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EMPOWERMENT LAWYERING: THE ROLE OF TRIAL PUBLICITY IN ENVIRONMENTAL JUSTICE

*Jennifer L. Johnson**

We are talking about toilet training trans-national corporations We don't want our lands polluted, our water made unsafe to drink, and our air a cause of sickness and disease. Rich corporations who violate our citizens and our environment must be punished and they shall be.¹

I. INTRODUCTION

Traditionally, environmental harms have occurred most often in low-income communities and communities of color.² Across the United States, communities and their attorneys battle against this unsettling tendency and for environmental justice. Environmental poverty lawyer³ Luke Cole has suggested an approach to lawyering⁴ that has

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¹ *ASARCO Hit with Class Action Lawsuit*, ENOS MILLS NEWS (The Denver Group for the Sierra Club, Denver, Colo.), Sept.-Oct. 1991, at 1 (Attorney Macon Cowles commenting on aim of his case).

² Charles P. Lord & William A. Shutkin, *Environmental Justice and the Use of History*, 22 B.C. ENVTL. AFF. L. REV. 1, 1 (1994). See generally Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1.

³ Throughout this Comment, the term "environmental poverty lawyer" is used to describe an attorney who represents low-income communities—often communities of color—facing environmental hazards. Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1992 (1992).

⁴ See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 661–82 (1992) [hereinafter Cole, *Empowerment*].

received widespread acceptance as a method of solving environmental problems faced by low-income communities and communities of color.⁵ The basic tenets of the type of lawyering Cole suggests are: "client empowerment; group representation; and law as a means, not an end."⁶ The gist of empowerment lawyering is that the community must speak for itself as much as possible.⁷

This Comment suggests, however, that in order to empower the community successfully, the lawyer must be critically involved.⁸ In other words, the lawyer has a specific role to play in empowerment lawyering. That role, this Comment argues, requires publicity work.⁹

Until now, environmental justice scholars have not focused on the potential impact of ethical trial publicity rules on empowerment lawyering. This Comment analyzes the potential impact of these rules in the context of environmental justice cases and suggests that states adopt a provision similar to Model Rule 3.6 of the Model Rules of Professional Conduct (Model Rule 3.6), as amended in 1994 (1994 Model Rule 3.6). Section II of this Comment provides an historical backdrop for the issue of trial publicity and explores the evolution of the ethical rules governing trial publicity leading to 1994 Model Rule 3.6. Section III suggests that those states that remain governed either by Disciplinary Rule 7-107 of the Model Code of Professional Responsibility (DR 7-107) or Model Rule 3.6 adopt a provision similar to 1994 Model Rule 3.6. Section III also compares 1994 Model Rule 3.6 with DR 7-107 and analyzes the constitutionality of DR 7-107, finding that DR 7-107, especially as applied in the civil setting, is unconstitutional. Finally, Section III examines the harmful effect the speech limitations of DR 7-107 have had in the environmental justice context. Section IV argues that 1994 Model Rule 3.6 protects fair trials without hindering expression and thus permits environmental poverty lawyers to use this less restrictive rule to further the environmental justice movement. Finally, Section V summarizes and concludes that, with certain restrictions, attorney trial publicity can be a valuable part of environmental justice.

⁵ Interview with Charles P. Lord, Visiting Scholar, Boston College Law School, and Co-Director, Alternatives for Community and Environment, Inc., in Newton, Mass. (Mar. 24, 1995).

⁶ Cole, *Empowerment*, *supra* note 4, at 661.

⁷ Interview with Charles P. Lord, *supra* note 5; see Cole, *Empowerment*, *supra* note 4, at 661-68.

⁸ See *infra* section IV.

⁹ See *infra* section IV.A.

II. HISTORICAL BACKGROUND

A. *Constitutional Considerations of Trial Publicity*

Litigants have a constitutional right to have their dispute resolved on admissible evidence, by fair procedures, in a tribunal that is not influenced by public sentiment or outcry.¹⁰ The right to a fair trial is guaranteed to criminal defendants by the Sixth Amendment¹¹ and to all persons by the Due Process Clause of the Fifth Amendment.¹² Protection of that right requires some limits on the kinds of information that can be disseminated to the public before trial—particularly where the trial is to be by jury.¹³ On the other hand, the public and the press have countervailing rights under the First Amendment.¹⁴ The public has a right to know about threats to its safety and an interest in knowing about the conduct of judicial proceedings.¹⁵ Moreover, litigation often leads to debate over questions of public policy.¹⁶

B. *Historical Background of Trial Publicity Rules in Light of Constitutional Considerations*

Since 1908, the American Bar Association (ABA) has sought to balance the constitutional rights of the public and the press against the litigants' constitutional right to a fair trial by restricting extrajudicial statements made by lawyers.¹⁷ Since that time, the ABA has promulgated and promoted three standards regarding trial publicity: Canon 20 of the Canons of Professional Ethics (Canon 20), DR 7-107,

¹⁰ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1993).

¹¹ *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" U.S. CONST. amend. VI.

¹² *United States v. Marion*, 404 U.S. 307, 324 (1971). The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V. The Due Process Clause of the Fourteenth Amendment incorporates the Fifth and Sixth Amendments against the states. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

¹³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1993).

¹⁴ See U.S. CONST. amend. I; MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1993). The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

¹⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1993).

¹⁶ *Id.*

¹⁷ *See id.*

and Model Rule 3.6. These standards have served as the basis for the standards adopted by state bar agencies that license attorneys.¹⁸

The ABA adopted the first standard, Canon 20, in 1908.¹⁹ According to Canon 20, statements made by lawyers regarding pending or anticipated litigation, whether civil or criminal, generally were condemned.²⁰ Although Canon 20 was in effect for sixty-one years, it was rarely enforced because courts considered it general and vague.²¹

The 1960s were a time of ardent debate over the problems of fair trial and free press.²² The debate intensified in 1963, with the pervasive press coverage and publicity surrounding the assassination of President John F. Kennedy.²³ The 1964 Warren Commission Report on the assassination of President Kennedy²⁴ furthered the debate and

¹⁸ Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 361 (1995).

¹⁹ CANONS OF PROFESSIONAL ETHICS Canon 20 (1908). Canon 20 reads:

[n]ewspaper 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.

Id.

²⁰ *See id.*

²¹ *See, e.g.*, *Hirschkop v. Snead*, 594 F.2d 356, 365 (4th Cir. 1979) ("The trouble [with Canon 20] was that the standards were so general and vague that they were exceedingly difficult to apply and did little to forewarn speakers for publication about what was proscribed and what was permitted."); ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 81 (Tentative Draft Dec. 1966) (The general language of Canon 20 "fails to give adequate guidance and it is perhaps for this reason that it has not been enforced.").

²² *See Gentile v. State Bar*, 501 U.S. 1030, 1067-68 (1991).

²³ *See Committee on the Operation of the Jury System, Report of the Comm. on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391, 395 (1968). The Committee stated:

[t]he events surrounding the assassination of President Kennedy in November 1963 graphically illustrate the effect of pervasive news coverage and publicity on the right of a defendant to a trial by an impartial jury. Because of this publicity, the President's Commission felt, "it would have been a most difficult task to select an unprejudiced jury, either in Dallas or elsewhere."

Id. (quoting PRESIDENT'S COMM'N ON THE ASSASSINATION OF PRESIDENT KENNEDY, REPORT OF THE PRESIDENT'S COMM'N ON THE ASSASSINATION OF PRESIDENT KENNEDY, at 238 (1964) [hereinafter WARREN COMM'N REPORT]).

²⁴ WARREN COMM'N REPORT, *supra* note 23, at 27. The Warren Commission Report asked that "representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial." *Id.*

ultimately led to the adoption of Standards Relating to Fair Trial and Free Press by the ABA in 1968.²⁵ These standards limited statements of lawyers that presented a “reasonable likelihood that such dissemination [would] interfere with a fair trial or otherwise prejudice the due administration of justice.”²⁶

The 1966 United States Supreme Court decision in *Sheppard v. Maxwell* also influenced significantly the debate over fair trial and free press.²⁷ In this landmark decision, the Court found that the deluge of pervasive and prejudicial publicity that accompanied Dr. Sam

²⁵ In December 1966, the ABA Advisory Committee on Fair Trial and Free Press, under Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court, released a tentative draft of its report. ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 19 (Tentative Draft Dec. 1966). The draft was approved in 1968. ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft Feb. 1968) [hereinafter REARDON REPORT].

The Reardon Report did not recommend restraint on the press. *Id.* at 68–73. Instead, the Reardon Report recommended that the ABA impose restrictions on the release of information by lawyers and law enforcement officers. *Id.* at 76.

Other reports that added to the debate on the fair trial and free press issue were noted 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, 397 (1968) (citing AMERICAN NEWSPAPER PUBLISHERS ASS'N, FREE PRESS AND FAIR TRIAL (Jan. 1967); SPECIAL COMM. ON RADIO, TELEVISION AND THE ADMINISTRATION OF JUSTICE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL: FINAL REPORT WITH RECOMMENDATIONS (1967)).

²⁶ REARDON REPORT, *supra* note 25, § 1.1, at 2.

²⁷ *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In *Sheppard*, defendant Dr. Sam Sheppard was accused of bludgeoning his pregnant wife, Marilyn Sheppard, to death. *See id.* at 335. Before the trial, the Cleveland news media filled the area with stories about the case and Sheppard's personal problems. *Id.* at 338–42. Most of the stories focused on highly incriminating evidence. *Id.* at 340. Three months before the trial, the coroner called an inquest. *Id.* at 339. The three-day inquest was televised and conducted before an audience of several hundred. *Id.* Although Sheppard's counsel were present, they were not allowed to participate. *Id.* Several weeks before the trial, the names and addresses of prospective jurors were published, resulting in their receipt of telephone calls and letters about the case. *Id.* at 342. The trial court did nothing to limit the pretrial publicity. *See id.* at 338–42.

