South Carolina Law Review

Volume 42 | Issue 4 Article 6

Summer 1991

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THE RIGHT TO FREE SPEECH VERSUS THE RIGHT TO A FAIR TRIAL—BALANCING COMPETING CONSTITUTIONAL INTERESTS

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I. INTRODUCTION

The desire to regulate the participation of lawyers in trial publicity is not new. As early as 1908 the American Bar Association (ABA) recognized that newspaper publications by a lawyer concerning pending litigation could interfere with fair trials and the administration of justice. The ABA endeavored to discourage such publications by adopting Canon 20. Canon 20 provided:

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

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cases it is better to avoid any *ex parte* statement.[1]

This vague ethical suggestion was in place for years and, not surprisingly, was largely ignored.[2] Interest in the issue of lawyer communication with the media revived after extraordinary publicity dominated two murder cases.

In 1963, President John F. Kennedy's assassination evoked intense nationwide attention regarding the case against Lee Harvey Oswald. The publicity continued up to and following Oswald's murder.[3] The report[4] of the Commission headed by Chief Justice Earl Warren criticized the Dallas police department[5] and the news media[6] for their roles in creating the publicity surrounding the case against Oswald. The Commission noted that although the public had a profound interest in the events surrounding the assassination, neither the press nor the public had a right to be informed of the evidence being accumulated against Oswald. The Commission stated: "The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime."[7] The Warren Report recommended that the bar, the police, and the media work together to establish ethical standards for publicity, "so that there will be no interference with pending criminal investigations, court proceedings or the right of individuals to a fair trial."[8] In response, the ABA Advisory Commission on Fair Trial and Free Press (Reardon Committee) was formed in 1964 to consider attorney participation in trial publicity.[9]

While the Reardon Committee studied the problem of establishing ethical guidelines, the Supreme Court issued an opinion in another

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1. CANONS OF PROFESSIONAL ETHICS Canon 20 (1908).

2. Reardon, *The Fair Trial—Free Press Standards*, 54 A.B.A. J. 343, 344 (1968).

3. Note, Chicago Council of Lawyers v. Bauer: *Gag Rules—The First Amendment vs. the Sixth*, 30 SW. L.J. 507, 510 (1976).

4. THE WARREN COMM'N, REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (1964).

5. *Id.* at 20, 231-40.

6. *Id.* at 240-42.

7. *Id.* at 240.

8. *Id.* at 27.

9. The ABA Advisory Commission on Fair Trial and Free Press was chaired by the Honorable Paul C. Reardon. Judge Reardon recounted the formation of the Committee:

> For some time the American Bar Association had been concerned with launching studies in the criminal field. It was not contemplated at first that a separate study would be made of the possible effects of news reporting on criminal trials. However, the recommendations of the Warren Commission [were generally] that the Bar and the press should concern themselves with . . . [the] strengthening of professional discipline . . . .

Reardon, *supra* note 2, at 343.

sensational murder case, *Sheppard v. Maxwell*.[10] Sheppard was accused of bludgeoning his wife to death. On the day of his wife's funeral, the first in an avalanche of news stories criticizing Sheppard appeared. The stories initially stressed Sheppard's alleged failure to cooperate with the authorities and his failure to submit to a lie detector test. The sources for these stories included police officers, the coroner, and the county attorney. Newspapers printed editorials calling for official action against Sheppard. In response, an inquest held in a school gymnasium before several hundred spectators was broadcast live. Newspaper accounts accentuated evidence which tended to incriminate Sheppard. Police officials disclosed scientific evidence and called for Sheppard's arrest. The negative publicity intensified during the period between Sheppard's arrest and indictment. In fact, the Court observed that it had in its possession five volumes filled with clippings compiled from three local papers during a six-month period.[11]

At Sheppard's trial, approximately twenty reporters sat at a table set up inside the bar behind counsel. The media used all the rooms on the courtroom floor for their activities. The local television station broadcast from next door to the jury room. Reporters filled the courtroom to capacity during the entire nine-week trial. Reporters moving in and out of the courtroom caused such a commotion that witnesses could not be heard. The close proximity of the reporters forced Sheppard and his attorney to leave the courtroom to confer privately. Jurors were not insulated from the circulation of news, rumor, and gossip.[12]

