 (1985).

80 *Id.* § 203. The Model Rules are essentially black letter rules supplemented by commentary. *Id.* *See also* Loder, *supra* note 58, at 323 (stating that the Kutak Commission and the new rules "abandon the division in the *Model Code* between 'aspirational' (and unenforceable) 'Ethical Considerations' and the mandatory 'Disciplinary Rules' " and instead adopts a black letter format for easier enforcement).

to reconcile the reasonable likelihood and clear and present danger standards by establishing a "substantial likelihood" test.[81] The Model Rules of Professional Conduct were officially adopted by the ABA in 1983, augmenting the confusion created by the variety of state rules promulgated during the evolution of the ABA rules.[82] Three conflicting standards emerged that permit speech restraint when: a) a clear and present danger of imminent harm is presented; b) a substantial likelihood of material prejudice exists; or c) a reasonable likelihood of material prejudice is or should be recognized by the speaker.[83]

3. Conflicting Standards and Rule 3.6

The emergence of three standards raises questions regarding the difference, if any, between the standards.[84] Some commentators claim that none of the standards reconcile the

---

[81] *See* Stern, *supra* note 48, at 95 n.150. Rule 3.6 does not indicate whether a disciplinary board must prove a substantial risk was created or only that an attorney "reasonably" should have foreseen the risk. *Id.* Requiring proof only that an attorney should have realized the risk allows courts too much discretion to punish regardless of the actual probability and immediacy of the risk. *Id. But see* FREEDMAN, PRESS AND MEDIA ACCESS, *supra* note 17, at 88 (Rule 3.6 avoids the "Scylla and Charybdis" of the free speech and fair trial dilemma); 1 HAZARD & HODES, *supra* note 58, § 3.6:102 at 665 (Rule 3.6 builds on DR 7-107 of the Code of Professional Responsibility but changes the language and format and replaces the reasonable likelihood standard with a substantial likelihood standard); Cornelia H. Tuite, *A Slip of the Lip*, A.B.A. J., Apr. 1991, at 140 (Rule 3.6 was drafted to replace DR 7-107, which was overbroad, and to approximate the clear and present danger test's protection).

[82] *See* 1 HAZARD & HODES, *supra* note 58, § 205. Twenty-nine states revised and ten considered revising their standards during the ten years between the promulgation of the Model Code and the Rules. Abel, *supra* note 58, at 640 nn. 6-7. Abel also cited a study reporting the existence of 4,786 ethics opinions—315 by the ABA—and subsequent studies reporting 5,507 opinions including 1,086 by the ABA. *Id.* at 640 n.7.

[83] 2 ABA STANDARDS FOR CRIMINAL JUSTICE standard 8-1.1 commentary at 8.8 (1978).

[84] *See generally* BOGEN, *supra* note 8, at 41-42 (analyzing clear and present danger test in trial context); Thomas K. Pfister, Casenote, Kemner v. Monsanto Company, *The Illinois Supreme Court Confronts the Free Speech/Fair Trial Controversy*, 20 J. MARSHALL L. REV. 581, 588-93 (1987) (comparing the standards and determining that reasonable likelihood test is less restrictive and should be used in criminal trials where a greater danger of harm exists); Joseph T. Rotondo, Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 CORNELL L. REV. 1106, 1111-19 (1980) (distinguishing the standards); Swartz, *supra* note 16, at 1433-36 (reasonable likelihood standard is inconsistent with strong presumption against prior restraints); Sally R. Weaver, Comment, *Judicial Restrictions on Attorney's Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech*, 33 VAND. L. REV. 499, 503-12 (1980) (proposing dual standard because one standard cannot accommodate different circumstances).

competing First and Sixth Amendment interests due to the varying circumstances in which the speech occurs.[85] The time element, however, separates the standards of speech protection.[86] Under the clear and present danger test prejudice must be imminent and virtually certain.[87] In contrast, the reasonable likelihood and substantial likelihood tests eliminate a clear time element and permit restrictions when any chance of prejudice exists.[88] Almost any comment could prejudice a jury under different circumstances at a different time; these standards therefore

---

85 Weaver, *supra* note 84, at 512. *See* Matheson, *supra* note 48, at 930-32 (proposing that courts consider several factors before punishing or restraining speech: degree of harm, intent, burden of proof and timing).

86 *See* Patricia A. Sallen, Comment, *Gag Me With a Rule—Arizona Model Rules of Professional Conduct Rule 3.6 (1985)*, 19 ARIZ. ST. L.J. 115, 129 (1987) (the reasonable and substantial likelihood tests redress a harm that may not be present); *see also* Rotondo, *supra* note 84, at 1118 (the reasonable likelihood test lacks the imminence requirement of the clear and present danger standard); Swartz, *supra* note 16, at 1414 n.25 (the difference in the standards is the stricter language in the clear and present danger test that requires the "inescapable conclusion" that the speech will harm).

87 *See* Bridges v. California, 314 U.S. 252, 263 (1941) ("The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."); *see also* REDISH, *supra* note 2, at 204-06 (criticizing Meiklejohn's absolutist analysis of the clear and present danger test and discussing arguments that the test is overprotective); Pfister, *supra* note 84, at 592-93 (mere chance of harm is not sufficient to justify restraint).

88 Rotondo, *supra* note 84, at 1118. The substantial likelihood test approved in *Gentile* approaches the certainty of the clear and present danger test but, like the reasonable likelihood standard, fails to require clear, imminent and virtually irreversible harm. The test is therefore unconstitutional. *But see* Weaver, *supra* note 84, at 503-04 (clear and present danger and substantial likelihood tests are "substantively indistinguishable"). Hazard and Hodes equated "clear" with "material" and "present" with "substantially likely" to support their claim that both standards were equally effective. 1 HAZARD & HODES, *supra* note 58, § 3.6:201. These definitions conflict with common usage. For example, *Black's Law Dictionary* defines "clear" as "[o]bvious; beyond reasonable doubt. . . . [F]ree from all limitation, qualification, question or shortcoming. . . . Plain, evident, free from doubt or conjecture, unequivocal." BLACK'S LAW DICTIONARY 250 (6th ed. 1990).

Black's, however, defines "material" as "[i]mportant; more or less necessary; having influence or effect; going to the merits." *Id.* at 976. Thus, "clear" protects more speech, requiring that the danger be grave and immediate, virtually a reality. "Material," however, only requires that the danger be important and having an influence, any influence, before it can be restricted. *Black's* defines "present" to mean "now existing; at hand; relating to the present time; considered with reference to the present time." *Id.* at 1183. "Substantially" is defined as "belonging to substance; actually existing; real; not seeming or imaginary." *Id.* at 1428. "Likelihood" means "something less than reasonably certain." *Id.* Although "substantially" approximates the meaning and specificity of "clear," when coupled with the word "likelihood," the clarity and certainty offered by "substantial" is tempered and the standard as a whole allows more room for restriction and leaves the speaker unsure of what may be safely said.

restrict too much speech.[89] The clear and present danger standard's explicit time element restricts only speech that creates immediate harm under the current circumstances.[90]

The rules and codes promulgated by the American Bar Association and state bars embrace the reasonable likelihood and substantial likelihood standards and therefore operate under these timing and certainty deficiencies.[91] Some commentators classify these disciplinary rules as unconstitutional prior restraints.[92] Many commentators argue that Model Rule 3.6 and its predecessors are vague and overbroad[93] due to an absence of clear work-

---

89 *See* Pfister, *supra* note 84, at 594 (narrow restraints are needed so that harmless speech "will not be stifled along with the targeted speech").

90 *See* REDISH, FREEDOM OF EXPRESSION, *supra* note 2, at 179 (Justice Brandeis, in interpreting the clear and present danger test, "reveal[ed] a clear intention to impose strict requirements concerning both the likelihood and timing of harm that would flow from any particular speech"); *see also* Pappas, *supra* note 36, at 1032 (clear and present danger analysis ensures that trivial interference or prejudice is insufficient for prohibition of speech).

91 *See supra* notes 57-83 and accompanying text (discussing various rules promulgated by the ABA).

92 Sallen, *supra* note 86, at 132 (rules preventing attorney comment are unconstitutional prior restraints because they silence lawyers and prevent the media from disseminating information to the public). *See also* Dehryl A. Mason, Note, *DR 7-107: The ABA's Sanction Against Extrajudicial Statements by Attorneys*, 8 J. LEGAL PROF. 187, 189 (1983) (disciplinary rules are similar to prior restraints because both punish speech using the court's contempt power). *But see* Hirschkop v. Snead, 594 F.2d 356, 368 (4th Cir. 1979) (a disciplinary rule is not a prior restraint because a disciplinary rule gives the attorney due process before punishment).

For analysis of prior restraints, see Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-62 (1976) (analyzing prior restraints); BOGEN, *supra* note 8, at 144-52 (offering analysis of the constitutionality of prior restraints); NIMMER, *supra* note 4, § 4.03, at 4-14 (defining prior restraint); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 55 (1984) (defining prior restraint as restraint on "all relevant expression, whether or not fully protected"); Todd, *supra* note 1, at 1174-87 (examining the effect of gag orders and history of prior restraint).

93 *See generally* Smith v. Goguen, 415 U.S. 566 (1973) (vagueness); Grayned v. City of Rockford, 408 U.S. 104 (1972) (overbreadth). In *Smith*, the Court reversed a defendant's conviction for a wearing a flag on the rear pocket of his pants, stating that the law prohibiting such action was vague and did not provide the defendant with sufficient notice of the prohibited conduct. *Smith*, 415 U.S. at 568, 582. The Court noted that the vagueness doctrine required legislatures to create "reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' " *Id.* at 573 (quoting *Grayned*, 408 U.S. at 108). In *Grayned*, the Supreme Court found that a noise ordinance was not overbroad because it prohibited "only conduct which disrupts or is about to disrupt" normal school activities. *Grayned*, 408 U.S. at 119. The Court stated that since the ordinance implicated speech rights, it had to be narrowly tailored and reasonable, imposing only time, place and manner restraints. *Id.* at 115-16 (citing Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941)). The Court also opined that vagueness offended the following principles: 1) insistence that laws offer a "person of ordi-

able guidelines which forces attorneys to guess whether a comment is protected or prohibited.[94]

4. Federal Court of Appeals and State Court Debate

Four notable federal and state court decisions demonstrate the conflict among courts and bar associations regarding the proper standard for attorney speech restriction.[95] The Seventh

---

nary intelligence a reasonable opportunity to know what is prohibited;" 2) the desire that laws provide clear standards to avoid "arbitrary and discriminatory application;" and 3) concern that vague statutes may infringe "sensitive areas of basic First Amendment freedoms." *Id.* at 108-09. The Court warned that vague laws force citizens to unreasonably restrict their conduct to a greater degree than necessary. *Id.* at 109. *See also In re* Hinds, 90 N.J. 604, 625 n.5, 449 A.2d 483, 494 n.5 (1982) (overbreadth doctrine mandates that the least restrictive means be used to protect the government interest).

For analysis of overbreadth and vagueness doctrines see NIMMER, *supra* note 4, §§ 4.11[D]-[E] (with respect to First Amendment generally); REDISH, FREEDOM OF EXPRESSION, *supra* note 2, at 214 (criticizing Warren and Burger Courts' interpretation of the overbreadth doctrine for failing to account for specific circumstances).

[94] *See* Johnston, *supra* note 2, at 693 (concluding that the code is frequently broad and that there is significant possibility that attorney may be disbarred or disciplined for comments that the attorney did not realize were unethical or in violation of a disciplinary rule); Stern, *supra* note 48, at 116 ("the attempt to define, in advance, which defense statements should be prohibited according to content results in irreconcilable conflict between vagueness and overbreadth"); Sallen, *supra* note 86, at 129 (Rule 3.6 and the substantial likelihood standard fail to distinguish statements posing a present threat); Mason, *supra* note 92, at 195 (criticizing DR 7-107 for overbreadth); Matheson, *supra* note 48, at 899 (the reasonable likelihood standard " 'hangs over [people's] heads like the 'Sword of Damocles' " because it is uncertain and punishes speech retrospectively rather than addressing the speaker's actual knowledge); Loder, *supra* note 58, at 313 (quoting Brodrick v. Oklahoma, 413 U.S. 601, 615 (1973)) (criticizing rules for vagueness and lack of clarity); Abel, *supra* note 58, at 642 (rules are drafted with "amorphousness and ambiguity that renders them virtually meaningless"); Swift, *Model Rule 3.6*, *supra* note 2, at 1006 (Rule 3.6 is "insufficiently precise").