Pervasive publicity continued during the trial. *Id.* at 342–49. Twenty reporters were allotted seats within the bar and other members of the press crowded the small courtroom, continually disrupting the trial. *See id.* at 342–44. Before deliberations, the jurors were not sequestered and were constantly exposed to the news media. *Id.* at 345. Although they were sequestered during their deliberations, the jury was given inadequately supervised access to telephones. *See id.* at 349. The trial judge did nothing to limit the massive publicity except to make “suggestions” and “requests” that the jurors not expose themselves to comment about the case. *See id.* at 353. The trial terminated on December 21, 1954 with Dr. Sheppard's conviction of second-degree murder. *Sheppard v. Maxwell*, 231 F. Supp. 37, 40 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965), *rev'd*, 384 U.S. 333 (1966).

Nearly ten years later on a writ of habeas corpus the United States District Court for the Southern District of Ohio found that Sheppard had been denied due process because of this prejudicial publicity and the total failure of the trial judge to protect the jury from its effects.

Sheppard's murder prosecution denied him a fair trial.²⁸ The Court stated that, to secure a defendant's right to a fair trial, "extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters" should be restricted.²⁹

Sheppard influenced the drafters of the Model Code of Professional Responsibility, which superseded the Canons of Professional Ethics in 1969.³⁰ DR 7-107³¹ of the Model Code of Professional Responsibility

See *id.* at 60. The United States Court of Appeals for the Sixth Circuit reversed by a divided vote. *Sheppard v. Maxwell*, 346 F.2d 707, 709-10, 738 (6th Cir. 1965), *rev'd*, 384 U.S. 333 (1966).

²⁸ *Sheppard*, 384 U.S. at 363. The Supreme Court affirmed the grant of writ by the district court. *Id.*

²⁹ *Id.* at 361. In the penultimate paragraph of the majority opinion, Justice Clark also warned that trial judges must take steps to limit outside influences on juries. *Id.* at 362-63. "Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press . . . is highly censurable and worthy of disciplinary measures." *Id.* at 363.

Sheppard did not, however, discuss the effect of the First Amendment on the trial court's power to regulate the speech of attorneys. *Gannett Co., Inc. v. State*, 571 A.2d 735, 742 (Del.) ("While *Sheppard* did not specifically involve a first amendment challenge, we nevertheless keep in mind its principles when extensive media activity threatens a party's fundamental right to a fair trial."), *cert. denied*, 495 U.S. 918 (1990).

³⁰ STEVEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 409 (1995).

³¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1983). DR 7-107 provides:

(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.
- (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.

ity incorporated the 1968 ABA Standards Relating to Fair Trial and Free Press governing public statements by lawyers in criminal

(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 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 extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extra-judicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
- (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
- (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

- (1) Evidence regarding the occurrence or transaction involved.

cases.³² Accordingly, subsections (A) through (D) of DR 7-107 prohibit comments during criminal trials that are "reasonably likely to interfere with a fair trial."³³

DR 7-107(G) absolutely prohibits a lawyer in a pending civil case from making public comments on any of the subjects enumerated in the rule.³⁴ For example, lawyers are forbidden from making public statements relating to: "[e]vidence regarding the occurrence or transaction involved; . . . [t]he character, credibility, or criminal record of a party [or] witness; . . . [or] the merits of the claims or defenses of a party."³⁵ In addition to these absolute prohibitions, DR 7-107(G) also prohibits comments regarding "[a]ny other matter reasonably likely to interfere with a fair trial of the action."³⁶ DR 7-107(G) therefore creates a conclusive presumption that a civil lawyer's comments on any of the enumerated subjects will be "reasonably likely" to interfere with a fair trial, giving the lawyer no opportunity to prove otherwise.³⁷

The adoption of DR 7-107, however, did not silence the debate regarding trial publicity rules. While a number of courts upheld the circumscriptions imposed by the "reasonable likelihood" standard,³⁸

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(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 extra-judicial statement that he would be prohibited from making under DR 7-107.

Id. (footnote omitted).

³² MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 n.85 (1983).

³³ *Id.* DR 7-107.

³⁴ *Id.* DR 7-107(G).

³⁵ *Id.* DR 7-107 (G)(1), (2), (4).

³⁶ *Id.* DR 7-107(G)(5).

³⁷ See *Hirschkop v. Snead*, 594 F.2d 356, 365 (4th Cir. 1979). The United States Court of Appeals for the Fourth Circuit rejected appellee's argument that "the rule should be read with a gloss that prohibits only those comments which are reasonably likely to interfere with the administration of justice." *Id.*

³⁸ See, e.g., *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 610 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988); *Hirschkop*, 594 F.2d at 362; *United States v. Tjjerina*, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *Younger v. Smith*, 106 Cal. Rptr. 225, 242 (Cal. Ct. App. 1973); *Hughes v. State*, 437 A.2d 559, 575 (Del. 1981); *In re Hinds*, 449 A.2d 483, 493 (N.J. 1982); *In re Rachmiel*, 449 A.2d 505, 655 (N.J. 1982); *State v. Carter*, 365 A.2d 473, 474 (N.J. Super. Ct. App. Div. 1976).

other courts held that the standard unduly restricted attorneys' First Amendment rights.³⁹ Three cases, *Chicago Council of Lawyers v. Bauer*,⁴⁰ *Hirschkop v. Snead*,⁴¹ and *Markfield v. Association of the Bar*,⁴² often are cited as illustrations of the various interpretations of the "reasonable likelihood" standard.⁴³

In *Bauer*, an association of local lawyers and several of the association's members brought an action seeking a declaratory judgment and an injunction against enforcement of a local rule of the district court and DR 7-107.⁴⁴ The United States Court of Appeals for the Seventh Circuit held that the "reasonable likelihood" standard of DR 7-107 was unconstitutional in both civil and criminal cases and that the "serious and imminent threat" standard, a narrower, more restrictive standard, should apply instead.⁴⁵ The *Bauer* court further stated that rules should be formulated, declaring:

that comment concerning certain matters will presumptively be deemed a serious and imminent threat to the fair administration of justice so as to justify a prohibition against them. One charged with violating such a rule would of course have the opportunity to prove that his statement was not one that posed such a serious and imminent threat, but the burden would be upon him.⁴⁶

In *Hirschkop v. Snead*, an attorney brought suit to challenge Rule 7-107 of the Virginia Code of Professional Responsibility, which follows DR 7-107 verbatim.⁴⁷ The plaintiff claimed that Virginia Rule 7-107 violated lawyers' freedom of speech.⁴⁸ The United States Court of Appeals for the Fourth Circuit rejected the "serious and imminent

³⁹ See, e.g., *CBS, Inc. v. Young*, 522 F.2d 234, 239 (6th Cir. 1975); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); *In re Oliver*, 452 F.2d 111, 114-15 (7th Cir. 1971); *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970); *Markfield v. Association of the Bar*, 370 N.Y.S.2d 82, 84 (N.Y. App. Div.), appeal dismissed, 337 N.E.2d 612 (N.Y. 1975).

⁴⁰ 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); see *infra* text accompanying notes 44-46.

⁴¹ 594 F.2d 356 (4th Cir. 1979); see *infra* text accompanying notes 47-51.

⁴² 370 N.Y.S.2d 82 (N.Y. App. Div.), appeal dismissed, 337 N.E.2d 612 (N.Y. 1975); see *infra* text accompanying notes 52-54.

⁴³ See AMERICAN BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 280-81 (1992).

⁴⁴ *Bauer*, 522 F.2d at 247.

⁴⁵ *Id.* at 249.

⁴⁶ *Id.* at 251.

⁴⁷ *Hirschkop v. Snead*, 594 F.2d 356, 361-62 (4th Cir. 1979).

⁴⁸ *Id.* at 363.

threat" standard proposed by *Bauer* with respect to criminal cases.⁴⁹ The *Hirschkop* court found the "reasonable likelihood" standard to be a constitutional check on the speech of criminal lawyers.⁵⁰ The *Hirschkop* court, however, found that the "reasonable likelihood" standard as applied to civil cases is unconstitutional because it is vague and overbroad and thus violates the Due Process Clause of the Fourteenth Amendment.⁵¹

In *Markfield v. Association of the Bar*, an attorney in the Tombs' Riots trial participated in a panel discussion concerning prison rebellions that was carried over the radio.⁵² The trial court found the attorney guilty of violating New York's DR 7-107(D).⁵³ The First Department of the Appellate Division of the New York Supreme Court dismissed the charge of professional misconduct, explaining that the "reasonable likelihood" standard of DR 7-107 may be constitutionally adequate, but declaring that the rule should be applied only where an attorney's extrajudicial statements present a "clear and present danger" to the administration of justice.⁵⁴

Experts cite the preceding three cases as the impetus for the 1978 amendment to the ABA Standards Relating to Fair Trial and Free Press, which limited lawyer publicity that presented a "clear and present danger" to a fair trial,⁵⁵ and the 1983 adoption of Model Rule 3.6.⁵⁶ Model Rule 3.6 was based on the Model Code of Professional

⁴⁹ *Id.* at 362.

⁵⁰ *Id.* at 362, 370.

⁵¹ *Id.* at 370, 373.

⁵² *Markfield v. Association of the Bar*, 370 N.Y.S.2d 82, 84 (N.Y. App. Div.), *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1975).