The Court reversed Sheppard's conviction on the grounds that the publicity which saturated the community[13] and the carnival-like atmosphere of the courtroom[14] usurped Sheppard's due process rights.[15] The Court held that the trial judge failed to control the flow of information from the police, witnesses, and counsel for both sides, thus depriving Sheppard of his right to "receive a trial by an impartial jury free from outside influences."[16]

The Court placed responsibility for ensuring Sheppard a fair trial squarely on the shoulders of the trial judge. The Court suggested that the trial judge should

> have more closely regulated the number and conduct of newspersons

10. 384 U.S. 333 (1966).
11. *Id.* at 337-58.
12. *Id.* at 355-59.
13. *Id.* at 363.
14. *Id.* at 358.
15. *Id.* at 363.
16. *Id.* at 359.

> in the courtroom; insulated prospective witnesses, who had been interviewed at will by the media; controlled the release of information to the press by the police, witnesses, and counsel, particularly statements divulging prejudicial matters or belief in Sheppard's guilt or innocence.[17]

The Court admonished, "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[18]

Influenced by these two important events, the guidelines drawn by the Reardon Committee curtailed attorney speech in an attempt to control prejudicial trial publicity. The Reardon Committee's recommendations were adopted substantially by the ABA as DR 7-107.[19]

II. TRIAL PUBLICITY UNDER THE MODEL CODE

DR 7-107 addresses the propriety of lawyer speech to the media regarding both criminal and civil trials. The first part of the rule is divided into sections that track the stages of a criminal prosecution: investigation, the period from arrest to commencement of trial, jury selection and trial, and sentencing. DR 7-107 lists types of statements either prohibited or permitted at each stage.

During the initial two stages, a lawyer may not make statements a reasonable person would expect to be disseminated by means of public communication.[20] Prohibited comments include those relating to the character, reputation, or prior record of the defendant; the possibility of a guilty plea; the contents of confessions; results of examinations; identity and credibility of prospective witnesses; and opinions as to the "guilt or innocence of the accused, the evidence or the merits of the case."[21]

During the trial and sentencing stages, an attorney is prohibited from making statements a reasonable person would expect to be disseminated by means of public communication, and when there is a reasonable likelihood that the statement will interfere with a fair trial or affect the imposition of sentence.[22] DR 7-107(D) limits attorneys from making remarks during this time which relate to "the trial, parties, or issues in the trial or other matters that are reasonably likely to inter-

17. *Id.* at 358-61.
18. *Id.* at 363.
19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1969).
20. *Id.* DR 7-107(A), (B) (1980).
21. *Id.* DR 7-107(D), (E).
22. *Id.*

fere with a fair trial . . . ."[23] Attorneys may quote from public records without comment.[24]

In 1983, the ABA House of Delegates adopted the Model Rules of Professional Conduct to supersede the Model Code of Professional Responsibility. South Carolina adopted the new standards and they went into effect September 1, 1990. Thus, Model Rule 3.6 now governs the relationship between lawyers and the media in South Carolina.[25]

III. TRIAL PUBLICITY UNDER THE MODEL RULES

Rule 3.6 prohibits a lawyer from making an extrajudicial statement that he knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding if he reasonably should expect that statement to be publicized.[26] This language differs dramatically from language found in DR 7-107(A) and (B) which placed a flat prohibition on attorneys' *ex parte* comments regarding pending cases without addressing the probability or severity of prejudice arising from the statements.[27] In addition, Rule 3.6(b) furnishes an inventory of statements which ordinarily will have a substantial likelihood of material prejudice when made in reference to a civil jury trial,[28] a criminal case, or any other proceeding that could result in incarceration. Presumptively prejudicial comments include those regarding (1) the character, credibility or criminal record of a party, suspect, or witness, or the identity or expected testimony of a witness or party; (2) the possibility of a guilty plea or the existence or contents of any statement given by a suspect or defendant, or his refusal to make such a statement; (3) performance or results of examinations or tests or the refusal to submit to such tests, or the nature of physical evidence; (4) any opinion as to the guilt or innocence of a defendant or suspect;

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23. *Id.*

24. *Id.*

25. S.C. APP. CT. R. 407, Rule 3.6.

26. Much of the substance of Rule 3.6 was adopted when South Carolina's DR 7-107 was rewritten in 1984.

27. *See supra* note 20 and accompanying text.