But see 1 HAZARD & HODES, *supra* note 58, § 3.6:102 (Rule 3.6 contains lists of particular statements presumed prejudicial and is therefore essentially as certain as the clear and present danger test); *Revised Report of Judicial Conference Committee on the Operation of the Jury System on the "Free Press — Fair Trial" Issue*, 87 F.R.D. 519, 524 (1980) (the reasonable likelihood test sufficiently "inform[s] attorneys of what they may and may not say for publication regarding imminent or pending criminal litigation").

[95] *See infra* notes 96-120 (discussing Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)); Markfield v. Association of the Bar, 370 N.Y.S.2d 82 (App. Div.) (per curiam), *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1975); Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); *In re* Hinds, 90 N.J. 604, 449 A.2d 483 (1982)). For other state and federal decisional law construing disciplinary rules see United States v. Troutman, 814 F.2d 1428, 1444 (10th Cir. 1987) (statement to press that people lied in corruption investigation was not violation of disciplinary rule 7-107 because no proof of exposure or prejudice was offered); *In re* Eisenberg, 423 N.W.2d 867, 874 (Wis. 1988) (holding the reasonable likelihood standard constitutional and finding remarks prejudicial despite lack of

Circuit, in *Chicago Council of Lawyers v. Bauer*,[96] evaluated an Illinois District Court rule modeled after ABA Disciplinary Rule 7-107.[97] That court, determining that attorney comment could be restrained only if it posed a serious and imminent threat to the administration of justice,[98] held that the reasonable likelihood standard was unconstitutionally broad.[99] Judge Swygert, writing for the court, noted that *Sheppard* emphasized a trial judge's obligation to ensure a fair trial.[100] The *Bauer* court interpreted *Sheppard* as mandating speech restrictions in a particular trial, not all trials.[101] Recognizing the "checking value"[102] of free speech and its usefulness to the accused's defense, the Seventh Circuit rejected any standard which did not approximate the traditional

---

adverse affect); National Broadcasting Co., Inc. v. Cooperman, 501 N.Y.S.2d 405, 408-09 (App. Div. 1986) (although the reasonable likelihood standard was held constitutional, the court order was impermissibly overbroad because danger and lack of other less restrictive alternatives were not proved); *In re* Grand Jury Investigation, 492 N.E.2d 459, 461 (Ohio Ct. App. 1985) (prosecutor's statement to Washington Post merely repeated his in-court statement and was not a violation of DR 7-107); *In re* Keller, 693 P.2d 1211, 1214 (Mont. 1984) (refusing to adopt the various standards used in other jurisdictions, holding Montana disciplinary rule unconstitutionally overbroad and vague for a failure to adopt any standard); *In re* Lasswell, 673 P.2d 855, 858 (Or. 1983) (any disciplinary rule attempting to restrain speech must consider the lawyer's intent or knowledge in making the comment).

96 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

97 *Id.* at 247. For text of Rule 7-107, see *supra* note 67. The Chicago Council of Lawyers brought an action seeking an injunction and a declaratory judgment that the District Court's Local Criminal Rule 1.07 and ABA Disciplinary Rule 7-107 were unconstitutionally vague and overbroad. *Id.*

98 *Id.* at 249. The court noted that despite a legitimate and substantial government interest, broad means of serving that interest could not be upheld when less restrictive means could have been employed. *Id. See also* Taffy Bagley, Note, *Speech Restriction Must be Narrowly Drawn*, 54 TEX. L. REV. 1158, 1168 (1976) (restrictions should meet due process requirements).

99 *Bauer*, 522 F.2d at 249. The Seventh Circuit explained that attorneys should be given a test clearly identifying statements that create a serious and imminent threat to the proper administration of justice. *Id.* An amorphous phrase such as "reasonable likelihood that such dissemination will interfere with a fair trial," according to the court, was too broad and offered no such guidance. *Id. See* David W. Hipp, Note, *Attorney Comment on Pending Trial*, 22 WAYNE L. REV. 1233, 1242 (1976) (concluding that although the *Bauer* court found the reasonable likelihood test unconstitutional, it failed to significantly change the standard).

100 *Bauer*, 522 F.2d at 251.

101 *Id.* The court quoted *Sheppard*'s declaration that "collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Id.* (quoting Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)). In doing so, the court misconstrued the *Sheppard* Court's intent. *See supra* note 47 and accompanying text for analysis of misinterpretations of *Sheppard* holding.

102 *See generally* Blasi, *supra* note 15 (discussing the important role of free speech in monitoring government functions).

clear and present danger analysis.[103]

In *Markfield v. Association of the Bar*,[104] a New York appellate court dismissed professional misconduct charges against an attorney who made extrajudicial statements during a trial.[105] Although the New York disciplinary rule included the reasonable likelihood standard, the court limited the standard's application to statements posing a clear and present danger.[106] The court noted that applying a less protective analysis prohibited comment regardless of its actual effect.[107] The court stated that its application of the clear and present danger test fulfilled the rule's purpose while providing attorneys with adequate notice of prohibited conduct.[108]

Disagreeing with the Seventh Circuit and the New York appellate court, the Fourth Circuit, in *Hirschkop v. Snead*[109] endorsed the reasonable likelihood standard.[110] Relying on

---

103 *Bauer*, 522 F.2d at 249, 250. In doing so, the court noted that a more restrictive standard could remove an "informed viewpoint" from the public and would conflict with the "very purpose of the First Amendment." *Id.* at 259. The court continued that any other standard would deprive society of a valuable check on the government, and deprive the accused of a voice to defend his name. *Id.* at 250.

Some commentators maintain that the Seventh Circuit did not extend its holding far enough because, in allowing some attorney restraint, the court combined a "good deal of sense with an equal amount of nonsense." Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys:* Ratio Decidendi v. Obiter Dictum, 29 STAN. L. REV. 607, 608 (1977). Noting that the Sixth Amendment speaks only of the right of the accused and Fifth Amendment only of personal rights, Freedman and Starwood asserted that "[b]y a neat slight of pen, however, [Judge Swygert] equated the [S]ixth [A]mendment more broadly with the 'integrity of our system of justice' and concluded that public 'justice is no less important than accused's right to a fair trial.'" *Id.* (quoting *Bauer*, 522 F.2d at 250).

For commentary and analysis of the *Bauer* holding, see generally Bagley, *supra* note 98; Hipp, *supra* note 99; Johnston, *supra* note 2, at 689-92 (criticizing the *Bauer* court for eliminating overbreadth but failing to avoid vagueness by excluding examples of speech posing serious and imminent threat).

104 370 N.Y.S.2d 82 (App. Div.) (per curiam), *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1975).

105 *Id.* at 84. While acting as defense counsel in a criminal trial, the attorney participated in a radio panel discussion concerning prison rebellions. *Id.* The underlying case was *People v. Brown* and was commonly known as the "Tombs' Riots Trial." *Id.*

106 *Id.* at 84-85. *See* FREEDMAN, PRESS AND MEDIA ACCESS, *supra* note 17, at 89 (analyzing the *Markfield* holding).

107 *Markfield*, 370 N.Y.S.2d at 84.

108 *Id.* at 85. The court noted that the purposes of the disciplinary rule were to notify attorneys of prohibited conduct and protect fair trials without infringing speech rights. *Id.*

109 594 F.2d 356 (4th Cir. 1979).

110 *Id.* at 362. Philip J. Hirschkop, a Virginia attorney, instituted suit to have Dis-

Sheppard, the court asserted that, "implicitly if not explicitly," the Supreme Court ratified a reasonable likelihood standard for attorney disciplinary rules.[111] The Fourth Circuit disregarded First Amendment guarantees as well as overbreadth and vagueness arguments, insisting that no obstacles prevented the termination of attorney speech rights during a trial.[112] In reaching this conclusion, the court misconstrued *Sheppard*'s limited focus, which endorsed remedial action only after publicity appeared threatening.[113]

Observing these conflicting federal holdings, the New Jersey Supreme Court adopted the less protective reasonable likelihood standard in *In re Hinds*.[114] The New Jersey Supreme Court agreed with *Hirschkop*'s interpretation of *Sheppard* and held that a reasonable likelihood test constitutionally restrained harmful

---

ciplinary Rule 7-107 of the Virginia Code of Professional Responsibility declared an unconstitutional restraint on free speech. *Id.* The court, applying the reasonable likelihood standard, stated that "the injection of any other standard would make the prohibition, which is now clear and definite, to some extent unclear and gray." *Id.* at 368. The court was divided, however, with one judge concurring, three judges concurring in part and dissenting in part and three separate opinions. FREEDMAN, PRESS AND MEDIA ACCESS, *supra* note 17, at 90.

111 *Id.* at 370. The court asserted that "the rules would be meaningless if sanctions could be imposed only when the lawyer's published speech creates unremediable prejudice." *Id.* Instead, the court continued, the rules were designed to prevent the possibility of a lawyer prejudicing a trial. *Id.*

112 *Id.* The court, ignoring First Amendment concerns and the harm of silencing free expression, stated: "We know of no good reason why the court may not forbid the lawyer from intentionally creating grave due process problems, and we are unaware of any constitutional requirement that forbids the court from protecting the integrity of its processes to that extent." *Id.*

Justices Wintner and Butzner, concurring in part and dissenting in part, argued that "[t]he difficulty arises from attempting to restrict [F]irst [A]mendment rights prospectively by using a standard that was formulated for retrospectively gauging infringements of the [D]ue [P]rocess [C]lause." *Id.* at 380.

See also Cole & Spak, *supra* note 2, at 369 (advocating restraint of participating attorney's free speech rights because some attorney comment is inherently prejudicial and can be easily prohibited beforehand).

113 *See supra* note 47 (criticizing the *Hirschkop* court and other authorities for misinterpreting *Sheppard*).

114 90 N.J. 604, 449 A.2d 483 (1982). A press conference was held while the jury was being empaneled for a murder trial. *Id.* at 610, 449 A.2d at 486. The defense attorney characterized the proceedings as a "legalized lynching"; he was charged with violating the court's disciplinary rule modeled after ABA Disciplinary Rule 7-107. *Id.* at 611, 449 A.2d at 487. In a companion case, the court held that a disciplinary rule prohibiting a former prosecutor from commenting on a criminal case did not violate his First Amendment rights. *In re* Rachmiel, 90 N.J. 646, 654, 449 A.2d 505, 510 (1982). *See also* Dorothy J. Nemetz, Development, In re Hinds, *New Jersey Establishes a Standard for Restricting Attorney Speech*, 35 RUTGERS L. REV. 661 (1983) (in-depth analysis of *In re Hinds*).

speech.[115] The court conceded that several courts refused to prohibit attorney speech unless the comment posed a clear and present threat to justice.[116] Nevertheless, justifying the court's acceptance of the reasonable likelihood standard, Justice Handler cited the government's duty to ensure the fair administration of justice and the attorney's ability to interfere with that obligation.[117] The court noted that a restriction could be upheld only if certain basic conditions were met.[118] Stating that speech limitations must promote a significant government interest unrelated to speech prohibition, the court announced that the restriction must be no broader than required to protect that interest.[119] Thus, the New Jersey Supreme Court, although adopting the less protective standard, mitigated the damage to First Amendment rights by clarifying the scope of the standard and enumerating factors for consideration.[120]

---

115 *In re Hinds*, 90 N.J. at 618-620, 449 A.2d at 491-92. The court maintained power of final review over attorney conduct in New Jersey consistent with the court's position at the top of New Jersey's three levels of review for unethical conduct charges. Nemetz, *supra* note 114, at 676-77. The first level consists of local district ethics committees, the second is a state-wide disciplinary review board with members appointed by the court. *Id.* The third level is the court itself, from which there is no opportunity for appeal. *Id.*

116 *In re Hinds*, 90 N.J. at 621, 449 A.2d at 492. *See* Chicago Council for Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (advocating clear and present danger test), *cert. denied*, 427 U.S. 912 (1976); *In re* Oliver, 452 F.2d 111 (7th Cir. 1971) (same); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (same); United States v. Garcia, 456 F. Supp. 1354 (D.P.R. 1978) (same); Hamilton v. Municipal Court, 76 Cal. Rptr. 168 (Ct. App.) (same), *cert. denied*, 396 U.S. 985 (1969).