⁵³ *Id.*

⁵⁴ *Id.* at 85.

⁵⁵ AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE 8•7-8•13 (2d ed. 1986). The *Chicago Council of Lawyers v. Bauer* decision led to the incorporation of the "clear and present danger" standard into the Fair Trial and Free Press standard. *Id.* at 8•7; see AMERICAN BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 280-81 (1992) (discussing the history of the "substantial likelihood of material prejudice" standard).

⁵⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1993). Model Rule 3.6 reads:

(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;

Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.⁵⁷ Unlike its predecessors, Model Rule 3.6 proscribes conduct that has a "substantial likelihood of materially prejudicing an adjudicative proceeding," making no distinction between civil matters triable to a jury and criminal matters.⁵⁸ Those who formulated the Model Rules of Professional Conduct apparently thought the "substantial likelihood" standard approximated the "clear and present danger" standard recommended by the Advisory Committee on Fair Trial and Free Press.⁵⁹

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

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

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

(2) the information contained in a public record;

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

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

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

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

(7) in a criminal case:

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

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

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

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

Id. Rule 3.6.

⁵⁷ *Id.* Rule 3.6 cmt.

⁵⁸ *Id.* Rule 3.6(a).

⁵⁹ *Gentile v. State Bar*, 501 U.S. 1030, 1037 (1991) (citations omitted); see *In re Hinds*, 449 A.2d

In August of 1994, the ABA House of Delegates substantially amended Model Rule 3.6 for the first time since its 1983 adoption.⁶⁰ The amendments to Model Rule 3.6 represent a direct response to *Gentile v. State Bar*, which raised First Amendment questions about portions of Model Rule 3.6.⁶¹

1. The *Gentile* Case

In *Gentile v. State Bar*, a Nevada criminal defense attorney held a press conference hours after his client was indicted in order to counteract what he perceived as unfair press coverage of his client's case.⁶² The police had charged his client, the owner of a security vault company, with the theft of drugs and travelers' checks that police had stored in one of the vaults.⁶³ Press reports had quoted various police sources as saying that the theft constituted an attempt to discredit the undercover police operation, that the defendant-client had business relationships with the targets of an undercover police probe, and that the police detectives who were possible suspects had been "cleared."⁶⁴ In holding the press conference, the attorney sought to present weaknesses in the State's case to counteract negative statements made by the police and prosecutors in the press and to protect the potential jury venire.⁶⁵ Accordingly, the attorney decided to hold the first formal press conference of his career.⁶⁶

The night before the press conference, the attorney and two colleagues carefully researched the extent of the obligations of an attorney under the Nevada Supreme Court Rule 177 (the Nevada Rule), worded identically to Model Rule 3.6.⁶⁷ The attorney decided that the timing of a statement was essential in the evaluation of potential prejudice.⁶⁸ Because the attorney knew that a jury would not be impaneled for at least six months, and because the attorney had read cases where no prejudice was found to result from "far worse" statements made only two and four months before trial, the attorney

483, 493 (N.J. 1982) (asserting that substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger).

⁶⁰ GILLERS & SIMON, *supra* note 30, at 228.

⁶¹ *Id.* at xi, 228.

⁶² *Gentile*, 501 U.S. at 1041-42.

⁶³ *Id.* at 1039-40, 1041-42.

⁶⁴ *Id.* at 1040.

⁶⁵ *Id.* at 1042.

⁶⁶ *Id.*

⁶⁷ See *Gentile*, 501 U.S. at 1044.

⁶⁸ *Id.*

determined that the proposed statement was not "substantially likely to result in material prejudice."⁶⁹

At the press conference, the attorney asserted the innocence of his client, stating that his client was a scapegoat in an attempt to cover up police corruption.⁷⁰ The attorney further alleged that there was more evidence that the police detective took the drugs and the travelers' checks "than any other living human being."⁷¹ The attorney also attacked the credibility of other victims of the theft, many of whom were convicted money launderers or drug dealers.⁷²

Events at trial confirmed that the proposed statement was not substantially likely to result in material prejudice.⁷³ Many of the jurors recollected news reports of the alleged theft, but "not a single juror indicated any recollection of [the attorney] or his press conference."⁷⁴ After presentation of the evidence that the attorney had outlined earlier at the press conference, his client was acquitted.⁷⁵

Following a complaint filed by the State Bar of Nevada, the Southern Nevada Disciplinary Board (Board) found that the pretrial comments of the attorney had violated the Nevada Rule.⁷⁶ The Board recommended that the attorney be privately reprimanded.⁷⁷ The Nevada Supreme Court affirmed.⁷⁸

On appeal to the United States Supreme Court, the attorney argued that (1) the Nevada Rule was unconstitutionally vague and overbroad as applied to him,⁷⁹ and (2) the Nevada Rule violated the First Amendment by punishing public comments by an attorney during a pending case that merely posed a "substantial likelihood of material prejudice" to a trial as opposed to a "clear and present danger."⁸⁰ The Supreme Court accepted the first argument by a five-to-four margin, but rejected the second argument by a different five-to-four vote.⁸¹

⁶⁹ *Id.*

⁷⁰ *Id.* at 1059 app. A.

⁷¹ *Id.*

⁷² *Gentile*, 501 U.S. at 1045.

⁷³ *Id.* at 1047.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1033.

⁷⁷ *Gentile*, 501 U.S. at 1033.

⁷⁸ *Id.*

⁷⁹ *See id.* at 1048.

⁸⁰ *See id.* at 1068-69.

⁸¹ *See id.* at 1048, 1051.

Justice Kennedy, writing for the five-to-four majority on the first argument, reversed the Nevada Supreme Court on the ground that the Nevada Rule was void for vagueness.⁸² Justice Kennedy explained that the “safe harbor” provision of the Nevada Rule⁸³ misled the attorney into thinking that he was guaranteed immunity from discipline when his public comments merely described the general nature of the defense.⁸⁴ Thus, by holding in favor of the attorney on this issue, the Kennedy majority exhibited some solicitude for the dilemma of a lawyer who seeks to counteract negative publicity.

Justice Kennedy also stated that the Nevada Rule failed to provide the necessary fair notice to a lawyer seeking protection of the safe harbor provision that allows a criminal lawyer to explain the “general” nature of a client’s defense “without elaboration.”⁸⁵ Specifically, Justice Kennedy found that the provision gave deficient guidance because the terms “general” and “elaboration” were classic terms of degree, which “have no settled usage or tradition of interpretation in law.”⁸⁶ As such, the Nevada Rule left the attorney with “no principle for determining when his remarks [would] pass from the safe harbor of the general to the forbidden sea of the elaborated.”⁸⁷ In support of the preceding conclusion, Justice Kennedy quoted portions of the attorney’s press conference indicating that the attorney conscientiously researched the requirements of the Nevada Rule, and that the remarks of the attorney were circumspect and general.⁸⁸ Justice Kennedy asserted that “[t]he fact [that the attorney] was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that [the Nevada Rule] creates a trap for the wary as well as the unwary.”⁸⁹

Chief Justice Rehnquist authored the Court’s five-to-four rejection of the attorney’s First Amendment argument.⁹⁰ The Chief Justice wrote that “the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard” than the “clear and present danger” standard advocated by the attorney.⁹¹

⁸² *Gentile*, 501 U.S. at 1048 (Kennedy, Marshall, Blackmun, Stevens, O’Connor, JJ.).

⁸³ The “safe harbor” provision of the Nevada Rule, which was held unconstitutional, is verbatim of Model Rule 3.6(c). For the full text of Model Rule 3.6(c), see *supra* note 56.

⁸⁴ *Gentile*, 501 U.S. at 1048.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1048–49.

⁸⁷ *Id.* at 1049.

⁸⁸ *Id.*

⁸⁹ *Gentile*, 501 U.S. at 1051.

⁹⁰ *Id.* at 1062.

The Chief Justice wrote that “the ‘substantial likelihood of material prejudice’ standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state’s interest in fair trials . . . and it imposes only narrow and necessary limitations on lawyers’ speech.”⁹² Chief Justice Rehnquist reasoned that as “key participants” in the criminal justice system, lawyers are subject to controls on their speech in order to ensure trial fairness.⁹³ Furthermore, lawyers’ “extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative.”⁹⁴

2. The 1994 Amendment to Model Rule 3.6

The decision of the Supreme Court in *Gentile v. State Bar* prompted the Standing Committee on Ethics and Professional Responsibility (Standing Committee), whose task is to review the continued effectiveness and enforceability of the Model Rules of Professional Conduct, to begin work on an amendment to Model Rule 3.6.⁹⁵ In August 1994, the ABA House of Delegates adopted the amendment proposed by the Standing Committee.⁹⁶

⁹¹ *Id.* at 1074.

⁹² *Id.* at 1075 (Rehnquist, White, O’Connor, Scalia, Souter, JJ.). The remaining four Justices indicated skepticism, but eventually pronounced it nonessential to determine the constitutionality of Model Rule 3.6, noting that the difference between a “substantial likelihood of material prejudice” and a “clear and present danger” could prove to be “mere semantics.” *Id.* at 1036–37.

⁹³ *See id.* at 1074.

⁹⁴ *Gentile*, 501 U.S. at 1074 (citations omitted).

⁹⁵ GILLERS & SIMON, *supra* note 30, at 228, 233–35.