28. Rule 3.6 specifically applies to civil matters triable by a jury, but this application of the rule probably is not constitutionally valid. Both the Fourth and the Seventh Circuit Courts of Appeal have found no-comment rules unconstitutionally overbroad when applied to civil matters. Those courts focused on the differences between civil and criminal trials, including: (1) the greater constitutional protection guaranteed a criminal defendant under the Sixth Amendment; (2) the protracted nature of civil litigation which could lead to restraint of comment lasting several years; and (3) the inherent entanglement of many important social issues with civil litigation. *See* Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

(5) information the lawyer knows or reasonably should know is likely to be inadmissible at trial and which would, if disclosed, create a substantial risk of prejudicing an impartial trial; and (6) the fact that a defendant has been charged with a crime unless accompanied by a statement that the defendant is presumed innocent unless proven guilty.[29]

Notwithstanding Rule 3.6(a) and (b)(1-5), an attorney permissibly may, without elaboration, comment on (1) the general character of a claim or defense, (2) information included in the public record, (3) the general nature and scope of an investigation, (4) scheduling or result of stages in litigation, (5) request for assistance in obtaining information, (6) a warning of danger concerning a person who poses a likely threat of substantial harm, and (7) in a criminal case, biographical information on the accused; information necessary to aid in his capture; fact, time and place of arrest; and the identity of the investigating officers.[30]

Rules 3.6(b) and (c) parallel types of statements treated in DR 7-107(b) and (c). Rule 3.6 adds prohibitions regarding inadmissible, prejudicial information and disclosure of charges made without an appropriate warning regarding innocence. The provisions of DR 7-107(c)(7) allowing a description of physical evidence seized and DR 7-107(c)(11) allowing a statement that the defendant denied the charges have both been omitted from Rule 3.6.[31]

IV. Fair Trial versus Free Speech

No significant dispute exists about what types of remarks are subject to the trial publicity rules. Debate centers around the issue of whether no-comment rules impermissibly circumscribe First Amendment rights of free speech.

Certainly attorneys, like all citizens, enjoy First Amendment protection, even when they participate in the administration of justice.[32] However, this safeguard must be considered within the context of the defendant's right to a fair trial guaranteed by the Sixth Amendment. The right to a fair trial is "the most fundamental of all freedoms."[33]

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29. *See* S.C. App. Ct. R. 407, Rule 3.6(b)(1).

30. *See id.*, Rule 3.6(c)(1)-(7).

31. Rule 7-107(c)(7) was omitted because revelations of physical evidence seized may be substantially prejudicial and are frequently the subject of pretrial suppression motions, which, if successful, may be circumvented by prior disclosure to the press. Model Rules of Professional Conduct Rule 3.6 model code comparison (1983).

32. *In re* Hinds, 90 N.J. 604, 614, 449 A.2d 483, 489 (1982).

33. Estes v. Texas, 381 U.S. 532, 540 (1965). The Court set aside the conviction in *Estes* because the procedure employed by the State of Texas involved such a probability of prejudice that the procedure was inherently lacking in due process. This was true even

Thus, the question becomes whether the court may infringe on one constitutional right in order to uphold another.

In *Nebraska Press Association v. Stuart*[34] the United States Supreme Court refused to issue a blanket ruling that the Sixth Amendment supersedes the First Amendment, at least in regard to protected speech accorded the media.[35] In *Nebraska Press* a trial court issued a restraining order prohibiting the media from publishing accounts of confessions allegedly made by an accused murder. The defendant had been charged with brutally slaying a family residing in a rural community.[36]

The Court found that tensions develop between the First and Sixth Amendment when a criminal trial is a sensational one.[37] Under normal circumstances, criminal trials can be fair in spite of widespread publicity.[38] The Court determined the question is whether the means employed to protect the defendant's Sixth Amendment rights were forbidden by the First Amendment.[39] *Nebraska Press* involved a prior restraint on the press. According to the Court, prior restraints "are the most serious and least tolerable infringement on First Amendment rights."[40] This is because the media publish information about court proceedings and open the proceedings to public scrutiny, both valuable societal benefits. However, according to the Court, the "extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly . . . ."[41]

As in *Sheppard*, the Court observed that another method of ensuring a fair trial without ordering a prior restraint would be for the trial court to limit comments by police, witnesses, and participating lawyers.[42] In his concurrence, Justice Brennan applauded the Nebraska

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though "[t]he press coverage of the *Estes* trial was not nearly as massive and pervasive as the attention given [by the media] to the Sheppard prosecution." Sheppard v. Maxwell, 384 U.S. 333, 353 (1966).