117 *In re Hinds*, 90 N.J. at 624, 449 A.2d at 494. Justice Handler noted: "While the administration of criminal justice is a governmental responsibility, it cannot be accomplished through fiat or authoritarian methods." *Id.* The court contended that the proper administration of justice depended on the cooperation of all those involved in the process. *Id.* The justice further criticized the clear and present danger standard because, although appearing to more strictly guard free speech, it failed to offer more precision or certainty than the reasonable likelihood test. *Id.* at 622, 449 A.2d at 493. The court cautioned that strictness did not automatically guarantee greater precision or clarity. *Id.*

118 *Id.* at 614, 449 A.2d at 488.

119 *Id.* Although admitting that the reasonable likelihood test was not as narrowly tailored as the clear and present danger test, the court found that the reasonable likelihood standard was "no broader than necessary" to protect the government's interest in fair trials. *Id.* at 623-24, 449 A.2d at 494.

120 Nemetz, *supra* note 114, at 697. The court articulated several factors for consideration under the reasonable likelihood test: the nature of the comment, the timing, the extent of publication of the comment, the nature and type of judicial proceeding and its vulnerability to prejudice, the "attorney's status in the case" and the attorney's unique position as "an informed and accurate source of information," the effect of uncontrolled speech on the accused's rights and the "integrity of

B. Gentile v. State Bar

Recently, the United States Supreme Court, resolving the disagreement among the lower courts, endorsed a substantial likelihood standard for regulating attorney extrajudicial comment.[121] In *Gentile v. State Bar*,[122] the Court examined disciplinary action taken against Gentile, an attorney, for holding a press conference addressing alleged injustices in the prosecution of his client.[123] Prior to the conference, Gentile examined Nevada Supreme Court Rule 177[124] and, accordingly, restricted his com-

---

the proceeding." *In re* Hinds, 90 N.J. at 622-23, 449 A.2d at 493. The court also limited its holding to criminal trials. *Id.* at 635, 449 A.2d at 499.

The court carefully posited that the disciplinary rule only prohibited commentary by attorneys "associated with" a trial. *Id.* at 627, 449 A.2d at 495. Justice Handler recommended that in determining a lawyer's association with a trial, courts utilize a common sense approach. *Id.* at 628, 449 A.2d at 496. The court held that an attorney who regularly contributes to the defense of a case and "holds himself out to be a member of the defense team" is sufficiently "associated with" the trial and subject to the disciplinary rule. *Id.* Contemporary commentary suggested that the court's most valuable achievement in *In re Hinds* was the specific notice provided to attorneys regarding the "type of behavior . . . that is expected of them by the court" with respect to extrajudicial comment. Nemetz, *supra* note 114, at 704.

121 Gentile v. State Bar, 111 S. Ct. 2720, 2731, 2745 (1991) (ruling that although a substantial likelihood standard was constitutionally permissible, Nevada Supreme Court Rule 177, adopting that standard, was unconstitutional due to its misleading "safe harbor" provision). *See* Henry J. Reske, *Limited Free Speech for Lawyers*, A.B.A. J., Oct. 1991, at 22-23 (examining *Gentile* and its progeny).

122 111 S. Ct. 2720 (1991).

123 *Id.* at 2738-39. Dominic P. Gentile, a criminal defense attorney, held a press conference to address the indictment of his client, the owner of a safe deposit vault company, following the theft of cocaine and money from an undercover drug operation. *Id.* at 2727-28. Preceding the indictment, extensive publicity focused on the investigation of Gentile's client and two Las Vegas Metropolitan police officers, the only suspects. *Id.* at 2727. Six months before trial, after carefully reviewing Nevada's attorney comment rules, Gentile determined that a press conference was necessary to balance the slanted publicity against his client and to point out the press's omissions regarding the state's lack of evidence. *Id.* at 2728, 2729. Petitioner claimed his client was being used as a scapegoat and alleged misconduct on the part of the prosecutors, the investigators and others involved in the arrest and indictment. *Id.* at 2729. Gentile commented solely on evidence against the two officers, who were exonerated, and on his own client's innocence. *Id.* Gentile refused to answer questions that could potentially prejudice his client or other parties. *Id.* at 2730. The State Bar of Nevada filed a complaint against Gentile for violating Rule 177. *Id.* at 2723. Gentile argued that he believed his remarks fit within the exception in Rule 177, coined the "safe harbor provision" by the Court, which allowed an attorney to "state without elaboration . . . the general nature of the . . . defense." *Id.* at 2731 (quoting NEV. SUP. CT. R. 177(3)(a)). The Southern Nevada Disciplinary Board of the State Bar nevertheless recommended a private reprimand, which was affirmed by the Nevada Supreme Court. *Id.* at 2723-24. *See* Gentile v. State Bar, 787 P.2d 386 (Nev. 1990).

124 Nevada Supreme Court Rule 177 provided:

ments to criticism of the prosecution's faulty case and the possi-

---

1. Notwithstanding the provisions of any contrary statute or rule, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication *if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.*

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

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

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

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

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

3. *Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration*:

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

(b) the information contained in a public record;

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

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

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

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

(g) in a criminal case:

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

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

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

bility of police misconduct.[125] Validating ABA Model Rule of Professional Conduct 3.6,[126] the Court held that a substantial likelihood of material prejudice warranted restrictions on attorney comment.[127]

Justice Kennedy and Chief Justice Rehnquist wrote distinct portions of the majority's opinion.[128] Despite attorneys' First Amendment rights and their value as a "check" on government conduct, the majority promoted restrictions on attorney extraju-

---

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

NEV. SUP. CT. R. 177 (emphasis added).

125 *Gentile*, 111 S. Ct. at 2729-30. Gentile intended only to refute the publicity against his client. *Id.* at 2728. Gentile claimed that the investigation of his client had affected his client's health and had caused the failure of his business. *Id.* Criticizing the prosecution's methods, Gentile asserted that the evidence showed his client was innocent and that the true perpetrator was a police detective cleared by the police. *Id.* at 2729. At the conference Gentile made brief opening remarks and refused to answer several questions that he believed would prejudice his client or other parties. *Id.* at 2731. When asked to elaborate on his claims, Gentile stated that ethics rules forbid further comment: "Last night before I decided I was going to make a statement, I took a close look at the rules of professional responsibility. There are things that I can say and there are things that I can't." *Id.*

126 See *supra* note 78 for text of Model Rule of Professional Conduct 3.6. Nevada Court Rule 177 incorporated the substantial likelihood test utilized in Rule 3.6. See *supra* note 124 for text of Nevada Supreme Court Rule 177.

127 *Gentile*, 111 S. Ct. at 2738.

128 *Id.* at 2723. Justice Kennedy, joined by Justices Marshall, Blackmun, Stevens and O'Connor, found Nevada Supreme Court Rule 177 void for vagueness and reversed Gentile's reprimand by the Southern Nevada Disciplinary Board and the Nevada Supreme Court. *Id.* at 2731, 2736. Chief Justice Rehnquist wrote the remainder of the Court's opinion which held the rule's "substantial likelihood of material prejudice" standard constitutional. *Id.* at 2745. The Chief Justice added that the restraint in Rule 177 was proper and sufficiently narrow and that attorney comment could be regulated more heavily than press speech due to the attorneys' participation in the trial process. *Id.* Justices White, O'Connor, Scalia and Souter joined Chief Justice Rehnquist. *Id.* at 2723.

Justice Kennedy, joined by Justices Marshall, Blackmun and Stevens, framed the issue as the "constitutionality of a ban on political speech critical of the government and its officials." *Id.* at 2723-24. Justice Kennedy declared that Nevada's application of the rule did not satisfy the First Amendment. *Id.* at 2723. Therefore, according to Justice Kennedy, the state court judgment should not have been affirmed because Gentile's statements did not create a likelihood of material prejudice or any harm sufficient to punish speech. *Id.* at 2731. Justice O'Connor filed a separate concurring opinion upholding attorney comment regulation under a less demanding test for speech restraint due to attorneys' status as officers of the court. *Id.* at 2748. Justice O'Connor agreed, however, that Nevada Rule 177's safe harbor provision was vague and required reversal of the Nevada Supreme Court decision. *Id.* at 2749. Chief Justice Rehnquist dissented, positing that Rule 177 was not overbroad or vague and was validly interpreted by the Nevada Supreme Court. *Id.* 2747. The Chief Justice deferred to the Nevada Bar and courts that were in the best position to evaluate prejudicial effect. *Id.* Justices White, Scalia and Souter joined Chief Justice Rehnquist's dissent. *Id.* at 2723.

dicial comment.[129] Justice Kennedy authored a reversal of Gentile's reprimand, holding Nevada Supreme Court Rule 177 void for vagueness due to its misleading "safe harbor provision."[130] Chief Justice Rehnquist endorsed the substantial likelihood standard adopted by the Nevada Supreme Court,[131] emphasizing the importance of impartial juries.[132] The Court noted that Sixth Amendment fair trial guarantees may override First Amendment rights of access to criminal proceedings.[133]

Chief Justice Rehnquist framed the issue as whether attorney speech may be regulated more strenuously than that of other citizens.[134] Justifying disparate treatment of attorneys, Chief Justice Rehnquist distinguished lawyers, as officers of the court, from ordinary citizens.[135] The Court posited that an attorney's increased skill and access to information may unduly influence prospective jurors.[136] The Chief Justice held that the substantial likelihood

---

129 *Id.* at 2742-43. The Court noted that it was an attorney's "professional mission" to criticize government misuse of power. *Id.* at 2732.

130 *Id.* at 2731. The safe harbor provision was found in Rule 177(3). *See supra* note 124 for text of Rule 177. Justice Kennedy asserted that the safe harbor provision "misled" Gentile because, when read literally, it permitted the comments Gentile made in his press conference. *Gentile*, 111 S. Ct. at 2731. The majority focused on the grammatical structure of the section and the use of the words "elaboration" and "general nature of the defense," which Justice Kennedy deemed insufficient guides to permissible speech. *Id.* Additionally, the Court noted that the safe harbor provision explicitly protected statements "notwithstanding" the prohibitions listed elsewhere in the rule, further confusing the rule's mandate. *Id.*

131 *Id.* at 2738.

132 *Id.* at 2742. Chief Justice Rehnquist stated that the criminal justice system relied on impartial jurors who "know as little as possible of the case, based on material admitted into evidence before them in a court proceeding." *Id.*

133 *Id.* at 2745. Chief Justice Rehnquist acknowledged the importance of both rights but noted that in the courtroom, attorney speech rights were "extremely circumscribed." *Id.* at 2743.

134 *Id.* at 2742-43.

135 *Id.* at 2744. The Court relied on several earlier cases regulating attorney speech and conduct more closely than ordinary citizens' rights. *Id.* at 2743-44. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (subordinating litigants' First Amendment rights to other interests arising at trial); *In re* Sawyer, 360 U.S. 622 (1959) (holding lawyers subject to ethical restrictions on speech that could not constitutionally be applied to ordinary citizens); Sacher v. United States, 343 U.S. 1 (1952) (permitting an attorney in a criminal trial to speak or act freely only to the extent necessary to preserve an appeal); Fisher v. Pace, 336 U.S. 155 (1949) (applying *Sacher* principle to civil trials). *Cf.* Peel v. Attorney Registration and Disciplinary Comm'n, 110 S. Ct. 2281 (1990) (First Amendment protected attorney advertisement on letterhead regarding qualifications); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (bar association can discipline lawyers for solicitation of clients despite First Amendment rights); Bates v. State Bar, 433 U.S. 350 (1977) (attorney advertising deemed a protected First Amendment right).

136 *Gentile*, 111 S. Ct. at 2745. *See also In re* Hinds, 90 N.J. 604, 627, 449 A.2d 483,

standard palliated jury prejudice and constitutionally balanced First and Sixth Amendment rights.[137]

Dismissing procedural methods such as voir dire and change of venue as unduly costly to the judicial system, the Court deemed disciplinary rules a more feasible and efficient solution.[138] The Court noted that the rules did not completely restrain speech but only required that attorneys wait until after trial to comment.[139] Therefore, although the Court absolved Gentile, its holding withdrew traditional speech protection and removed an influential voice from the "marketplace of ideas."[140]

---

496 (1982) (emphasizing the attorney's ability to interfere with the fair administration of justice); *In re* Rachmiel, 90 N.J. 646, 656, 449 A.2d 505, 511 (1982) (same).