⁹⁶ *See id.* at 233. 1994 Model Rule 3.6 reads:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter 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 in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

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

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

The amendment achieves three goals. First, the amendment reformulates the types of extrajudicial statements that lawyers may make notwithstanding the general prohibition of extrajudicial statements that will have a substantial likelihood of materially prejudicing a court proceeding.⁹⁷ Second, and perhaps most importantly, the amendment adds a new "safe harbor" provision that permits lawyers to make statements for the purpose of guarding against undue prejudice due to recent adverse publicity initiated by someone else.⁹⁸ Third, the amendment explicitly states that Model Rule 3.6(a) governs lawyers who are participating or have participated in the investigation of a case, as well as their associates in their firm or government agency.⁹⁹

III. THE NEED FOR UNIVERSAL ADOPTION OF 1994 MODEL RULE 3.6 IN CIVIL CASES

States should adopt trial publicity rules similar to 1994 Model Rule 3.6 for several reasons. First, those states that remain governed by DR 7-107(G) should adopt 1994 Model Rule 3.6 because DR 7-107(G) imposes more restrictions on attorney speech than 1994 Model Rule 3.6,¹⁰⁰ and any rule that prohibits attorneys' speech in civil cases is of extremely doubtful constitutional character.¹⁰¹ Moreover, the more

(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, in addition to subparagraphs (1) through (6):

(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.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).

⁹⁷ Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(b) (1994) with MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1993).

⁹⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

⁹⁹ *Id.* Rule 3.6(d)& cmt.

¹⁰⁰ See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.2, at 634 (1986) ("The 'substantial likelihood' test of the Model Rules plainly permits more extrajudicial commentary by lawyers than does the 'reasonable likelihood' test of DR 7-107.").

¹⁰¹ See discussion *infra* section III.C.

permissive 1994 Model Rule 3.6 allows environmental poverty lawyers to employ publicity, while DR 7-107(G) creates a chilling effect on environmental justice lawyering and is one weapon in a vast arsenal used to intimidate environmental justice communities.¹⁰² Furthermore, a number of courts have concluded that a more lenient standard should apply in civil litigation than in criminal litigation.¹⁰³ Finally, those states that remain governed by Model Rule 3.6 should adopt 1994 Model Rule 3.6 to reflect the Supreme Court's ruling in *Gentile v. State Bar*.¹⁰⁴

A. A Need for Uniformity

Only eight states currently remain governed by the restrictions of DR 7-107(G).¹⁰⁵ The majority of states instead have adopted less restrictive standards.¹⁰⁶ Twenty-one states have adopted Model Rule 3.6 verbatim,¹⁰⁷ while fourteen states have adopted slight variations

¹⁰² See discussion *infra* section III.D.

¹⁰³ *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) (noting "significant differences" between civil and criminal cases must be considered in evaluating constitutionality of rules); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 257-58 (7th Cir. 1975) (noting "particular distinctions" between civil and criminal cases demand less restrictions on speech in civil cases), *cert. denied*, 427 U.S. 912 (1976); *Shadid v. Jackson*, 521 F. Supp. 85, 87 (E.D. Tex. 1981) (citing with approval *Hirschkop* and *Bauer*); *Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036, 1039-40 (D.R.I. 1980) (noting that the standard in civil cases must be at least equal to or less restrictive than that allowed for in criminal proceedings).

¹⁰⁴ See discussion *infra* section IV.

¹⁰⁵ Georgia, Iowa, Massachusetts, Nebraska, Ohio, Tennessee, and Vermont have adopted DR 7-107(G) verbatim. GA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (current with amendments through Jan. 15, 1995); IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (current with amendments through Jan. 1, 1995); MASS. RULES OF THE SUPREME JUDICIAL COURT DR 7-107(G) (current with amendments through Jan. 15, 1995); NEB. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (current with amendments through Oct. 15, 1994); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (current with amendments through June 29, 1995); TENN. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (current with amendments through July 15, 1995); VT. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (current with amendments through May 23, 1994). Although North Carolina did not adopt DR 7-107(G) verbatim, the state did adopt the "reasonable likelihood" test of DR 7-107. N.C. RULES OF PROFESSIONAL CONDUCT Rule 7.7(d) (current with amendments through Dec. 8, 1994).

¹⁰⁶ See WOLFRAM, *supra* note 100, at 634 ("The 'substantial likelihood' test of the Model Rules plainly permits more extrajudicial commentary by lawyers than does the 'reasonable likelihood' test of DR 7-107.").

¹⁰⁷ Alabama, Alaska, Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, Pennsylvania, Rhode Island, South Carolina, West Virginia, Wisconsin, and Wyoming have adopted Model Rule 3.6 verbatim. ALA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Apr. 1, 1995); ALASKA RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Oct. 1, 1995); ARIZ. RULES OF PROFESSIONAL CONDUCT ER 3.6 (current with amendments through

of Model Rule 3.6.¹⁰⁸ Six other states and the District of Columbia have adopted standards that are even less restrictive than Model Rule

Aug. 1, 1995); ARK. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Dec. 1, 1994); CONN. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Oct. 1, 1994); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Nov. 20, 1995); IND. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through June 1, 1995); KAN. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Oct. 15, 1994); KY. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Nov. 1, 1994); LA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Jan. 1, 1995); MD. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Mar. 1, 1995); MISS. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Apr. 15, 1995); MO. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Dec. 1, 1994); NEV. RULES OF PROFESSIONAL CONDUCT Rule 177 (current with amendments through Sept. 20, 1993); N.J. RULES OF PROFESSIONAL CONDUCT RPC 3.6 (current with amendments through Mar. 1, 1995); PA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Mar. 1, 1995); R.I. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through May 11, 1993); S.C. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through May 15, 1995); W. VA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Jan. 1993); WIS. RULES OF PROFESSIONAL CONDUCT SCR 20:3.6 (current with amendments through Aug. 1, 1995); WYO. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Dec. 1993).

¹⁰⁸ Colorado, Delaware, Hawaii, Montana, New Hampshire, New York, Oklahoma, South Dakota, and Texas have adopted Model Rule 3.6 with minor modifications. COLO. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through July 1, 1995); DEL. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Apr. 1, 1995); HAW. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Apr. 15, 1995); MONT. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through July 15, 1995); N.H. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Dec. 31, 1993); N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (current with amendments through Feb. 14, 1995); OKLA. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Sept. 1, 1995); S.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Jan. 1, 1995); TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 3.07 (current with amendments through Sept. 1, 1994). Florida, Michigan, Minnesota, and Washington have adopted only subsection (a) of Model Rule 3.6. FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-3.6 (current with amendments through Apr. 1, 1995); MICH. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Feb. 1, 1995); MINN. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Sept. 15, 1994); WASH. RULES OF PROFESSIONAL CONDUCT RPC 3.6 (current with amendments through Sept. 1, 1995). Florida adds "due to its creation of an imminent and substantial detrimental effect on that proceeding" to the "substantial likelihood of materially prejudicing standard" of subsection (a); Minnesota limits the application of subsection (a) to "pending criminal jury trial[s];" and although Washington only adopts subsection (a), the remainder of Model Rule 3.6 is present in the "Guidelines for Applying RPC 3.6." FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-3.6 (current with amendments through Apr. 1, 1995); MINN. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Sept. 15, 1994); WASH. RULES OF PROFESSIONAL CONDUCT RPC 3.6 (current with amendments through Sept. 1, 1995). Utah adopted a version of Model Rule 3.6 employing a "substantial likelihood of materially influencing" test. UTAH RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through May 15, 1995).

3.6.¹⁰⁹ California is the only state that has adopted 1994 Model Rule 3.6.¹¹⁰ The patchwork of ethical rules affecting trial publicity detailed above makes compliance difficult for attorneys and exhibits the need for uniformity.

B. *A Comparison of 1994 Model Rule 3.6 and DR 7-107(G)*

1994 Model Rule 3.6 is less restrictive¹¹¹ than DR 7-107(G) in a number of significant ways. First, 1994 Model Rule 3.6 prohibits only those comments that "the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding . . ." ¹¹² DR 7-107(G), however, restricts lawyers from speaking on public matters "reasonably likely to interfere with a fair trial of the action."¹¹³

Second, rather than creating a conclusive presumption that certain types of speech will have such a prejudicial effect, as does DR 7-107(G), the commentary of 1994 Model Rule 3.6 merely gives illustrations of types of speech that are "more likely than not" to have such an effect.¹¹⁴ Thus, the presumptions under 1994 Model Rule 3.6 are

¹⁰⁹ See D.C. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through July 1, 1993) ("serious and imminent threat to the impartiality of the judge or jury"); ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through June 1, 1995) ("serious and imminent threat to the fairness of an adjudicative proceeding"); ME. RULES OF PROFESSIONAL CONDUCT Rule 3.7 (current with amendments through May 15, 1995) ("substantial danger of interference with the administration of justice"); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-306 (current with amendments through May 15, 1995) ("clear and present danger of prejudicing the [criminal] proceeding"); N.D. RULES OF PROFESSIONAL CONDUCT Rule 3.6 (current with amendments through Jan. 15, 1995) ("serious and imminent threat of materially prejudicing an adjudicative proceeding"); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (current with amendments through Dec. 1, 1994) ("serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect"); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(A) (current with amendments through Aug. 15, 1995) ("clear and present danger of interfering with the fairness of [criminal] trial by jury").

¹¹⁰ CA. RULES OF PROFESSIONAL CONDUCT Rule 5-120 (current with amendments through Oct. 1, 1995).

¹¹¹ 1994 Model Rule 3.6 may be viewed as more restrictive than DR 7-107 in one limited sense. 1994 Model Rule 3.6(b) eliminates DR 7-107(c)(7), which provided that a lawyer may reveal "[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement" because such revelations may be substantially prejudicial. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (Model Code Comparison) (1994).

¹¹² *Id.* Rule 3.6.

¹¹³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1983).