34. 427 U.S. 539 (1976).

35. *Id.* at 542.

36. *Id.* at 551.

37. *Id.* at 554.

38. *Id.* at 556.

39. *But c.f.* Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1146-47 (E.D. Va. 1976), *aff'd in part, rev'd in part sub nom.* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); (the right to a fair trial is superior to the right of free speech); *In re* Hinds, 90 N.J. 604, 616, 449 A.2d 483, 490 (1982) (the criminal "defendant's constitutional right to a fair trial must take precedence over free speech . . . .") (citing Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)).

40. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

41. *Id.* at 560.

42. *Id.* at 564. One article has noted that "[d]espite its concern for the first amend-

Bar-Press Guidelines' attempt to regulate disclosure of information about a pending criminal trial in a manner intended to preserve an accused's Sixth Amendment rights.[43]

The *Nebraska Press* Court noted that to determine whether no-comment rules pass constitutional muster, a court must examine each restriction to determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[44] This less protective standard may be appropriate in cases when the restriction on speech does not amount to a prior restraint. The mention of this less stringent test in *Nebraska Press*, however, has been labeled anomalous because *Nebraska Press* involved a prior restraint.[45]

Thus, as recently reiterated by the United States Supreme Court,[46] the fundamental constitutionality of attorney no-comment rules appeared to be well established. The language in *Sheppard* mandating that courts possess both the power and the responsibility to ensure a fair trial is cited extensively in cases discussing attorney no-comment rules.[47] This is partially because lawyers are officers of the court and have a duty to protect the judicial process.[48] Therefore, the questions left open for argument have revolved around an examination of the scope and application of attorney no-comment rules.[49]

V. Evaluating No-Comment Rules

A preliminary issue addressed by the courts is whether to evaluate no-comment rules as prior restraints. As noted earlier,[50] prior restraints on speech and publication are highly intolerable encroach-

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ment rights of the press . . . the court showed no such solicitude for the free speech rights of defendants and their attorneys." Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys:* Ratio Decidendi v. Obiter Dictum, 29 Stan. L. Rev. 607, 607 (1977) [hereinafter *Prior Restraints*].

43. *Nebraska Press*, 427 U.S. at 613 (Brennan, J., concurring). The guidelines, included as an appendix to Justice Brennan's opinion, are similar in many respects to the Model Rules.

44. *Id.* at 562 (citing United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)). *See also* L. Hand, The Bill of Rights 58-61 (1958); Matheson, *The Prosecutor, The Press, and Free Speech*, 58 Fordham L. Rev. 865, 927 n.382 (1990).

45. Matheson, *supra* note 44, at 927 n.382.

46. *See infra* notes 108-26 and accompanying text.

47. Note, *Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107:* Hirschkop v. Snead, 41 Ohio St. L.J. 771, 789 n.113 (1980).

48. *Id.* at 886.

49. *Id.* at 789.

50. *See supra* notes 40-41 and accompanying text.

ments on rights protected by the First Amendment.[51] Restrictions alleged to be prior restraints come before the court "with a 'heavy presumption' against [their] validity."[52]

In *Chicago Council of Lawyers v. Bauer*[53] the court held that no-comment rules could not be labeled as prior restraints.[54] The court conceded that a court could punish a lawyer who violated disciplinary rules with its contempt power and that the threat of contempt is an important attribute of a prior restraint. However, the court distinguished a prior restraint, which is a predetermined judicial prohibition and cannot be violated even though the judicial action is unconstitutional, from a court regulation, which can be challenged when one is prosecuted for its violation.[55] Moreover, as stated earlier,[56] the Supreme Court apparently approves no-comment rules as measures that fall short of prior restraints on publication and that tend to blunt the impact of negative trial publicity.[57]

Because no-comment rules possess some of the inherent features of prior restraints, the judiciary reviews the rules with particular care.[58] Whenever First Amendment rights come into conflict with a compelling governmental interest, a court must balance the individual and societal interest in free expression against the public interest that the regulation restraining expression seeks to protect. The court also must find that a substantial relationship exists between the interest and the regulation.[59] Further, the regulation must be narrowly tailored to effect

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51. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

52. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975) (quoting Organization for a Better Austin v. Keefe, 482 U.S. 415 (1970)), *cert. denied*, 427 U.S. 912 (1976).

53. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *See infra* notes 79-86 and accompanying text for additional discussion of this case.

54. *Chicago Council*, 522 F.2d at 248-49.

55. *Id.* at 248. Several other courts also have treated no-comment rules as non-prior restraints. Hirschkop v. Snead, 594 F.2d 356, 368 (4th Cir. 1979); Central S.C. Chapter, Soc'y of Professional Journalists, Sigma Delta Chi v. Martin, 431 F. Supp. 1182, 1188( ), *aff'd in part*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). *But see* Levine v. United States Dist. Court for Cent. Dist. of Cal., 764 F.2d 590, 595 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986) (order precluding attorneys from making statements to media regarding espionage case "properly characterized as a prior restraint").

56. *See supra* text accompanying notes 17-18.

57. *See Nebraska Press*, 427 U.S. at 564.

58. *Chicago Council*, 522 F.2d at 249.

59. Comment, *Professional Ethics and Trial Publicity: What All the Talk is About*, 10 SUFFOLK U.L. REV. 654, 660-61 (1976). *See also In re* Hinds, 90 N.J. 604, 614, 449 A.2d 483, 488 (1982) ("A restriction on free speech can survive judicial scrutiny under the First Amendment only if certain fundamental and stringent conditions are satisfied. First, the limitation must 'further an important or substantial governmental

the interest.[60]

The first two stages of the analysis rarely are disputed. Plainly, the state seeks to preserve the accused's constitutional right to a fair trial and the due administration of justice. These are compelling interests which can be affected by adverse publicity.[61] Moreover, a substantial relationship exists between regulating extrajudicial statements made by attorneys involved in prosecuting litigation and the interests sought to be protected. Therefore, the no-comment rules pass constitutional muster as to the first two prongs of the test.

The controversy arises in investigating the final requirement that any restriction on free speech be no greater than necessary to further the governmental interest being protected.[62] The dispute centers around the disagreement over what standard should be applied to avoid overbreadth in the no-comment rules.[63] The Supreme Court has not determined the proper standard for limiting speech made by attorneys involved in pending litigation.[64] In *Sheppard* the Supreme Court held that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial . . . [t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[65] DR 7-107 tracked this language when it prohibited statements that were "reasonably likely" to cause prejudice.[66] The "reasonably likely" measurement explicitly modifies only DR 7-107(D) and (E) (statements "reasonably likely to affect the imposition of a sentence") regarding criminal trials. However, several courts have assumed that the "reasonably likely" standard modifies DR 7-107 in its entirety.[67]

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interest unrelated to the suppression of expression.' " *Id.* quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974) and *In re* Rachmiel, 90 N.J. 646, 449 A.2d 505 (1982)).

60. *See Hinds*, 90 N.J. at 614, 449 A.2d at 488 (and cases cited therein).

61. *But see infra* notes 136-44 and accompanying text for discussion of the view that the state has no similar compelling interest when publicity is favorable to the accused, as would occur when a defense attorney makes statements to the media on behalf of his client.

62. *Chicago Council*, 522 F.2d at 249 (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)); *Hinds*, 90 N.J. at 614, 449 A.2d at 488.

63. "Since the right of free speech must give way to the right of a fair trial when there is an irreconcilable conflict, the next inquiry relates to the limits of the circumscription on comment that lawyers can be required to observe consistent with their rights under the First Amendment." *Chicago Council*, 522 F.2d at 248.

64. Comment, *Professional Ethics and Trial Publicity: What All the Talk is About*, 10 SUFFOLK U.L. REV. 654, 668 (1976).

65. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

66. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980).

67. *See, e.g.*, Hirschkop v. Snead, 594 F.2d 356, 368 (4th Cir. 1979).