[137] *Gentile*, 111 S. Ct. at 2745. The Chief Justice noted that when legislation threatens First Amendment rights, a reviewing court must balance those rights against the state interest being forwarded. *Id.* The substantial likelihood test, according to Chief Justice Rehnquist, satisfied this requirement by protecting the "integrity and fairness" of the trial process. *Id.* Additionally, the Chief Justice asserted that the legitimate state interest was furthered with minimal speech restraint. *Id.*

[138] *Id.* Chief Justice Rehnquist concluded that Nevada Supreme Court Rule 177 narrowly restrained the evils of publicity without extinguishing attorneys' First Amendment rights. *Id.* The Court credited the disciplinary rule with ameliorating two "principal evils": 1) comments that could influence the trial result, and 2) comments that risk prejudicing the jury venire, even if an impartial jury panel is ultimately assembled. *Id.*

[139] *Id.* The Chief Justice commended the rule's narrow scope, which did not forbid speech entirely, and limited the speech of all participating attorneys equally, irrespective of content. *Id.*

[140] *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6-7 (1989). Baker discussed the market place of ideas theory and its three assumptions: 1) "truth must be 'objective' or 'discoverable' "; 2) people are able to accurately recognize truth and reality; and 3) "discovery of truth must be desirable" to encourage action and human interest. *See supra* note 2 for resources discussing the marketplace of ideas theory and the need for numerous and varied informational sources. *See also* Pennekamp v. Florida, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring) ("A free press is vital to a democratic society because its freedom gives it power."); Tuite, *supra* note 81, at 140 (*Gentile* presented the Supreme Court with its first opportunity to decide if the First Amendment protected attorney comment during trial to the same degree it protected advertising).

For post-*Gentile* cases demonstrating the scope of attorneys' First Amendment rights, see Stretton v. Disciplinary Board of the Supreme Court, 944 F.2d 137 (3d Cir. 1991) (statements made during judicial candidacy could constitutionally be prohibited but only narrowly under specific circumstances); United States v. Bingham, 769 F. Supp. 1039, 1041 (N.D. Ill. 1991) (defense attorneys sanctioned for comments violating serious and imminent threat standard); *In re* Holtzman, 577 N.E.2d 30 (N.Y.) (per curiam) (finding that statements to media alleging judicial wrongdoing warranted reprimand), *cert. denied*, 112 S. Ct. 648 (1991); *In re* Westfall, 808 S.W.2d 829 (Mo.) (affirming disciplinary sanction for television statement, made with reckless disregard for the truth, charging court of appeals judge with purposefully dishonest conduct), *cert. denied*, 112 S. Ct. 648 (1991). *Cf.* Marcia Chambers, *Bars Sanction Lawyers Who Fault Judges*, NAT'L L.J., Nov. 25, 1991, at 13

Justice Kennedy dissented with respect to the substantial likelihood standard, however, reminding his colleagues of precedential mandates that attorney disciplinary rules could not disclaim First Amendment guarantees.[141] Justice Kennedy averred that attorneys' informed and persuasive comments are valuable expressions protected by the First Amendment regardless of their "power to command assent."[142]

Unlike his colleagues, Justice Kennedy adhered to consistent First Amendment protection which allowed only minimal restraints on speech when absolutely necessary.[143] Ambivalent to Justice Kennedy's concerns, the majority weakened attorneys' First Amendment right to speak and the public's First Amendment right to gather accurate information.[144]

PART II

Facing the threat of disciplinary action, an attorney will err on the side of silence.[145] Suppression of extrajudicial comment not only deprives society of valuable information but impairs an attorney's obligation to expose judicial abuse and to effectively advocate.[146] Vague disciplinary rules sacrifice First Amendment

---

(criticizing actions taken in *Holtzman* and *Westfall*); Reske, *supra* note 121, at 22-23 (reviewing the holdings in *Holtzman* and *Westfall*).

141 *Gentile*, 111 S. Ct. at 2734.

142 *Id.* at 2735. Justice Kennedy warned that the dangers arising from the authoritativeness and persuasiveness of attorney comment resulted from the attorney's ability to understand and explain judicial proceedings. *Id.* The probability that the public would believe the attorney's speech, according to Justice Kennedy, did not justify restraints on speech. *Id.* *See also In re* Primus, 436 U.S. 412, 432 (1978) ("Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts.").

143 *Id.* at 2734-35. Justice Kennedy noted that pretrial publicity rarely affected trials and that studies proved jurors could disregard publicity in reaching a verdict. *Id.* at 2734.

144 See *infra* notes 148-61 for discussion of the value of First Amendment rights to society.

145 *See* Swift, *Model Rule 3.6*, *supra* note 2, at 1029 ("it would indeed be a rare and unique individual who would not choose to err on the side of caution," particularly considering the lack of penalty for failing to keep the public informed). Threat of self-censorship demands a high degree of precision when attorney speech is regulated. *Id.* *See also* Loder, *supra* note 58, at 314 (the threat of sanctions may silence lawyers); Schwab, *supra* note 3, at 27 (advising lawyers never to hold a press conference because there are too many uncontrollable variables; "no attorney of any degree of competence would knowingly permit himself and his firm to be placed in such an uncontrollable situation").

146 *See* Emerson, *supra* note 1, at 881 (society needs to gather information from many sources, particularly the most informed and persuasive sources); Swift, *Restraints*, *supra* note 38, at 71-75 (detailing society's interests in the judicial process and the evils of secrecy).

rights without substantial evidence that attorney comment prejudices the trial process or that disciplinary rules actually cure the harm.[147]

A. Damage to Society

Courts should protect an attorney's out-of-court statements as jealously as the Court has protected the public's right to receive information regarding criminal trials.[148] Attorney comment enables the public to monitor governmental conduct and to advocate reform.[149] Freedom to speak and to gather information through the speech of others ensures the proper administration of justice.[150] Amorphous disciplinary rules expunge these

---

147 *See* Vermont Royster, *The Free Press and a Fair Trial*, 43 N.C. L. REV. 364, 366 (1965) (in contrast to traditional speech crimes such as defamation and libel where government action is taken only after harm results, disciplinary rules punish speech before any damage occurs); Swift, *Model Rule 3.6*, *supra* note 2, at 1049 (the possibility of harm to a trial is a "matter of conjecture and speculation," and therefore does not warrant broad restrictions on free speech).

148 See *supra* notes 20-41 and accompanying text (discussing *Bridges*, *Pennekamp*, *Sawyer* and *Nebraska*). One commentator acknowledged that "the operation of the judicial branch of government is emphatically the public's business" and limitations on the information available to the public for reviewing that process should be made only narrowly. Swift, *Model Rule 3.6*, *supra* note 2, at 1006. The right to monitor judicial processes includes not only the right to physically attend trials but also to gather information from other sources relating to court proceedings. *Id.* at 1011 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570 (1980)). Therefore, information sources for people unable to physically view the trial should not be silenced. *Id. See also Richmond Newspapers*, 448 U.S. at 575 (few other aspects of government are of "higher concern and importance to the people than the manner in which criminal trials are conducted"); *In re* Oliver, 333 U.S. 257, 270-71 (1948) (publicity provides the only sufficient "check" on government); NIMMER, *supra* note 4, § 4.09[B] (analyzing the right to gather information); Blasi, *supra* note 15, at 552 (free speech and access to information is essential to monitor government and judicial conduct); REDISH, FREEDOM OF EXPRESSION, *supra* note 2, at 41-42 (criticizing Blasi for protecting too much speech under the checking value theory).

149 Lewis, *supra* note 12, at 796-97 (due to the complexity and size of our government, greater scrutiny is required to detect and stop abuse); Royster, *supra* note 147, at 364 (the Sixth Amendment was intended to protect the public from arbitrary government acts and unrestrained access to and comment on judicial proceedings deters such arbitrary acts against citizens); Todd, *supra* note 1, at 1207 (concluding that overbroad restraints on information sources could subvert society's ability to check judicial integrity).

150 *See* Meiklejohn, *supra* note 12, *reprinted in* REDISH, FREEDOM OF EXPRESSION, *supra* note 2, at 75 (First Amendment rights should be unqualified because ensuring the proper administration of justice requires that members of society: 1) comprehend problems confronting the nation; 2) judge decisions made by government officials and 3) share in the decision-making process to ensure the best decisions are made and effectuated). But see REDISH, FREEDOM OF EXPRESSION, *supra* note 2, at 205 for criticism of Meiklejohn's theory.

freedoms.[151]

Forcing attorneys to remain silent or risk sanctions under vague and unpredictable rules deprives the public of its most perceptive informational source regarding trials.[152] Although the press reports trial details, lawyers explain their significance and detect iniquities.[153] Attorney criticism must be offered at a time when public attention is focused on the events involved.[154] In the absence of attorney comment, uninformed media speculation and misinterpretation remain the only source of information.[155]

Moreover, the necessity of lawful convictions, not based on

---

[151] *See supra* note 145 (asserting that disciplinary rules punish speech before any showing of harm can be made).

[152] *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 259 (7th Cir. 1975) (disciplinary rules remove "[a]n informed viewpoint . . . from the public forum without justification" in violation of the First Amendment), *cert. denied*, 427 U.S. 912 (1976); NIMMER, *supra* note 4, § 1.02[B], at 1-13 (cautioning that the people are the backbone of democracy and must be enlightened "by those who are informed" to ensure the proper administration of justice); Freedman & Starwood, *supra* note 103, at 613 (the press is necessary to guard against abuse of the judicial system and will not be able to fulfill that goal if the most knowledgeable sources of information are "silenced at the very moment at which they have the greatest incentive to protest"); Lewis, *supra* note 12, at 797 (right to scrutinize government action is essential to exercising First Amendment rights because public debate must be informed).

[153] *See Bauer*, 522 F.2d at 250 (lawyers are one of the most valuable sources of information because they are perceived as credible and knowledgeable); Stern, *supra* note 48, at 112 (defense counsel is in the best position to "explain the proceedings, and articulate the defense perspective"); Swift, *Model Rule 3.6*, *supra* note 2, at 1013 (the defense attorney is the best source of trial information and reveals possible abuses); Swift, *Restraints*, *supra* note 38, at 79 (silencing the defendant deprives the public of the voice which has the strongest interest in reforming abuse). *But see* Cole & Spak, *supra* note 2, at 377 (because the attorney is the most knowledgeable and influential source of information, attorney comments unduly influence the public and should be silenced; no harm would result because many other voices remain).

[154] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560-61 (1976). Delay harms the public interest. *Id.* at 561. "[M]oreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly." *Id.* *See* Blasi, *supra* note 15, at 553 (communication is most essential when "the public is first made aware of what is going on"); John Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 622 (1977) (unrestrained press and speech during the Watergate crisis prevented information from losing its newsworthiness and impact); Matheson, *supra* note 48, at 924 (requiring that speech be made after trial permits governmental destruction of the speech's immediacy and ultimate impact); Swift, *Model Rule 3.6*, *supra* note 2, at 1014 (trials in the public eye allow attorneys to advocate reform not only to fellow lawyers but also to the public when public attention is at its peak).

[155] *See* Sallen, *supra* note 86, at 135 (silencing attorneys deprives the media of its most knowledgeable source and handicaps the media's efforts, limiting the public's opportunity to scrutinize judicial processes).

illegally seized evidence, coerced confessions or prejudiced juries overrides society's interest in punishing the guilty.[156] Allowing the government to convict a guilty man by unconstitutional means condones the government's use of those same methods to imprison an innocent man.[157] Unrestrained criticism of judicial proceedings ensures that all participants defend the truth.[158] Finally, insightful comment educates the public and fosters judicial respect.[159] Scarcity of attorney comment undermines faith in the judicial process.[160] Silence breeds ignorance, fear and mistrust.[161]

B. Damage to Attorneys

Attorneys are citizens with the First Amendment right to speak.[162] Regulating speech because its source retains more knowledge draws an absurd and unconstitutional distinction.[163]

---

156 Swift, *Restraints*, *supra* note 38, at 107-08.

157 *See id.*

158 Swift, *Model Rule 3.6*, *supra* note 2, at 1012-13. *See supra* note 2 (demonstrating the importance of numerous sources for effective information gathering).