¹¹⁴ Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt.5 (1994) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (1983). Comment 5 indicates:

[t]here are, on the other hand, certain subjects which are more likely than not to have

rebuttable, rather than conclusive.¹¹⁵ Finally, 1994 Model Rule 3.6 empowers a lawyer to protect a client by making a limited response to adverse publicity believed to be substantially prejudicial to the client, while DR 7-107(G) has no comparable provision.¹¹⁶

C. *The Constitutionality of DR 7-107(G)*

The four federal courts that have examined the constitutionality of DR 7-107(G)—two federal appellate courts and two federal trial courts—all have struck down DR 7-107(G) as an unconstitutional restraint on attorney speech.¹¹⁷ *Chicago Council of Lawyers v. Bauer and Ruggieri v. Johns-Manville Products* found DR 7-107(G) to be constitutionally infirm because of the rule's failure to restrict the ban on comments of lawyers to instances where those comments pose a "serious and imminent threat" to a fair trial.¹¹⁸ *Hirschkop v. Snead*, without advocating a different standard, found the "reasonable like-

a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate 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 that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

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

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt.5 (1994).

¹¹⁵ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

¹¹⁶ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1983).

¹¹⁷ *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Shadid v. Jackson*, 521 F. Supp. 85 (E.D. Tex. 1981); *Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036 (D.R.I. 1980); *see also Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1062 (D.C. Cir.) (expressing "serious reservations about the wisdom and even the constitutionality" of DR 7-107(G)), *cert. granted*, 469 U.S. 915 (1984), *and vacated, remanded*, 472 U.S. 424 (1985).

¹¹⁸ *Bauer*, 522 F.2d at 251; *Ruggieri*, 503 F. Supp. at 1040.

likelihood" standard unconstitutional because the standard is vague and overbroad.¹¹⁹ *Shadid v. Jackson*, on the other hand, found the "reasonable likelihood" standard unconstitutional because it operates as a prior restraint.¹²⁰ Thus, no federal or state appellate authority has held that public comments by lawyers in a civil suit may be prohibited if they are "reasonably likely to interfere with a fair trial."¹²¹

In *Gentile v. State Bar*, as previously noted, the "substantial likelihood of material prejudice" standard passed constitutional muster only because five Justices, led by Chief Justice Rehnquist, concluded that the standard was sufficiently "narrowly tailored" to protect the interest of the state in fair trials without unduly restricting attorneys' right of free speech.¹²² A different majority, led by Justice Kennedy, concluded that even this less restrictive standard was impermissibly vague and overbroad as applied to the criminal defense attorney's public comments regarding the evidence, defenses, and credibility of witnesses in a pending case.¹²³

Unlike Model Rule 3.6, DR 7-107(G) is not narrowly tailored to strike a constitutionally permissible balance between an attorney's right of free speech and the state interest in fair trials.¹²⁴ By comparison to Model Rule 3.6, DR 7-107(G) is patently vague and overbroad.¹²⁵ Given the fact that the United States Supreme Court has narrowly held constitutional only the more lenient standard of Model Rule 3.6,¹²⁶ the "reasonably likely to interfere with a fair trial" standard of DR 7-107(G) most likely would be found by the Court to be facially unconstitutional.¹²⁷

¹¹⁹ *Hirschkop*, 594 F.2d at 373.

¹²⁰ *Shadid*, 521 F. Supp. at 86.

¹²¹ The New Jersey Supreme Court has held the "reasonable likelihood of interference with a fair trial" standard constitutional as applied to lawyers' public comments on a criminal matter. *In re Rachmiel*, 449 A.2d 505, 511 (N.J. 1982); *In re Hinds*, 449 A.2d 483, 486 (N.J. 1982). The Pennsylvania Supreme Court has upheld the standard with respect to comments on an administrative proceeding. *Widoff v. Disciplinary Bd.*, 420 A.2d 41, 44 (Pa. 1980).

¹²² *Gentile v. State Bar*, 501 U.S. 1030, 1074-76 (1991) (Rehnquist, C.J., White, O'Connor, Scalia, Souter, JJ.).

¹²³ *Id.* at 1048-51 (Kennedy, Marshall, Blackmun, Stevens, O'Connor, JJ.).

¹²⁴ See *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) ("The dearth of evidence that lawyers' comments taint civil trials and the courts' ability to protect confidential information establish that the rule's restrictions on freedom of speech are essential to fair civil trials.").

¹²⁵ See *id.*

¹²⁶ *Gentile*, 501 U.S. at 1074-76.

¹²⁷ See *Hirschkop*, 594 F.2d at 373; *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258-59 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Shadid v. Jackson*, 521 F. Supp. 85, 86-87 (E.D. Tex. 1981).

In holding DR 7-107(G) unconstitutional, the United States Court of Appeals for the Seventh Circuit in *Chicago Council of Lawyers v. Bauer* exposed the inherent vagueness and overbreadth of each of the provisions of section (G).¹²⁸ Subsection (1) of DR 7-107(G) prohibits any public statements concerning “[e]vidence regarding the occurrence or transaction involved.”¹²⁹ Such a sweeping prohibition might prevent an environmental poverty lawyer from notifying the public about an industry’s method of disposing of toxic wastes because testimony about these practices would probably be relevant evidence.¹³⁰

DR 7-107(G)(2), which restricts comment concerning the “character, credibility, or criminal record of a party, witness or prospective witness,”¹³¹ is, “[a]rguably the most defensible portion” of DR 7-107(G).¹³² The *Bauer* court found, however, that even this limited provision should not stand.¹³³ Although the *Bauer* court stated that “[u]sually there would be little need or ethical justification” for such statements, sometimes character and credibility statements would be appropriate, such as when they involve statements or actions of public officials.¹³⁴

The performance or results of tests, possibly containing vital information, also cannot be the topic of extrajudicial comment pursuant to DR 7-107(G)(3).¹³⁵ According to the *Bauer* court, the need of the public for knowledgeable and thorough discussion of this type of information “far outweighs any possible benefit that might accrue in terms of maintaining the laboratory conditions of a civil trial.”¹³⁶ The *Bauer* court also found that the prohibition of DR 7-107(G)(4), which prohibits opinions “as to the merits of the claims or defenses of a party,”¹³⁷ was so overbroad that it would restrict attorney speech on legal, social, and public policy issues.¹³⁸ The court elaborated:

¹²⁸ *Bauer*, 522 F.2d at 258-59.

¹²⁹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G)(1) (1983). See *supra* note 31 for full text of DR 7-107.

¹³⁰ Cf. *Bauer*, 522 F.2d at 258 (stating that DR 7-107(G)(1) would prevent attorneys from informing the public of unsafe flight procedures).

¹³¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G)(3) (1983). See *supra* note 31 for full text of DR 7-107.

¹³² *Bauer*, 522 F.2d at 258.

¹³³ *Id.* at 259.

¹³⁴ *Id.*

¹³⁵ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G)(3) (1983); see *Bauer*, 522 F.2d at 258.

¹³⁶ *Bauer*, 522 F.2d at 258.

¹³⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G)(4) (1983). See *supra* note 31 for full text of DR 7-107.

¹³⁸ See *Bauer*, 522 F.2d at 258.

if the case is one involving "public policy considerations" the attorney could not offer his views on the social issue. Yet his involvement in the suit would show his interest in and familiarity with the question. An informed viewpoint would be removed from the public forum without justification. We can envision little benefit from this prohibition and find that as drawn it would conflict with the very purpose of the First Amendment.¹³⁹

Finally, subsection (5) of DR 7-107(G) prohibits public comment on "[a]ny other matter reasonably likely to interfere with a fair trial of the action."¹⁴⁰ The *Bauer* court held this restriction to be so vague that it would not be constitutional, even if substituted with the less restrictive "serious and imminent threat of harm" standard.¹⁴¹ The court stated that "[i]ts chilling effect is obvious."¹⁴²

D. *Using DR 7-107(G) to Intimidate Environmental Poverty Lawyers*

DR 7-107(G) has been used as a weapon to intimidate environmental poverty lawyers and their communities. Polluters, especially industrial polluters, are using the legal system to launch a new wave of attack against the environmental justice movement.¹⁴³ Across the United States, industrial polluters are lashing back at environmental justice advocates by seeking injunctions to limit their activities, attacking with Strategic Lawsuit Against Political Participation (SLAPP) suits, and, in the case of environmental poverty lawyers, filing bar grievances against them for violations of trial publicity rules.¹⁴⁴ *Colorado Supreme Court Grievance Committee v. District Court*¹⁴⁵ illustrates one attorney's fight for environmental justice, while facing the threat of disciplinary action.

¹³⁹ *Id.*; cf. *In re "Agent Orange" Product Liability Litigation*, 475 F. Supp. 928, 936-37 (E.D.N.Y. 1979) (declining to enter any order limiting communications between plaintiffs' counsel and third parties, based on considerations such as "the unique nature and public importance of this litigation, the contemporaneous action in related matters by other government agencies [and] the first amendment rights of counsel . . .," but noting that counsel was bound by professional standards).

¹⁴⁰ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G)(5) (1983). See *supra* note 31 for full text of DR 7-107.

¹⁴¹ *Bauer*, 552 F.2d at 259.

¹⁴² *Id.*

¹⁴³ Letter from Jeanne Gauna, staff member, SouthWest Organizing Project, & Richard Moore, Coordinator, Southwest Network for Environmental and Economic Justice, to Friends of SouthWest Organizing Project 1 (Feb. 22, 1995) (on file with BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW).

¹⁴⁴ See *id.*

¹⁴⁵ 850 P.2d 150 (Colo. 1993).