159 *See* Swift, *Restraints*, *supra* note 38, at 71-72 (knowledge that participants in the judicial process are being monitored by the public checks the abuse of power). Public monitoring of judicial processes ensures that possible abuses arising when prosecutors and police are under pressure are stopped before they harm the innocent. Royster, *supra* note 147, at 369-70. "There are, indeed, a hundred ways in which justice can be and sometimes is debauched by those whose job it is to serve it." *Id.* at 369.

160 *See* Matheson, *supra* note 48, at 883-84 (silencing comment about judicial processes could have a "detrimental effect" on public confidence); Cynthia M. Nakao, Casenote, *Gag Me with a Prior Restraint: A Chilling Effect That Sends Shivers Down the Spines of Attorneys and the Media*, 7 LOY. ENT. L.J. 353, 353 (1987) (prohibiting media access to information about the court system would "increase the public's ignorance and distrust of the legal system").

161 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

162 Hirschkop v. Snead, 594 F.2d 356, 366 (4th Cir. 1979); Royster, *supra* note 147, at 366. Blackstone asserted that every man possessed the right to "lay what sentiments he pleases" in the public forum. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 151-52). Royster added that if every man possessed this right then it should not be a privilege for some and denied to others. *Id.* "[A]nything that abridges the right for any man—even a muddleheaded editor—abridges the right for all men." *Id. But see* Hirschkop, 594 F.2d at 366 (adding that First Amendment rights for members of the bar include certain responsibilities; guidelines must be established to ensure responsible use of speech rights).

163 *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 259 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Pappas, *supra* note 36, at 1037 (proposing that litigants' First Amendment rights should not be limited, for if they were so limited, the government could silence a citizen simply by dragging him into court); Royster, *supra* note 147, at 366 (the probability that an expression will be "mischievous in its effects, be it on a great matter of [s]tate or on a county trial for poaching," does not

Nebulous restraints on attorney comment, lacking clear guidelines, regulate speech because of its source, not its effect.[164] Disciplinary rules therefore encourage silence, more often eliminating productive rather than prejudicial speech.[165] These rules may punish an attorney despite the attorney's conscientious attempt to balance the right to speak against the amorphous probability of harm created by that speech.[166]

The *Gentile* standard fosters self-censorship because it prevents potential harm, not actual harm.[167] Forced forfeiture of First Amendment rights, therefore, compromises an attorney's professional and civic duty to criticize injustice.[168] An attorney must be free to criticize a rule or statute that is or has become oppressive.[169] Attorneys must also be permitted to question devious trial tactics.[170] Without this speech, a citizen loses fundamental rights and society loses an informed voice.[171]

Several courts have justified disparate treatment of attorneys' First Amendment rights by referring to an attorneys' perceived status as an "instrument of justice."[172] This disparate

---

justify silencing expression); Panel Discussion, *Walking the Line Between Free Press and Fair Trial* (pt. 1), 125 N.J.L.J. 1365 (1990) (panel discussion addressing police susceptibility to Rule 3.6). These commentaries highlight the pointlessness of restraining attorney comment when other parties with the same information are permitted to disseminate prejudicial information and create the same danger.

164 Sallen, *supra* note 86, at 128. Any ordinary citizen acquiring the same information as the participating attorney could publish it, possibly with less accuracy, and not be sanctioned.

165 Swift, *Model Rule 3.6*, *supra* note 2, at 1016 (the rules are "likely to prevent speech under circumstances where no harm will result"); Sallen, *supra* note 86, at 133 (attorneys, fearing sanctions, will remain silent despite the possibility that their speech may never be harmful); Stern, *supra* note 48, at 118 (the self-censorship fostered by the disciplinary rules "creates a vastly more inclusive ban on protected speech" than narrowly tailored prior restraints).

166 *Id.*

167 *See supra* notes 164-65 (discussing the inability of vague standards to prohibit only harmful speech).

168 Swift, *Restraints*, *supra* note 38, at 67; Pappas, *supra* note 36, at 1022. *See* Abel, *supra* note 58, at 671 (an attorney has various obligations to society, to the adversary and to third parties, and cannot disregard these duties to pursue personal interests); Sallen, *supra* note 86, at 138 (disciplinary rules hinder the representation of a client and interfere with the public's information gathering process).

169 Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 253 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

170 *See* Freedman & Starwood, *supra* note 103, at 616 (an attorney must be permitted to attack injustice within a particular case and counter the prosecutor's allegations).

171 *See id.* (an attorney has First Amendment rights that are vital to society's information gathering process).

172 *See* Gentile v. State Bar, 111 S. Ct. 2720, 2745 (1991) (detailing the historical regulation of attorneys on the basis of their special status and expressing the major-

treatment, however, cannot be justified unless the attorney, as an officer of the court, committed some impropriety that was inconsistent with this role.[173] An attorney cannot be deprived of these rights simply because a lawyer serves as an officer of the court.[174]

---

ity's acceptance of the substantial likelihood test for attorney comment rules); *In re* Hinds, 90 N.J. 604, 615, 449 A.2d 483, 489 (1982) (discussing attorneys' special status and essential function in the trial process). *See also In re* Sawyer, 360 U.S. 622, 666 (1959) (Frankfurter, J., dissenting) (quoting *Ecclesiastes*, 3:1*V*7 stating that there is a "time to keep silence and a time to speak," in support of the argument that attorneys may be regulated because of the importance of their function in the judicial system and the need to maintain order); *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press — Fair Trial" Issue*, 87 F.R.D. 519, 527 (1980) (courts not only have the power to regulate attorneys but have a duty to do so under the *Sheppard* holding). *But see Gentile*, 111 S. Ct. at 2733-34 (Kennedy, J., dissenting in part) (rejecting officer of the court justification for the argument that attorneys should be subject to more restrictions than other citizens).

173 Swift, *Restraints*, *supra* note 38, at 82; Swift, *Model Rule 3.6*, *supra* note 2, at 1027-28. *See* Wood v. Georgia, 370 U.S. 375, 393 (1962) (a sheriff, despite his status as an officer of the court, could not be reprimanded for his comments regarding judicial conduct because there was no showing that this status contributed to a substantial likelihood of harm); Pappas, *supra* note 36, at 1028 (commenting on *Wood* and stating that, without additional justification, attorneys could not constitutionally be regulated merely because they were officers of the court).

Courts have recognized the power to regulate attorney speech in other contexts, but only when the attorney spoke as an officer of the court and not as an ordinary citizen. *See, e.g., In re* Primus, 436 U.S. 412, 422 (1978) (acknowledging attorneys' historical status as officers of the court subject to state regulation but upholding an attorney's free speech right to solicit a client for the American Civil Liberties Union). Those courts recognize the difference between speech which abuses the attorney's position within the court, such as inflammatory or untrue statements made during court proceedings, and those statements made outside the courtroom in the capacity of an observer to the process who happens to have extraordinary ties to the proceedings. *See, e.g., In re* Snyder, 472 U.S. 634, 643, 646-47 (1985) (noting that courts have the power to regulate an attorney who acts on behalf of the court, but protecting an attorney's right to criticize the administration of the Criminal Justice Act). The *Snyder* Court recognized that an attorney, like other citizens, was free to advocate change and was most motivated to do so when specifically interested in the topic. *Id.* at 644. *See* Swift, *Model Rule 3.6*, *supra* note 2, at 1028 (an attorney has significant professional obligations beyond those within the courtroom and cannot be prohibited from fulfilling these obligations simply because he is a participant in a trial); Pappas, *supra* note 36, at 1039 (attorneys' status within the judicial system should not prohibit attorneys from exercising First Amendment rights common to all citizens); Swartz, *supra* note 16, at 1429 (arguing that the speaker's status should not justify specialized treatment because it is the content of the speech that is purported to cause harm);

174 *In re* Sawyer, 360 U.S. 622, 636 (1959). *See supra* note 30-34 and accompanying text (analysis of *Sawyer*). *See* National Broadcasting Co. v. Cooperman, 501 N.Y.S.2d 405, 408 (App. Div. 1986) (while attorneys have certain professional obligations, these obligations do not require that lawyers "surrender their [F]irst [A]mendment rights"). *See also* Sallen, *supra* note 86, at 130 (attorney status as officer of the court does not justify special treatment because other public officers have obligations to the court and do not suffer restrictions on speech rights). *But*

An attorney, unlike another court officer who is merely a court employee, has obligations that are on occasion contrary to those of the court or the prosecution.[175] Thus, presumptively labeling attorneys as agents of the court and subjecting attorney expression to different and more exacting scrutiny ignores their duty to prevent abuse within the judicial system.[176]

C. *Harm to the Defendant*

An accused, like all other citizens, possesses a First Amendment right of free expression.[177] A defendant is therefore entitled to attack abuses and is most motivated to do so when they prejudice his own case.[178] The accused often, however, remains silent, because he fears self-incrimination or because physical in-

---

see Gentile, 111 S. Ct. at 2742-43 (stating that attorneys deserve the same fundamental rights as all other citizens but cautioning that their status as officers of the court subjects these rights to some conditions).

175 Swift, *Model Rule 3.6*, *supra* note 2, at 1027. Swift claimed that it is not the status of the speaker that must be considered but the "special needs of the environment in which [the speaker] operates or exists," and that the regulation should be "limited to the furtherance of those needs." *Id.* at 1024. Swift also argued, in accord with many other commentators, that prosecutors, who act directly for the government, should be more easily restrained than defense counsel, who act on behalf of an outsider opposing the state. *Id.* at 1005 n.13. Swift explicated that defense counsel and prosecutors differ because: 1) prosecutorial comment hinders government duty to provide fair trials; 2) prosecutors share the government's duty to be impartial; and 3) prosecutors do not have the same need to protect the accused or the public from abuse of the system. *Id. See also* FREEDMAN, PRESS AND MEDIA ACCESS, supra note 17, at 92, 101 n.22 (ABA Standards Relating to Fair Trial and Free Press acknowledge the differences between defense counsel and prosecutors by specifically addressing prosecutors in Standard 3-1.3); Matheson, *supra* note 48, at 868-69 (prosecutors more readily violate comment rules and their statements are more likely to prejudice jurors); Stern, *supra* note 48, at 113 (the prosecutor has obligations of justice to the accused and to the public while defense counsel represents only the accused); Swift, *Restraints*, *supra* note 38, at 83 (prosecutorial status as a government official does not "justify total elimination of [the prosecutor's] free speech rights, it does create considerations not applicable to the defense attorney"; the government has a greater obligation to be impartial than defense counsel); Blodgett, *Equal Access*, *supra* note 3, at 29 (citing a report by the Federal Bar Council Committee on Second Circuit Courts which recommended speech prohibitions for the prosecution only); Nancy Blodgett, *Press Sensitive, Prosecutors' Use of Media Hit*, A.B.A. J., Dec. 1985, at 17 (discussing prosecutorial use of the media); Panel Discussion, *supra*, note 163, at 1365 (prosecutors feel immune to Rule 3.6).

176 Swift, *Model Rule 3.6*, *supra* note 2, at 1027-28.

177 *See* Stern, *supra* note 48, at 98-99 (the free press and fair trial issue is triangular, with the press, the government and the defendant asserting competing interests that are all affected by publicity or restraint of publicity).

178 *See* Swift, *Restraints*, *supra* note 38, at 66 ("a citizen who is silenced at the very time the government is bringing criminal charges against him sustains a considerably greater personal loss than does the press").

carceration precludes communication with the public or press.[179] An accused must therefore exercise First Amendment rights through an attorney who can distinguish helpful and incriminating comments.[180]

To be publicly vindicated, a defendant should be permitted to expose judicial abuse, if necessary, risking forfeiture of Sixth Amendment rights to a fair trial.[181] The public indictment is analogous to a libel against the accused.[182] The defendant should be able to challenge the indictment or to instruct his counsel to do so.[183] If the defendant is deprived of this opportunity, the defendant's name may be irreversibly tarnished, his rela-

---

179 Freedman & Starwood, *supra* note 103, at 614 (the defendant may not have access to the press because bail is usually high in the most publicized cases, preventing the defendant from getting out of jail; therefore the defendant must "rely on those 'outside' " to speak for him); Stern, *supra* note 48, at 112 (the "accused may be detained, or otherwise unable to speak, and there may be no one else able to speak" for the accused). *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975) (a defendant should rely on his counsel's experience and expertise to publicly refute accusations), *cert. denied*, 427 U.S. 912 (1976).

180 *Id.* The *Bauer* court argued against attorney comment restraints claiming that the lawyer may be the client's most effective and perhaps only public advocate. *Id.* The court posited that a lawyer was usually "more articulate and more knowledgeable in the law than the accused, [and could] perhaps best speak about such matters as defenses or the reputation of the accused as a law abiding citizen." *Id. See* Freedman & Starwood, *supra* note 103, at 614 (an attorney is a more competent voice "than the involved, unsophisticated and inarticulate client"); Robert P. Isaacson, *Fair and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 568 (1977) (no comment rules frustrate the accused's right to protect himself and the fairness of the proceedings; the rules also 1) allow law enforcement agencies to self-regulate; 2) leave abuse of the system undetected; and 3) recommend use of contempt power against press); Royster, *supra* note 147, at 369 (a defendant should not suffer in silence); Stern, *supra* note 48, at 112 ("someone must decide which facts can be safely disclosed," and the defendant's lawyer is in the best position to determine what information should be released); Sallen, *supra* note 86, at 139 (an attorney may be the only party understanding the issues involved and prepared to speak for the defendant without incriminating him).

181 *See* Stern, *supra* note 48, at 109 ("the Sixth Amendment's guarantee protects many of the interests implicated by a defendant's right to protest").

182 *See* Blodgett, *Equal Access*, *supra* note 3, at 29 (the prosecutor monopolizes the public's knowledge with an indictment, stacking the deck against the accused who needs a knowledgeable and skilled voice to publicly defend him); Freedman & Starwood, *supra* note 103, at 611 (despite the presumption of innocence, "the impact of an indictment upon the general public is so great that few defendants will be able to overcome it"); Weaver, *supra* note 84, at 514 (the government does not have a right to a fair trial and the power of the public indictment should be balanced by allowing defense counsel to publicly rebut that indictment).

183 Stern, *supra* note 48, at 98-99 (the defendant has a legitimate interest in publicly responding even when the media publicizes only the indictment or arrest); Pappas, *supra* note 36, at 1037 (the defendant should be entitled through counsel to rebut government accusations).

tions with family and friends affected, his career compromised and his reputation and respect within the community destroyed.[184] The charges, arrest and indictment create prejudice against the accused because society imbues officials with trust and confidence and generally mistrusts anyone accused of a crime.[185]

Any highly publicized case amply demonstrates this potential bias.[186] Consider for example the recent acquittal of William Kennedy Smith.[187] Few, if any, are unfamiliar with the rape charges brought against William Kennedy Smith; this familiarity is due to the extensive media coverage.[188] Mr. Smith's future medical career was jeopardized because potential patients will re-

---

184 Chicago Council for Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *See* Stern, *supra* note 48, at 98 (the accusations are often accepted as true by the "uninformed citizen" thus damaging the accused's reputation); Swift, *Restraints*, *supra* note 38, at 80 (a defendant's public response to allegations against him is not always intended to interfere with the trial process but may be the only opportunity for "obtaining justice, or reducing the stigmatization of himself and his family, of offsetting community bias, of raising funds to defend himself or of participating in important public discussion and convincing his fellows that his acts were morally, if not legally, blameless").

185 *Id.* at 77, 95. *See* Isaacson, *supra* note 180, at 573 (concluding that courts should allow defense attorneys to make public statements in cases of extreme publicity to protect the defendant).

186 Stern, *supra* note 48, at 98 ("the most pressing need for exposure arises in the sensationalized case," because the press reports regardless of the cooperation of officials). See *infra* note 187 and accompanying text regarding the rape trial of William Kennedy Smith.

187 *See* Fred Strasser, *No Fair Trial, Poll: Publicity Skews Palm Beach Rape Case*, NAT'L L.J., Aug. 12, 1991, at 1 [hereinafter Strasser, *No Fair Trial*]. Strasser reported that a poll revealed that public awareness of the William Kennedy Smith trial was so great that while 85% of Palm Beach residents admitted having knowledge of the trial this was only 7% greater than the number of people in the rest of the nation who were aware of the trial. *Id.* at 44. Strasser also indicated that 65% of those answering the poll said that the judge should restrict attorney speech regarding the trial. *Id.* The study also demonstrated, however, that although respondents agreed that publicity affected the trial, 80% of the potential jurors in Palm Beach claimed they could serve impartially despite their awareness of the publicity. *Id.*

The Kennedy Smith trial involved hoards of media representatives, evoking a picture similar to that described in *Sheppard*. John Taylor, *Men on Trial I: The Palm Beach Rape Case is the Latest Skirmish on the Sexual Battlefield: Will Men or Women Define the Reality of How They Treat Each Other?*, NEW YORK, Dec. 16, 1991, at 22, 23. See *supra* note 46 for description of publicity in *Sheppard*. The difference between Sheppard's trial and Kennedy Smith's trial was that, in the latter, Judge Mary Lupo controlled the press and public at Smith's trial without depriving either the press or the public of the ability to view and criticize the trial and its administration. *See also* Fred Strasser, *Venue Move For Smith Rejected*, NAT'L L. J., Aug. 19, 1991, at 5 (trial court denied defense motion for change of venue stating that publicity did not warrant the removal).

188 *See supra* note 187 (discussing William Kennedy Smith's trial).

fuse to employ Smith's medical services, fearing the allegations were true.[189] Despite the acquittal, irreparable harm was wrought to the accused's name and reputation.[190] A defendant must be allowed, amidst the controversy, to offer his version to the public, asking for sympathy and trust just as the prosecutor asks the public to believe the assertion that this is the guilty man.[191]

Further, numerous other sources uncontrolled by attorney comment rules compound the publicity spurred by the indictment.[192] Court personnel, police and the press may not be gov-

---

189 Despite the fact that William Kennedy Smith was acquitted, over 80% of the nation is aware that he was once accused of rape. Strasser, *No Fair Trial*, *supra* note 187, at 44. At least a portion of that 80% will hesitate before hiring Smith for medical care and without Smith's ability to publicly refute the charges, either directly or through his attorney, that number would be greater.

190 *See* Freedman & Starwood, *supra* note 103, at 613 ("entirely apart from the proceedings in court, the good name earned during a lifetime can be demolished"). *See also* Matheson, *supra* note 48, at 884-85 (even the presumption of innocence and an eventual acquittal do not protect the accused from damage to reputation and invasion of privacy); Marcus, *supra* note 6, at 265-76 (analyzing publicity effects on defendant's privacy and rehabilitation).

191 *See* Royster, *supra* note 147, at 369 (due to the lengthy trial process in America, silencing a defendant throughout that process would be a "total curtain of silence under which many unfortunate men would be buried"). Royster, a *Wall Street Journal* editor, emphasized the importance of an accused's use of First Amendment rights to defend himself publicly against allegations of criminal conduct by personalizing the problem:

> I, for one man, would shudder at the prospect of being charged with some crime, especially one of moral turpitude, and being condemned to suffer silence until some distant day when even an acquittal would not be recompense. And what I shudder at for myself I would not wish upon any man. The history of the law means nothing if it does not mean that each man should be treated as we would be done by.

Id.

See also Stern, *supra* note 48, at 53. As an example, Stern detailed the Willie Sanders rape case in Boston. *Id.* at 55-61 Public pressure led to the arrest, indictment and trial of Sanders despite a lack of evidence and improperly obtained faulty identifications by victims. *Id.* at 57. The victims were shown either only one photo or photos which suggested the accused as the perpetrator. *Id.* at 57-58. Most victims could not identify Sanders with certainty and the detectives made false and misleading statements in court. *Id.* at 60-61. Stern credited the defense's public campaign on behalf of Sanders with generating public awareness of the injustices inflicted upon Sanders and leading to Sanders' acquittal. *Id.* at 68-74.

192 *See* Charles Garry & Dennis Riordan, *Gag Orders: Cui Bono?*, 29 STAN. L. REV. 575, 578-79 (1977) (regulating participants or press does not silence bailiffs, court personnel or courthouse rumor). *See also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 199 (1957) (admitting that negative publicity disadvantages a defendant); Blodgett, *Press Sensitive*, *supra* note 175, at 17 (the prosecutor expresses opinions regarding the defendant's guilt merely by issuing and defending the indictment with statements that "are not even qualified as opinion" and may

erned by disciplinary rules.[193] The press often aggravates pretrial publicity when attempting to reap the financial benefits of public interest.[194] Neither an acquittal months or years later nor a bare denial of the allegations will vindicate the accused.[195] Defense counsel, a knowledgeable and skilled source, must protect the name of the defendant against public accusations.[196]

---

mislead a public which trusts its officials and equates an indictment with guilt); Isaacson, *supra* note 180, at 569 (the court cannot control all sources of publicity and, additionally, the police, court personnel or the prosecution may violate a restrictive order and disseminate information); Stern, *supra* note 48, at 104 (the court cannot control "the victim's sympathizers" or the press who may express opinions on the case); Swift, *Restraints*, *supra* note 38, at 76 (even without contributions from the prosecution, the press may continue to level accusations against the accused).

193 Panel Discussion, *Supra* note 163, at 1365.

194 *See* DAVID J. BODENHAMER, FAIR TRIAL RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 92-93 (1992) (describing the *Scottsboro Case*, Powell v. Alabama, 287 U.S. 45 (1932), in which young black males were accused of raping a white girl and their trial was "a legal sham" with poor lawyers provided for defense; once media were involved, the case garnered support from NAACP and Communist party, and conviction was reversed on appeal because of ineffective representation); Stern, *supra* note 48, at 70-71 (the press's policies for reporting the Willie Sanders case were "entirely consistent with the assumption which underlay the initial coverage of the arrest—that the issue of guilt had already been satisfactorily resolved"). Trials involving celebrities or individuals in the public eye generate inordinate amounts of media coverage as the public becomes fascinated with the events. For example, one reporter described the William Kennedy Smith rape trial as a "truly astonishing spectacle." Taylor, *supra* note 187, at 25. The press overwhelmed the courtroom, court house and surrounding area, recording the "parade of Kennedys" attending the trial and reporting the trivial anecdotes of the trial itself as intently as the legal issues involved. *Id.* The press recorded in great detail the "stiff, sour prosecutor," the "judge with her thickly lipsticked and strangely pursed lips," the reactions of a juror's spouse after learning she would be separated from her husband for the three weeks of the trial, as well as the number of glasses of water that Judge Mary Lupo drank during the trial. *Id.* Public interest in well-known citizens motivates the press to go beyond mere reporting of evidence to critique not only the believability of the testimony but the personal characteristics of the participants and spectators as well.

195 Swift, *Restraints*, *supra* note 38, at 76 (the defendant cannot rely on an acquittal at the end of trial because by that time public interest has subsided and the public often believes the original accusations despite the acquittal, suspecting that the defendant was freed on a technicality).

196 Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)). *See* Blodgett, *Equal Access*, *supra* note 3, at 29 (without reliance on counsel, wealthier defendants may seek the assistance of consultants or public relations firms which disadvantages the indigent accused and permits restrictions of free speech according to wealth); Swift, *Restraints*, *supra* note 38, at 78 (in the case of less wealthy defendants who are wrongly accused, publicity may lead to public sympathy, and garner funds for the accused's defense). Attorney comment may also uncover new evidence or encourage witnesses to come forward who were previously afraid or unaware that they possessed relevant knowledge. Stern, *supra* note 48, at 81. Witnesses will not always come forward on their own initiative because "one's perception of her moral duty" depends on whether he or she believes

While the accused may choose to risk losing jury impartiality in an attempt to defend himself, the government does not have that right to risk.[197] Additionally, commentary by the accused or defense counsel rarely biases public opinion against the prosecution.[198] Even if such a risk exists, our judicial system rests on the principle that it is better to free a guilty man than to wrongfully imprison an innocent man.[199]

D. Lack of Evidence of Impact on Juries

Little substantive evidence demonstrates that publicity unduly prejudices a jury or that attorney comment creates a greater threat to impartiality than other comment.[200] The search for a completely impartial or "empty minded jury" is fruitless.[201] Innumerable factors influence a juror but it is part of the juror's

---

that the accused is innocent or guilty. *Id.* "The popular campaign" may convince the public that the accused is innocent and therefore generate support. *Id.*

197 *Id.* at 98, 101 (the government and the defendant do not share the same rights and are not equal participants in a trial); Swift, *Restraints*, *supra* note 38, at 66.