1. The *Colorado Supreme Court Grievance Committee* Case

In the summer of 1991, attorney Macon Cowles filed a complaint on behalf of several residents of the Globeville section of Denver, Colorado in the District Court for the City and County of Denver against Asarco, Inc. (Asarco).¹⁴⁶ The complaint alleged that the Asarco Globe Plant, a cadmium refining smelter, released, discharged, and leaked toxic chemicals that injured property and business interests and threatened public health.¹⁴⁷

Globeville is a low-income, largely minority neighborhood.¹⁴⁸ Like many inner-city areas, Globeville and the surrounding communities of Swansea and Elyria have "borne the brunt of heavy industrial uses and other locally undesirable land uses."¹⁴⁹ From low-level radioactive waste to sewer plants to slaughterhouses and packing plants, these communities have suffered disproportionately from environmental harms, yet they have few resources with which to combat these harms.¹⁵⁰ Typically, it is difficult for these communities to find legal counsel.¹⁵¹ In fact, six attorneys declined to represent the Globeville plaintiffs before Cowles took their case.¹⁵²

The plaintiffs in *Escamilla v. Asarco, Inc.* claimed, specifically, that operations of the Asarco Globe Plant had resulted in toxic chemical emissions into the air, soil, surface water, and groundwater of the community where plaintiffs and other class members own, occupy, or use property.¹⁵³ These emissions contain heavy metals such as cadmium, arsenic, and lead.¹⁵⁴ The plaintiffs further claimed that the

¹⁴⁶ Complaint at 2, *Cowles v. Colorado Sup. Ct. Grievance Comm.*, No. 92-CV-0984 (Colo. Dist. Ct. Sept. 29, 1992). Asarco is an acronym for the American Smelting and Refining Company.

¹⁴⁷ Amended Complaint at 2, *Ramirez v. Asarco, Inc.*, No. 91-CV-5716 (Colo. Dist. Ct. Apr. 23, 1993).

¹⁴⁸ Complaint at 4, *Cowles* (No. 92-CV-0984).

¹⁴⁹ See Lord & Shutkin, *supra* note 2, at 6.

¹⁵⁰ Complaint at 4, *Cowles* (No. 92-CV-0984). The situation in Globeville is representative of environmental justice cases. See Lord & Shutkin, *supra* note 2, at 6 n.26. See generally CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1992); TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE (Richard Hofrichter ed., 1993); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993); Cole, *Empowerment*, *supra* note 4.

¹⁵¹ See Complaint at 4, *Cowles* (No. 92-CV-0984).

¹⁵² Telephone Interview with Macon Cowles, attorney for plaintiffs (Jan. 19, 1995).

¹⁵³ Amended Complaint at 10, *Ramirez v. Asarco, Inc.*, No. 91-CV-5716 (Colo. Dist. Ct. Apr. 23, 1993). For clarity, the class action suit will be referred to as *Escamilla v. Asarco, Inc.* although the suit originally was filed as *Ramirez v. Asarco, Inc.*

¹⁵⁴ *Id.*

smelter not only devalued their property, wells, and water rights and caused business losses, but also that the toxic emissions significantly increased their risk of developing serious latent diseases, including "brain damage and retardation, various types of cancer, respiratory diseases, infectious diseases, and immune system changes."¹⁵⁵

On August 21, 1991, one day after Cowles filed an amended complaint, Neighbors for a Toxic-Free Community and the local chapter of the Sierra Club held a press conference outside the entrance gate to the Asarco Globe Plant.¹⁵⁶ Although the conference was sponsored by citizens' and environmental groups, Cowles spoke at the press conference and also gave interviews to the press.¹⁵⁷

In September 1991, the law firm of Holland & Hart, Asarco's counsel, sent a letter to the Office of Disciplinary Counsel, charging that Cowles violated Colorado Disciplinary Rule 7-107(G), which is identical to DR 7-107(G), by commenting on Asarco.¹⁵⁸ The comments identified by Holland & Hart were disseminated in two ways. First, Cowles's comments at the August 21, 1991 press conference were videotaped and subsequently broadcast on local news programs.¹⁵⁹ Second, a Sierra Club reporter interviewed Cowles and then quoted the comments in the Sierra Club's September-October 1991 newsletter.¹⁶⁰

¹⁵⁵ *Id.* at 11-12.

¹⁵⁶ Complaint at 2, *Cowles v. Colorado Sup. Ct. Grievance Comm.*, No. 92-CV-0984 (Colo. Dist. Ct. Sept. 29, 1992). Neighbors for a Toxic-Free Community is a citizens' environmental group. *Id.*

¹⁵⁷ Complaint at 2, *Cowles* (No. 92-CV-0984); Cowles is reported as saying the following:

1. KWGN TV Channel 2, Denver, CO, August 21, 1991, 9:12 P.M.

This is the only cadmium smelter in the United States which is in a residential area and we aim to shut it down.

2. KUSA TV Channel 9, Denver, CO, August 21, 1991, 5:10 P.M. In response to a statement of Asarco's plant manager that all operations are safe and its emissions meet all local, state and federal standards:

[w]ell I think it's misleading because there aren't, there are no cadmium standards, federal or state and that are no arsenic standards, federal or state.

3. KOA Radio, AM 850, Denver, CO, August 21, 1991, 5:35 P.M.

The cadmium, lead and arsenic that is produced here is shipped elsewhere around the globe and it enriches Asarco. The poisons that are left as a consequence of the manufacturing of cadmium stays [sic] here in Globeville.

Letter from William E. Murane & Scott S. Barker, Attorneys at Law, Holland & Hart, to L. Michael Henry, Chief Investigative Counsel, Office of Disciplinary Counsel, Supreme Court of Colorado 1 (Sept. 23, 1991) (on file with the BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW).

¹⁵⁸ Letter from William E. Murane & Scott S. Barker to L. Michael Henry, *supra* note 157, at 1.

¹⁵⁹ *Id.* at 2-3.

¹⁶⁰ *Id.* at 3. Cowles is quoted in the *Enos Mills News*, a publication of the Sierra Club, as saying:

On December 13, 1991, the Office of Disciplinary Counsel notified Cowles that it was proceeding with an investigation of Holland & Hart's allegations.¹⁶¹ In February 1992, Cowles filed a complaint against the Colorado Supreme Court Grievance Committee and its Chair, David L. Wood (the Grievance Committee defendants), in the District Court for the City and County of Denver.¹⁶² Cowles alleged, *inter alia*, that DR 7-107(G) was unconstitutional both on its face and in its application because the rule violated the First Amendment to the United States Constitution and article I, section 10 of the Colorado Constitution.¹⁶³ After Cowles filed the complaint, the Office of Disciplinary Counsel notified him that it would suspend its investigation pending resolution of Cowles's constitutional claims.¹⁶⁴ The Grievance Committee defendants subsequently filed a motion to dismiss based on lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.¹⁶⁵

The state trial court denied the Grievance Committee defendants' motion, finding that "subject matter jurisdiction to address the constitutionality of a Disciplinary Rule promulgated by the Colorado Supreme Court is not precluded by statute, rule, or case law."¹⁶⁶ The Grievance Committee defendants then filed a petition for writ of prohibition and rule to show cause in the state supreme court asserting that the respondent trial court lacked subject matter jurisdiction over the complaint and erroneously denied their motion to dismiss the action.¹⁶⁷ On April 19, 1993, the Supreme Court of Colorado concluded that a state trial court does not have subject matter jurisdiction to determine the constitutionality of a disciplinary rule while a disciplinary proceeding is pending against the attorney who alleges that the disciplinary rule is unconstitutional.¹⁶⁸

[w]e are talking about toilet training trans-national corporations; that's what our lawsuit is about. We don't want our lands polluted, our water made unsafe to drink and our air a cause of sickness and disease. Rich corporations who violate our citizens and our environment must be punished and they shall be.

ASARCO Hit with Class Action Lawsuit, *supra* note 1, at 1.

¹⁶¹ Complaint at 5, *Cowles* (No. 92-CV-0984).

¹⁶² *Id.* at 1-7.

¹⁶³ *Id.* at 7.

¹⁶⁴ Colorado Sup. Ct. Grievance Comm. v. District Ct., 850 P.2d 150, 151 (Colo. 1993) (en banc).

¹⁶⁵ Brief in Support of Defendants' Motion to Dismiss at 1, *Cowles v. Colorado Sup. Ct. Grievance Comm.*, No. 92-CV-0984 (Colo. Dist. Ct. Sept. 29, 1992).

¹⁶⁶ *Colorado Sup. Ct. Grievance Comm.*, 850 P.2d at 151.

¹⁶⁷ Petition for Writ of Prohibition and Rule to Show Cause at 3, *Colorado Sup. Ct. Grievance Comm. v. District. Ct.*, 850 P.2d 150 (Colo. 1993) (en banc) (No. 92-SA-437).

¹⁶⁸ *Colorado Sup. Ct. Grievance Comm.*, 850 P.2d at 154.

Approximately one month before the Colorado Supreme Court decided the case filed by Cowles, a jury, following a six-week trial, returned verdicts in *Escamilla v. Asarco, Inc.*¹⁶⁹ in favor of the plaintiff class.¹⁷⁰ Also before the decision of the Colorado Supreme Court, the Colorado legislature adopted the Colorado Rules of Professional Conduct to supersede and replace the Colorado Code of Professional Responsibility.¹⁷¹ The grievance against Cowles was subsequently dismissed.¹⁷²

2. A Method of Intimidation

The action against Cowles “smelled like a hybrid”¹⁷³ of a SLAPP suit—a suit brought essentially in retaliation for any activity adverse to the business interest of the industrial plaintiff.¹⁷⁴ Although SLAPP suits rarely succeed,¹⁷⁵ the knowledge that such a complaint could be filed intimidates environmental plaintiffs.¹⁷⁶ Environmental poverty lawyers and their clients are daunted by the mere threat of a costly SLAPP suit or DR 7-107(G) claim.¹⁷⁷

Intimidation in environmental poverty lawyering is a common tactic.¹⁷⁸ The DR 7-107(G) claim against Cowles is one example of a method of intimidation that need not succeed on its merits to achieve

¹⁶⁹ No. 91-CV-5716 (Colo. Dist. Ct. Apr. 23, 1993).