198 Stern, *supra* note 48, at 102.

199 Swift, *supra* note 38, at 108 (the criminal justice system operates on the premise that society is benefited by the protection of the innocent and that allowing a guilty individual to go free to ensure protection of the innocent against judicial abuse "is not too high a price to pay for those protections").

200 *Panel Three: The Roles of Juries and the Press in the Modern Judicial System*, 40 AM. U. L. REV. 597, 605 (1991) [hereinafter *Panel Three*] (emphasizing that the legal system and its rules make unsupported assumptions about juries). *See* Edwin Kennebeck, *From the Jury Box*, *in* THE JURY SYSTEM IN AMERICA 235 (Rita J. Simon ed., 1975) (offering a juror's perspective of the problem; Kennebeck served on the jury of a Black Panther case in the 1970's); Drechsel, *supra* note 5, at 35 (suggesting that the issue is "overblown" and that major problems really do not exist); Edith Greene, *Media Effects on Jurors*, 14 LAW & HUM. BEHAV. 439 (1990) (studying general media effects); Kaplan, *supra* note 154, at 623 (concluding that news publicity and out-of-court statements have "virtually no impact" on jurors); Kobylka & Dehnel, *supra* note 12, at 364 (the probability that publicity will aid a defendant's case is greater than the chance it will prevent an unfair trial); Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 414 (1990) (knowledge of the actual effect of publicity on jurors is "fragmentary"); Swift, *Model Rule 3.6*, *supra* note 2, at 1006 ("no empirical evidence exists" to establish a cause and effect relationship between attorney generated publicity and jury partiality); Swift, *Restraints*, *supra* note 38, at 92 (increased publicity and the release or dissemination of prejudicial information do not "inevitably destroy a fair trial" and in fact such publicity rarely affects trials).

But see Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 695 (1991) (some publicity can threaten an impartial jury if the information concerns a prior record, incriminating physical evidence or implication in another crime).

201 Royster, *supra* note 147, at 368-89. A panel of legal professionals suggested that instead of striving for a "homogenous" jury that knows nothing of the accused, we should attempt to select "intelligent individuals who can come in and develop individual stories." *Panel Three*, *supra* note 200, at 599-600. "In deliberations when

sworn duty to disregard prejudicial knowledge before entering the jury box.[202] Although a well-known case engenders excessive public attention,[203] rumors and the lay observations of the press should not be the sole source of information for prospective jurors.[204] Knowledgeable, first-hand accounts should also be disseminated.[205] The public should weigh all available information

---

jurors bring those stories and try to reconcile them, hopefully the truth will emerge." *Id.*

In cases where the defendant is well known to the public very few prospective jurors will not have at least minimal knowledge of the defendant's activities and background and the current allegations. Minow & Cate, *supra* note 3, at 633. Minow and Cate quoted Mark Twain who described this search as a ridiculous search for ignorance:

> In this age, when a gentleman of high social standing, intelligence, and probity swears that testimony given under solemn oath will outweigh, with him, street talk and newspaper reports based upon mere hearsay, he is worth a hundred jurymen who will swear to their own ignorance and stupidity, and justice would be far safer in his hands than in theirs. Why could not the jury law be so altered as to give men of brains and honesty an *equal chance* with fools and miscreants?

Id. at 664. (quoting MARK TWAIN, ROUGHING IT 307 (Iowa Center for Textual Studies edition, 1972) (1871). Minow and Cate noted an equally sarcastic criticism of America's obsession with impartiality in the jury box, in *The Daily Telegraph* concerning jury selection in Oliver North's trial: "[I]gnorance is the path to enlightenment .... The slightest taint of interest in the world beyond home and work is enough to win dismissal." *Id.* at 634-35. (quoting Brodie, *Wanted: 12 Good Men and True, With Bad Memories*, THE DAILY TELEGRAPH (London), Feb. 8, 1989, at 19). Minow and Cate argued that given the present abilities of modern communication systems, an important case would arouse the interest of the public, and "scarcely any of those best qualified to sit as jurors will not have formed some impression or opinion as to the merits of the case." *Id.* at 641 (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)). Minow and Cate cited several well-publicized cases in the recent past, including the trials of Marion Barry, the Exxon Valdez Tanker Captain Joseph Hazelwood, Leona Helmsley and Manuel Noriega. *Id.* at 635-36, 636 n.19.

202 *See* Swift, *Restraints*, *supra* note 38, at 79-80 (jurors must disregard outside influences when serving on a jury).

203 *See supra* note 187 and accompanying text (regarding William Kennedy Smith). For discussion of highly publicized trials, see Pappas, *supra* note 36, at 1033 (John DeLorean, Watergate); Graham, *supra* note 3, at 625 (John DeLorean, Watergate and John Hinckley); *Panel Three*, *supra* note 200, at 602 (Oliver North and Admiral Poindexter).

204 *See supra* notes 148-61 and accompanying text (examining the value of attorney comment and society's right of access to numerous and varied informational sources).

205 *See* Royster, *supra* note 147, at 370 (responding to the Warren Commission's apprehension that Lee Harvey Oswald would not have received a fair trial and recommending that the public hear knowledgeable accounts with "at least some chance of accuracy" rather than gossip).

A panel of legal professionals suggested that when cases receive increased media attention, jurors are often more aware of their responsibility to be impartial. *Panel Three*, *supra* note 200, at 602. "In such cases, jurors feel more responsibility

prior to determining the propriety of judicial actions.[206] Jurors, once selected, can be protected from further exposure to publicity by sequestration.[207] This solution removes any justification for depriving the public of information.[208]

Attorney comment rules, with vague unmanageable standards, remove the most knowledgeable sources of information yet fail to ensure juror impartiality.[209] Other sources remain to adulterate potential jurors' minds.[210] Defense statements that are fraudulent, sensational or unethical rarely bias jurors against the government.[211] Jurors are instructed to evaluate the accused's guilt solely on the evidence presented and are capable of presuming innocence unless the prosecution proves otherwise.[212] Disciplinary rules, therefore, needlessly restrain speech

---

rests on their shoulders to give both the government and, particularly the defendant, a fair shake." *Id.*

206 Royster, *supra* note 147, at 370.

207 Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (criticizing the trial judge for failure to sequester jurors, an alternative that the judge should have raised sua sponte).

208 *See* Swift, *Restraints*, *supra* note 38, at 79-80 (acknowledging that some public information will be false and emphasizing that a democracy requires informed citizens rather than government censorship of the information flow).

209 *See* Garry & Riordan, *supra* note 192, at 578-79 (eliminating press coverage does not eliminate juror bias). *See also supra* notes 190-92 and accompanying text (stating that other sources remain which can prejudice the jury, making the silence of the most accurate sources valueless).

210 Garry & Riordan, *supra* note 192, at 578-79 (eliminating press coverage and attorney comment does not silence rumors and comments by bailiffs and court personnel).

211 *See supra* note 200 and accompanying text (discussing the inability of defense publicity to prejudice jurors against the government). *See also* Kramer et al., *supra* note 200, at 411 (studies indicate that jurors with increased awareness or knowledge of a case are more likely to favor the prosecution than the defense); Kaplan, *supra* note 154, at 623 (claiming jurors mistrust reporters and believe that involvement as jurors gives them a better understanding than the press). One legal professional commented that his own personal experience indicated that attempts by lawyers to sensationalize a case or to act unethically seldom succeed: "Rambo may succeed in the theater, but he self-destructs in the courtroom." Thomas M. Reavley, *Rambo Litigators: Aggressive Tactics Versus Legal Ethics*, TRIAL, May 1991, at 63, 65.

212 Simon, *supra* note 36, at 520. Simon concluded that juries in the aggregate are "responsible and rational," even if the individuals comprising the jury are not. *Id.* Simon also contended that jurors take their role seriously and recognize that they must follow the rules and procedures of the court. *Id.* Criticism of jurors for capricious and emotional verdicts remains unsubstantiated, according to Simon. *Id.* A phone survey which Simon conducted before voir dire of a trial revealed that jurors were affected by publicity but 59% of those polled claimed they could ignore the publicity and focus on the evidence presented at court. *Id.* at 526-27. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 494 (1966) (the jury focuses on the evidence presented and understands its obligation to render a guilty verdict only

and ultimately fail to guarantee that pretrial publicity will not influence potential jurors.[213]

PART III

Several alternatives combat pretrial publicity and preserve jury impartiality more effectively than disciplinary rules.[214] The trial judge must exercise judicial power to take reasonable and specific precautions to ensure jury impartiality.[215] Although these precautions may be costly and time consuming, they mitigate the influence of publicity more successfully than disciplinary rules.[216] Disciplinary rules, which only limit one source of publicity, can also generate costs and delays as courts become mired in disputes over whether an attorney violated a rule.[217]

Change of venire and change of venue to a jurisdiction less

---

when that evidence proves guilt beyond a reasonable doubt); Kramer et al., *supra* note 200, at 413 (exposure to publicity does not preclude impartiality); Minow & Cate, *supra* note 3, at 656, 659 (jurors, when well-informed, are an essential check on law enforcement and are not overly influenced by media attention; they are, in fact, "skeptical about information from the media"); *Panel Three*, *supra* note 200, at 602 (jurors are capable of analyzing the evidence and the charges and reaching a just conclusion).

213 *See supra* note 147 and accompanying text (explaining the unnecessary harm caused by disciplinary rules).

214 *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (proposing postponement of the trial, change of venue, sequestration, voir dire, judicial instructions to jurors and narrowly tailored gag orders). *See also* Isaacson, *supra* note 180, at 562-66 (analyzing success of various methods in alleviating pretrial publicity); Rhode, *supra* note 59, at 718 (citing studies indicating that the rules are not strictly enforced—of 30,836 complaints made in 1978, only 626 disciplinary actions (2%) and 124 disbarments (.4%) resulted); Swift, *Model Rule 3.6*, *supra* note 2, 1020 (criticizing Rule 3.6 and its predecessors as "broadly worded regulations," which should be displaced by more specific alternatives). *But see* Minow & Cate, *supra* note 3, at 633 (alternatives may mislead the court into examining media exposure rather than the existence of prejudice; courts may confuse "unaware" with "impartial").

215 *Sheppard*, 384 U.S. at 363 (trial judge has duty to prevent publicity from disturbing the trial process). *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976) (trial judge bears responsibility for monitoring publicity and ensuring a fair trial).

216 *See supra* notes 192-94 and accompanying text (criticizing disciplinary rules because they restrict only source and do not reduce the effect of the information). *See also* Isaacson, *supra* note 180, at 562-67 (for a critique of alternatives to disciplinary rules); Kennebeck, *supra* note 200, at 240-41 (analysis from a juror's point of view); Alice M. Padawer-Singer & Allen H. Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts*, *in* THE JURY SYSTEM IN AMERICA, 125, 126 (Rita J. Simon ed., 1975) (trial publicity leads to lengthy jury selection, motions, delays, costs, and mistrials, which burden the judicial system and weaken public respect for the system).

217 Isaacson, *supra* note 180, at 570 (criticizing rules and noting that in some cases, the press may have to be subpoenaed and questioned to discover what party should be disciplined, generating more time-consuming litigation).

affected by the publicity are two effective remedies that do not unduly delay the trial process.[218] A continuance may also reduce the effects of pretrial publicity by allowing public attention to focus elsewhere.[219] The public's memory of the facts may not entirely fade, but any prejudicial emotions will have subsided.[220]

Voir dire,[221] when aggressively used, effectively eliminates prejudice from the jury and adequately addresses and determines the jurors' knowledge of and belief in any publicity.[222] No juror

---

218 Kramer et al., *supra* note 200, at 435. *But see* Minow & Cate, *supra* note 3, at 646-47 (these alternatives may, however, force a defendant to choose between the Sixth Amendment rights to an impartial jury and a trial in the community in which the crime was committed).

219 Patton v. Yount, 467 U.S. 1025, 1033 (1984). The *Patton* Court found that a delay "had a profound effect" and although jurors remembered that the crime had occurred, the "feelings of revulsion" that biased jurors had subsided. *Id.* at 1035. *See* Kramer et al., *supra* note 200, at 431 (even a twelve day delay eliminated bias created by factual publicity, allowing jurors to forget); Kerr et al., *supra* note 200, at 675 (discussing study of simulated jurors finding that continuance eliminated prejudicial effect except for some of the effects of emotional publicity); Minow & Cate, *supra* note 3, at 647-48 (criticizing postponement as ineffective but noting it was the least studied of judicial remedies).

220 *See supra* note 219 (analyzing the effectiveness of delaying trials).

221 Defined as "the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

222 Kerr et al., *supra* note 200, at 668. Many legal professionals assert that thorough voir dire can be effective in eliminating bias from the jury. *Id.* at 667. In highly publicized cases it may be even more effective because courts have something definite to focus on and generally allow more extensive questioning of jurors. *Id.* at 668. With specific publicity to focus questions on, biases are more easily detected than when questions must search for general biases created by unknown factors. *Id.* Voir dire also provides judges and attorneys an opportunity to explain the law to jurors and for attorneys to develop a rapport with jurors. *Id.* at 666. Several studies question the effectiveness of voir dire. *Id.* at 668-69. These studies, however, are merely experiments with "mock" juries and trials and neither address nor study the types of questions asked. *Id.* at 669-71. Thorough questioning, meticulously crafted, could determine biases that will prevent the juror from focusing on the evidence. Superficial voir dire, naturally, cannot detect latent bias. More searching and well-planned voir dire might. Kerr opined that professionals expect too much from voir dire: "No, it is not disturbing that voir dire accomplishes so little. What is disturbing is that we expect voir dire to accomplish so much." *Id.* at 699.

Kerr also cited a study that found that pretrial publicity appeared to have a stronger effect on juries selected without the benefit of voir dire than on juries selected with voir dire. *Id.* at 670. Kerr stated that the study attributed voir dire with ascertaining biased jurors, persuading jurors to displace preconceived ideas about the defendant and assisting jurors in understanding the relevant law. *Id.* Kerr conducted a separate study with simulated jurors exposed to varying levels of prejudicial pretrial publicity from different sources and found that pretrial publicity did not substantially affect individual jurors' pre-deliberation decisions but did affect post-deliberation verdicts. *Id.* at 672, 675. Kerr also analyzed the effects of casual and peremptory challenges on jurors and their disposition toward the case.

can remain completely ignorant of the crime, the subject of the trial or the accused's identity in a highly publicized case.[223] Thorough questioning, however, can determine whether the juror's outside knowledge may cloud his judgment.[224] This questioning also impresses on jurors the importance of relying solely on the evidence presented.[225]

Once an impartial jury has been selected, sequestration prevents prejudicial publicity from influencing jurors, without unnecessarily infringing the First Amendment rights of any party.[226] Removing jurors from the media's audience in a highly publicized trial also eliminates reinforcement of any prejudicial information released prior to jury selection.[227]

When publicity is not so pervasive to demand sequestration, a court order may prevent the dissemination of prejudicial information.[228] Unlike disciplinary rules, a protective order, or "gag order," is narrowly designed to prohibit the release of specific information within a particular trial for a definite period of time.[229] Such an order may immediately be appealed, unlike dis-

---

Id. at 681-88. For further analysis of the effect of jury challenges see *Panel Three*, *supra* note 200, at 604-07. *See also* Minow & Cate, *supra* note 3, at 649-54 (citing studies that indicate voir dire is ineffective because it fails to elicit honest responses and may be affected by social influences); Robert F. Hanley, *Voir Dire: The View from the Jury Box*, LITIGATION, Summer 1986, at 21 (criticizing attorneys who do not properly manipulate voir dire and ignore its value).

223 *See* Minow & Cate, *supra* note 3, at 635-36.

224 *See Panel Three*, *supra* note 200, at 602-03 (in high profile cases the judge has a greater duty to conduct careful voir dire to determine the extent of the jurors' knowledge and the effect of that knowledge on their judgment); Garry & Riordan, *supra* note 192, at 588 (pretrial publicity may enhance the effectiveness of voir dire by increasing the judges' and attorneys' scrutiny of the jurors which may then uncover latent prejudice). *See supra* note 222 (examining the usefulness of voir dire).

225 Kerr et al., *supra* note 200, at 670.

226 *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976) (sequestering jurors "enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths"). *But see* Isaacson, *supra* note 180, at 564 (criticizing sequestration as ineffective against pretrial publicity).

227 *See* Sheppard v. Maxwell, 384 U.S. 333, 359 (1966) (insulating jurors protects them from the press).

228 *See Sheppard*, 384 U.S. at 361-62 (recommending that trial courts control the release of information from various sources).

229 Swift, *Model Rule 3.6*, *supra* note 2, at 1051. Gag orders are constitutional if: a) the publicity to be restrained creates a danger; b) other measures are unlikely to resolve the publicity problem; and c) the gag order will mitigate the harm. *Nebraska Press Ass'n*, 427 U.S. at 562. *See also* Pappas, *supra* note 36, at 1038 (summarizing the standards articulated in *Nebraska Press Ass'n*). *Id.* A gag order is created after examining the facts involved and the "line between protected and unprotected speech." Swift, *Model Rule 3.6*, *supra* note 2, at 1051-53. The attorney need not speculate what speech is forbidden because speech not expressly prohibited in the order is protected. *Id. See also* Sallen, *supra* note 86, at 141 (orders are narrowly

ciplinary rules which cannot be appealed before speech is either punished or lost.[230] In addition, clear and precise jury instructions remind jurors of their sworn oath to judge solely the evidence presented.[231] Judicial instructions eliminate unconscious reliance on prejudicial information by distinguishing between judicially approved evidence and extrajudicial comment.[232] Although none of these methods alone remove all the effects of pretrial publicity, in combination, these alternatives are more successful and less restrictive than disciplinary rules.

CONCLUSION

Disciplinary rules, such as Model Rule 3.6, cannot resolve the dilemmas posed by pretrial publicity.[233] Rather, other methods more appropriately and effectively reduce the danger of pretrial publicity without jeopardizing society's interest in free and open debate. Only disciplinary rules endorsing the clear and present danger test guarantee that harmful speech is prevented while harmless speech is not needlessly silenced.[234] The clear and present danger standard upholds traditional protection of

---

tailored and the presumption that they are unconstitutional assures that they are only used when absolutely necessary). *But see* Garry & Riordan, *supra* note 192, at 577-78 (because gag orders are issued after publicity arises, they may be too late to prevent prejudice in a jury pool and may be violated by vigilante journalists).

230 Swift, *Model Rule 3.6*, *supra* note 2, at 1053.

231 Padawer-Singer & Barton, *supra* note 216, at 136. *But see* Isaacson, *supra* note 180, at 566 (instructions do not help jurors disregard the prejudicial information); Kramer et al., *supra* note 200, at 412 (instructions do not diminish the effect of publicity but rather strengthen its impact); Minow & Cate, *supra* note 3, at 648-49 (instructions are merely a "placebo" and require the jurors to perform "mental gymnastics" to forget information that they have already digested).

232 But see *supra* notes 221-25 and accompanying text regarding the ineffectiveness of voir dire in determining the juror's unconscious reliance on prejudicial information.

233 Abel, *supra* note 58, at 686-87 (the rules cannot resolve the publicity dilemma because the dilemma is "inherent in the structure of the lawyer's role").

234 *See* Swartz, *supra* note 16, at 1436 (clear and present danger analysis is consistent with the strong presumption against prior restraints and the principle that speech should only be prohibited in extreme circumstances and when no other alternative exists). The only state that has adopted a clear and present danger standard for attorney disciplinary regulations is Virginia. *Gentile v. State Bar*, 111 S. Ct. 2720, 2741 (1991). Virginia Disciplinary Rule 7-106 provides:

> [A] lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that he knows, or should know, constitutes a clear and present danger of interfering with the fairness of the trial by a jury.

First Amendment rights and provides explicit guidance in navigating the gray area between unreasonable and unethical commentary and good faith advocacy and criticism of government functions.[235] Some commentators recommend that reasonable or substantial likelihood tests be applied only in conjunction with a balancing approach.[236] Such a balancing test would not arbitrarily restrict comment but would instead measure potential harm against the need for information within each case.[237] Other commentators recommend a dual standard which acknowledges that some comment which is prejudicial in one context may be harmless in another.[238] Both suggestions, however, fail to clearly define prohibited comment and therefore continue to encourage self-censorship.

To preserve First Amendment rights, disciplinary rules should merely prohibit speech that an attorney knows or should know to be false or made in bad faith.[239] Such a rule would avoid sanctions against lawyers who are zealously defending their client in good faith and eliminate interference with an attorney's fiduciary obligations. Allowing attorneys to openly address and attack misleading or false publicity in court, eliminating unjustifiable reliance on the publicity, would also mitigate the publicity's impact.[240]

More importantly, education and reform within the adversary system should emphasize ethical conduct and condemn the combative atmosphere which sacrifices justice for legal fees and

---

VA. R. SUP. CT. pt. 6, § II, DR 7-107.

New Jersey currently applies a substantial likelihood analysis identical to that proposed by the A.B.A. For text of the New Jersey rule, see *supra* note 78.

235 *See* REDISH, FREEDOM OF EXPRESSION, *supra* note 2, at 192, 211 (the clear and present danger test offers considerable guidance because it requires a fact specific analysis; any test that does consider the facts of each situation would either provide too much or too little protection).

236 Rotondo, *supra* note 84, at 1119-20.

237 *Id.*

238 Weaver, *supra* note 84, at 512. Weaver recommended application of the clear and present danger test when the "possible danger is minimal" and the reasonable likelihood test when "the danger is great." *Id.* at 513. Weaver also argued for different treatment for prosecution and defense counsel, advocating the use of the clear and present danger protection for defense counsel speech and the less-protective reasonable likelihood standard for the prosecution. *Id.* at 514.

239 This standard would also punish comment made by an attorney simply for the sake of winning or to further a personal reputation as a litigator.

240 *See* Reavley, *supra* note 211, at 65 (attacking overly aggressive trial tactics of attorneys, but noting that an attorney has the opportunity to convince the jury that his adversary is over-zealously advocating without factual support).

notoriety.[241] An educational process stressing morality and personal ethics prevents abuse of free speech rights more effectively than pre-ordained and inflexible standards. When other more reasonable solutions exist that do not burden free speech, disciplinary rules which place overbroad and indecipherable restrictions on speech cannot be upheld. First Amendment freedoms are as vital to justice as an unhindered and impartial trial. One right cannot be arbitrarily extinguished for the sake of another when suitable alternatives exist which procure a viable compromise.

Kelly Ann Hardy

---

241 *See generally* Aronson, *supra* note 58, at 273 (the teaching of professional responsibility should be re-evaluated); Swift, *Model Rule 3.6*, *supra* note 2, at 1054 (the answer to pretrial publicity is not sanctioning lawyers but revising the educational process and fostering "an expression of professional disapproval of publicity which exceeds the attorney's obligations and pushes [First Amendment rights] to the limits); Donald M. Gillmor, *'Trial By Newspaper' and the Social Sciences*, 41 N.D. L.REV. 156, 159 (1964) (the adversarial system "gets sidetracked" and becomes concerned merely with victory); *A Time for Restraint*, 105 N.J.L.J. 132 (1980) ("[T]he public, the bar, the media and law enforcement in particular and government in general must . . . be responsible in terms of the actions they take and the judgements they make. Otherwise the landscape will be littered further with the corpses of careers and reputations."); Reavely, *supra* note 211, at 63 (the adversary system is a "combat zone" requiring a redefinition of its operation and goals); Schwab, *supra* note 3, at 52 (recommending that attorneys, when dealing with press, should convey information but not advocate); Nilsen, *supra* note 1, at 240 (free speech rights should be exercised responsibly and for the purpose of furthering freedom); Geoffrey C. Hazard, Jr., *Law Schools Must Teach Legal Ethics*, NAT'L L.J., Oct. 7, 1991, at 17 (arguing that law schools fail to adequately foster a respect among students for professional ethics); Abel, *supra* note 58, at 681 (a lawyer's many obligations to his client and society compete with personal interests and threaten the integrity of the adversarial system); Karl R. Wallace, *An Ethical Basis of Communication*, *in* PERSPECTIVES ON FREEDOM OF SPEECH 241, 243 (Thomas L. Tedford et al. eds., 1987) (the process of educating should emphasize the means of winning, not winning itself).