¹⁷⁰ *Id.* On March 12, 1993, the jury awarded the plaintiffs \$28.12 million. *Some Big Judgments Were Settled After Trial*, NAT'L L.J., Jan. 17, 1994, at S14, S14. Asarco planned to appeal, yet settled three months later for \$35 million. *Id.* Of this amount, it was agreed that \$14 million would be paid in cash and \$11 million would be applied to cleaning up the property of the Globeville residents. *Id.* The remaining \$10 million would be paid contingent upon Asarco winning a breach-of-contract lawsuit against its insurance carriers. *Id.*

¹⁷¹ *Colorado Sup. Ct. Grievance Comm.*, 850 P.2d at 154.

¹⁷² Telephone Interview with Macon Cowles, *supra* note 152.

¹⁷³ Kevin Simpson, *In Zeal to Keep Lawyers Quiet, Some People Push the Limits*, DENVER POST, Apr. 20, 1993, at 1B.

¹⁷⁴ David J. Abell, Comment, *Exercise of Constitutional Privileges: Deterring Abuse of the First Amendment—“Strategic Lawsuits Against Political Participation,”* 47 SMU L. REV. 95, 95-96 (1993). For a general overview of SLAPP suits, see generally George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3 (1989); Thomas A. Waldman, Comment, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979 (1992).

¹⁷⁵ Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 105 (1988) (asserting that intimidation suits “never result in judgments for plaintiffs”).

¹⁷⁶ Interview with Charles P. Lord, *supra* note 5.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (explaining that communities are unwilling to pursue legal action due to threats of physical and legal retaliation).

the desired goal of intimidation.¹⁷⁹ DR 7-107(G) claims signal that lawyers who participate in public discussion should be prepared to defend their speech in the courtroom against those whose business interests may be adversely affected.¹⁸⁰ Just as corporations consider litigation a cost of doing business, environmental poverty lawyers in states governed by DR 7-107(G) must assess the value of their public discussion against the potential risk of having a bar grievance filed against them.

E. A More Lenient Standard in Civil Cases

As noted in *Chicago Council of Lawyers v. Bauer*, there are substantial reasons for applying a more lenient standard to attorney speech in civil as opposed to criminal litigation.¹⁸¹ First, civil cases do not require the high degree of insularity essential to ensure fairness in criminal cases.¹⁸² For example, the Sixth Amendment explicitly requires an "impartial jury" in criminal cases while the Seventh Amendment ensures only "trial by jury" in civil cases.¹⁸³

Second, a civil case is likely to last substantially longer than a criminal case.¹⁸⁴ DR 7-107(G) does not specify a time frame in which the lawyer's speech is to be restricted.¹⁸⁵ The rule broadly states that a lawyer's speech is restricted during the lawyer's "investigation or litigation."¹⁸⁶ Accordingly, the *Bauer* court found the "blanket coverage" of DR 7-107(G) "an influential factor weighing against its constitutionality."¹⁸⁷

Finally, the public importance of many issues involved in civil litigation justifies limiting the application of restrictions on extrajudicial comments by attorneys in civil cases.¹⁸⁸ Indeed, the *Bauer* court noted

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 257-58 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

¹⁸² *Id.*

¹⁸³ *Id.* at 258.

¹⁸⁴ *Id.* The length of a civil case can be attributed to two factors. First, civil rules generally allow more discovery than criminal rules. *Id.* Second, criminal matters receive priority over civil matters because of the Sixth Amendment's guarantee of a "speedy trial" in criminal matters. *Id.*

¹⁸⁵ *Bauer*, 522 F.2d at 258.

¹⁸⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G) (1983); *Bauer*, 522 F.2d at 258.

¹⁸⁷ *Bauer*, 522 F.2d at 258.

¹⁸⁸ *See, e.g., In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979), *aff'd sub nom.* *Halkin v. Helms*,

that the goal of some civil suits even may be to provide the public with important information.¹⁸⁹ The court explained:

[s]ometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities. Often non-lawyers can adequately comment publicly on behalf of these institutions or governmental entities. The lawyer representing the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.¹⁹⁰

This analysis suggests DR 7-107(G) is unconstitutional not only because the rule fails to incorporate the constitutional standard set forth in *Gentile v. State Bar*,¹⁹¹ but also because the rule should incorporate a more permissive standard in light of its application in civil suits.¹⁹²

IV. EMPOWERMENT LAWYERING USING 1994 MODEL RULE 3.6

Although many environmental justice scholars suggest that the speech of the community, rather than that of the lawyer, is essential to environmental justice,¹⁹³ this Comment suggests that once litigation has commenced, the speech of the lawyer becomes equally, if not more, important.¹⁹⁴ Battles in the environmental justice movement are fundamentally political and economic battles—not legal ones.¹⁹⁵ Therefore, environmental justice lawsuits, environmental poverty lawyer Luke Cole urges, “must be brought in recognition of their political nature, in order to lift a community’s morale, strengthen the community group, raise the profile of the group, and build the political

690 F.2d 977 (D.C. Cir. 1982); *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979); *Bauer*, 522 F.2d at 258.

¹⁸⁹ *Bauer*, 522 F.2d at 258.

¹⁹⁰ *Id.* But see Interview with Charles P. Lord, *supra* note 5 (remarking that this sentiment runs counter to much of what environmental justice theorists believe; environmental justice theorists prefer to see residents, not lawyers, speaking out on their own problems).

¹⁹¹ See *supra* section II.B.1.

¹⁹² See *Bauer*, 522 F.2d at 257-58.

¹⁹³ Cole, *Empowerment*, *supra* note 4, at 661-68; Interview with Charles P. Lord, *supra* note 5.

¹⁹⁴ This Comment examines the situation in which a community group has decided to pursue litigation. Some environmental justice scholars have stated that “bringing a lawsuit may ensure loss of the struggle at hand, or cause significant disempowerment of the client community.” Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 *FORDHAM URB. L.J.* 523, 524 (1994) [hereinafter Cole, *Environmental Justice Litigation*].

¹⁹⁵ *Id.* at 541.

momentum necessary to win such struggles.”¹⁹⁶ Trial publicity, one of the political benefits of environmental justice lawsuits,¹⁹⁷ is more permissible under 1994 Model Rule 3.6 than it was under the rule’s predecessors. 1994 Model Rule 3.6, therefore, increases the benefits of environmental justice lawsuits while removing a weapon for polluters to use to attack those in support of environmental justice.

A. *The Importance of Trial Publicity in Environmental Justice Cases*

As an attorney for the plaintiff class in *Escamilla v. Asarco, Inc.*, Cowles brought media attention to the struggle of the Globeville community against corporate giant Asarco.¹⁹⁸ Cowles’s comments to the press were published in national publications such as the *Wall Street Journal* and *The American Lawyer*.¹⁹⁹ Cowles and members of the community also were featured on national news shows such as CNN.²⁰⁰ Publicity, like that Cowles generated, is important in drawing attention to struggles by communities faced with environmental harms and in building momentum for the environmental justice movement, especially since these communities are often disempowered and disenfranchised with respect to their corporate opponents.²⁰¹

The publicity surrounding an environmental justice case also may encourage other, similarly situated communities to take collective action.²⁰² Seeing or hearing a similar situation recounted on television or in the papers, and seeing what one community has accomplished by fighting that situation, may encourage other communities to fight back as well.²⁰³ Not only will other communities join the environmental justice battle, but other plaintiffs in the communities where the battle is being fought may be encouraged to join the class action. In fact, the publicity Cowles generated encouraged other plaintiffs to

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 541–42.

¹⁹⁸ See, e.g., Kris Newcomer, *ASARCO Settlement Set at \$28 Million Juror Says Award Sends Message You Don’t Throw ‘Toxic Trash’ on Ground*, ROCKY MOUNTAIN NEWS, Apr. 24, 1993, at 4A; sources cited *infra* notes 199–200.

¹⁹⁹ See, e.g., *Asarco is Told to Pay \$28 Million in Lawsuit Over Denver Cleanup*, WALL ST. J., Apr. 27, 1993, at C13; Stewart Yerton, *Counsel Switch Nets Quick Settlement*, AM. LAW., Sept. 1993, at 28.

²⁰⁰ CNN: *Denver’s ASARCO Smelter Blamed for Toxic Pollution* (Cable News Network, Inc. television broadcast, Aug. 19, 1993).

²⁰¹ See Cole, *Environmental Justice Litigation*, *supra* note 194, at 542.

²⁰² *Id.*

²⁰³ *Id.*

join the legal battle against Asarco.²⁰⁴ The original suit against Asarco, which was filed by nine Globeville residents, later became a class-action suit by 567 Globeville homeowners.²⁰⁵

Trial publicity serves yet another purpose—political education. Using publicity, a community group can educate its members, politicians, and other communities.²⁰⁶ Publicity may aid local residents, decision-makers, and company officials in viewing environmental problems differently.²⁰⁷

B. *Trial Publicity in Environmental Justice Cases Does Not Sacrifice Fair Trials*

Scant evidence exists to substantiate allegations that trial publicity unjustly prejudices a jury or that extrajudicial comment by attorneys causes a more considerable threat to impartiality than other comment.²⁰⁸ Environmental poverty lawyers, therefore, should be able to comment on matters under litigation, subject to the limited restrictions of 1994 Model Rule 3.6.

Safeguards already exist to prevent juror partiality. First, fraudulent, sensational, or unethical extrajudicial statements rarely bias jurors.²⁰⁹ Jurors tend to mistrust reporters and believe that their involvement as jurors gives them a better understanding than the

²⁰⁴ Telephone Interview with Macon Cowles, *supra* note 152.

²⁰⁵ *Globe Plant Historical Timeline* (ASARCO Inc., Denver, Colo.), Winter 1994, at 1.

²⁰⁶ See Cole, *Environmental Justice Litigation*, *supra* note 194, at 542.

²⁰⁷ See *id.*

²⁰⁸ *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 legal system and its rules make unsupported assumptions about juries); see Robert E. Dreschel, *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) (describing prejudicial publicity as a “small problem”); John Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1977) (concluding that newspaper publicity and out-of-court statements have “virtually no impact” on jurors); Joseph F. Kobyłka & David M. Dehnel, *Toward a Structuralist Understanding of First and Sixth Amendment Guarantees*, 21 WAKE FOREST L. REV. 363, 364 (1986) (asserting that pretrial publicity may help, as well as harm, a defendant’s case); Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 414 (1990) (concluding that knowledge of actual effect of publicity on jurors is “fragmentary”); Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003, 1006 (1984) [hereinafter Swift, *Model Rule 3.6*] (alleging that “no empirical evidence exists” to establish cause and effect relationship between attorney-generated publicity and juror partiality); Joel H. Swift, *Restraints on Defense Publicity in Criminal Jury Cases*, 1984 UTAH L. REV. 45, 92 (1984) (stating that extensive publicity and divulgence of prejudicial information do not “inevitably destroy a fair trial”).

²⁰⁹ Kaplan, *supra* note 208, at 623.

press.²¹⁰ One legal professional commented that his own personal experience indicated that jurors distrust lawyers that attempt to sensationalize a case or act.²¹¹

Second, jurors in civil cases are instructed to evaluate a case solely on the evidence presented.²¹² Behavioral scientist Rita Simon studied the influence of pretrial publicity on a defendant's right to a fair trial by jury.²¹³ Simon concluded that juries in the aggregate are "responsible and rational."²¹⁴ Jurors take their role seriously and recognize that they must follow the rules and procedures of the court.²¹⁵ Moreover, criticism of jurors for capricious and emotional verdicts remains unsubstantiated.²¹⁶ A phone survey Simon conducted before *voir dire* of a trial revealed that jurors were affected by publicity but fifty-nine percent of those polled claimed that they could ignore the publicity and focus on the evidence presented in court.²¹⁷

C. *The Importance of Attorney Speech*

It is important for environmental poverty lawyers to speak out about public matters, such as the pollution problem in Globeville, because attorney speech empowers the community. Attorney comment provides critical information the public can use to regulate the conduct of industry and other polluters and to suggest changes.²¹⁸

²¹⁰ *Id.*; see Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 656, 659 (1991) (declaring that jurors, when well-informed, are not overly influenced by media attention; they are, in fact, "skeptical about information from the media").

²¹¹ Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 649 (1990).

²¹² Interview with Margaret R. Hinkle, Associate Justice of the Superior Court of Massachusetts, in Boston, Mass. (Apr. 5, 1995); cf. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 494 (1966) (explaining that juries in criminal cases focus on evidence presented and understand obligation to render guilty verdict only when evidence proves guilt beyond reasonable doubt).

²¹³ Rita J. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Juror's of News Coverage?*, 29 STAN. L. REV. 515, 520 (1977).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*; see *Panel Three*, *supra* note 208, at 602 (avowing that jurors are capable of analyzing evidence and charges and reaching a just conclusion).

²¹⁷ Simon, *supra* note 213, at 526-27; see Kramer et al., *supra* note 208, at 413 (asserting that exposure to publicity does not preclude impartiality).

²¹⁸ Cf. Anthony Lewis, *Keynote Address: The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793, 796-97 (1980) (arguing that complexity and size of our government requires greater scrutiny to detect and stop abuse); Vermont Royster, *The Free Press and a Fair Trial*, 43 N.C. L. REV. 364, 364 (1965) (explaining

Freedom to speak and to gather information through the speech of others ensures the proper administration of justice.²¹⁹ Without free speech, not only does the attorney as a citizen lose fundamental First Amendment rights,²²⁰ but the public also loses an informed voice.²²¹

The press may report trial details, but lawyers are necessary to explain the significance of those details and to discover reporting inconsistencies.²²² Furthermore, attorney involvement in lawsuits exhibits an interest in and familiarity with the underlying problem. Thus, attorneys represent informed viewpoints.²²³ Absence of attor-

that unrestrained access to and comment on judicial proceedings deters arbitrary government acts against public); 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, 1207 (1990) (concluding that overbroad restraints on information sources subverts society's ability to check judicial integrity).

²¹⁹ 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) (arguing that First Amendment rights should be unqualified because ensuring proper administration of justice requires that members of society: (1) comprehend national problems; (2) judge decisions made by government officials; and (3) share in decisionmaking process to ensure best decisions are made and effectuated). *But see* MARTIN H. REDISH, FREEDOM OF EXPRESSION, A CRITICAL ANALYSIS 46, 205 (1984) (criticizing Meiklejohn's theory).

²²⁰ Attorneys are citizens with the First Amendment right to speak. *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979); Royster, *supra* note 218, at 366. William Blackstone declared that every man possessed the right to "lay what sentiments he pleases in the public forum." Royster, *supra* note 218, at 366 (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.* "[N]othing 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).

²²¹ *See Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 259 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (declaring that DR 7-107 conflicts with the "very purpose of the First Amendment"); 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, 616 (1977) (explaining that attorneys have First Amendment rights that are vital to society's information-gathering process).

²²² *See Bauer*, 522 F.2d at 250 (stating that lawyers are one of most valuable sources of information because they are perceived as credible and knowledgeable); Max D. Stern, *The Right of the Accused to a Public Defense*, 18 HARV. C.R.-C.L. L. REV. 53, 112 (1983) (explaining that attorneys are in best position to "explain the proceedings, and articulate the defense perspective"); Swift, *Model Rule 3.6*, *supra* note 208, at 1013 (asserting that attorneys are best source of trial information). *But see* Jeffrey Cole & 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, 377 (1974) (alleging that because attorneys are most knowledgeable and influential sources of information, their comments unduly influence the public and should be silenced, and that no harm would result because many other voices remain).

²²³ *Bauer*, 522 F.2d at 258.

ney comment in environmental justice cases leaves, as the only source of information,²²⁴ uninformed media speculation and misinterpretation, based in part, on information disseminated by the public relations firm of the defendant.²²⁵

D. *How 1994 Model Rule 3.6 Can Aid Environmental Justice*

Prior to the 1994 amendment to Model Rule 3.6, attorneys—the public's most knowledgeable source regarding trials—were forced to be silent or risk sanctions.²²⁶ The amended rule gives attorneys more freedom to speak out. Most importantly, 1994 Model Rule 3.6 adds a new “safe harbor” provision that permits lawyers to make statements for the purpose of guarding against undue prejudice due to recent publicity initiated by someone else.²²⁷ This new provision can aid the environmental justice movement by allowing environmental poverty attorneys to combat prejudicial publicity. While the defendant's public relations firm is at work to shape the perception of the public and that of policymakers about the defendant and its environmental problem, the plaintiff's attorney must work with community groups to ensure justice.

²²⁴ Although environmental poverty attorneys ideally work in conjunction with community groups, there is still a question as to whether an attorney who gives information that is prohibited by DR 7-107(G) to community groups could be in violation of DR 7-107(G).

²²⁵ 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, 135 (1987) (stating that silencing attorneys deprives media of its most knowledgeable source and limits public's opportunity to scrutinize judicial processes); see also Nancy Blodgett, *Equal Access Report: Let the Defense Tell Its Story*, A.B.A. J., Sept. 1, 1987, at 29 (alleging that if attorney speech is restricted, wealthier defendants may seek assistance of consultants or public relations firms which disadvantages indigent persons and permits restrictions of free speech according to wealth).

²²⁶ See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 259 (7th Cir. 1975) (stating that 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); MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02 [B], at 1-13 (1984) (cautioning that people are backbone of democracy and must be enlightened “by those who are informed” to ensure proper administration of justice); Freedman & Starwood, *supra* note 221, at 613 (arguing that press is necessary to protect against abuse of judicial system and will not be able to fulfill that goal if most knowledgeable sources of information are “silenced at the very moment at which they have the greatest incentive to protest”); Lewis, *supra* note 218, at 797 (explaining that right to scrutinize government action is necessary to exercising First Amendment rights because public debate must be informed).

²²⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1994).

V. CONCLUSION

Publicity generated by environmental poverty attorneys has the potential to enable the communities they represent, which are long overburdened by uses no other areas would tolerate, from escaping that particular part of their past and from realizing their vision for a better future.²²⁸ Attorney comment alone, however, is not the panacea for the environmental injustice that plagues many low-income communities and communities of color. Attorney comment must inspire others to take action and fight those that violate our citizens and our environment.

Although attorney comment is still somewhat limited under the current Model Rules of Professional Conduct, the ABA has made enormous strides in protecting First Amendment rights while not sacrificing fair trials. Environmental poverty attorneys must take the next step and speak out. As the United States Supreme Court stated in *Whitney v. California*, the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."²²⁹

²²⁸ See Lord & Shutkin, *supra* note 2, at 5.

²²⁹ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).