> It is obvious from a reading of the entire rule that the drafters were concerned with speech for publication which had a reasonable likelihood of interference

A. *The "Reasonably Likely" Standard*

Several courts have upheld the "reasonably likely" standard as being sufficiently narrow to satisfy constitutional demands. In *Hirschkop v. Snead*[68] an attorney challenged the constitutionality of Virginia's version of DR 7-107. At the time of the challenge, the attorney, Hirschkop, had no complaints pending against him, but he had been cited eleven times in the preceding thirteen years. On one occasion, a complaint was filed against Hirschkop for stating to the press that his client was "a good guy."[69]

The court reiterated that First Amendment rights are not absolute, but may be considered in the context of the environment in which the speech is made.[70] The court proceeded to address statements made during criminal proceedings. The court found that less intrusive means than DR 7-107 are inadequate to ensure an accused the right to a fair trial. The court discerned that the inequity developed because most prejudicial publicity occurs during the investigatory stage of a proceeding before the matter comes before a judge. Thus, it is not feasible for a judge to restrict speech on an *ad hoc* basis.[71]

The court noted that the press "may publish any information in its possession . . . , but lawyers are directed to try their cases in the court and not in the press."[72] This is because lawyers have a fiduciary responsibility to their clients, as well as a duty to the court, litigants, and the public to ensure the integrity of the judicial process. The court reasoned that lawyers' duties arise because they possess special privileges not enjoyed by other citizens.[73]

The *Hirschkop* court observed that many remarks made by attorneys regarding pending litigation are so inherently prejudicial that attorneys should be censured for making them.[74] However, the court rejected the notion that DR 7-107 implicates a prior restraint on speech. DR 7-107 applies in every situation where exceptions to free speech exist, and violations may not be punished without due process.[75]

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with a fair trial. It does not strain the language of the rule to treat that qualification as implicit in each of the expressed prohibitions.

Id.; *but cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983) (using "substantial likelihood of materially prejudicing" a fair trial).

68. 594 F.2d 356 (4th Cir. 1979).

69. *Id.* at 362.

70. *Id.* at 363.

71. *Id.* at 365.

72. *Id.* at 366.

73. *Id.* The court also noted that attorneys are subject to discipline for failing to discharge their particular obligations. *Id.*

74. *Id.* at 367.

75. *Id.* at 368. Prior restraint violations are summarily punishable as contempt. *Id.*

Therefore, the court concluded that "[n]o heavier or stiffer standard than the reasonable likelihood test is needed to protect [lawyers] from disciplinary sanctions for speech for publication without adequate notice of the consequences."[76]

The court characterized DR 7-107 as explicit in informing lawyers of what they may and may not say for publication. The court found that the "reasonable likelihood test divides the innocuous from the culpable, adds clarity to the rule and makes it more definite in application."[77] Most importantly, the court expressed its view that lawyers may be held to higher standards than other participants in the judicial process.[78]

B. The Serious and Imminent Threat Test

Other courts have rejected the reasonable likelihood standard. In *Chicago Council of Lawyers v. Bauer*[79] the Chicago Council of Lawyers and seven attorneys sought declaratory relief on behalf of themselves and other attorneys who practiced in the Northern District of Illinois. The plaintiffs contended that the no-comment rules of the district court deprive lawyers of their free speech rights under the First Amendment.[80] The attorneys asserted that the "reasonable likelihood of interference with a fair trial" standard was overbroad and vague and therefore unable to withstand constitutional scrutiny. The plaintiffs also argued there was no need to balance their free speech rights against a defendant's Sixth Amendment right to a fair trial because the two provisions do not conflict.[81]

The court rejected plaintiffs' contention that the First and Sixth Amendments did not collide except in the abstract. The court reiterated that the right to a fair trial is the most fundamental of all freedoms.[82] Therefore, courts not only have a duty to ensure judicial integrity, but the inherent power to formulate rules that protect the judicial process from outside influences.[83]

The court found that the next inquiry was to discern the extent to which lawyers could be limited in their speech consistent with attorneys' First Amendment rights. The court noted that any restriction on

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76. *Id.* at 369.
77. *Id.* at 370.
78. *Id.*
79. 522 F.2d 242 (1975). In *Chicago Council* the plaintiffs sought declaratory judgment and injunction against enforcement of a local criminal rule and DR 7-107.
80. *Id.* at 247.
81. *Id.*
82. *Id.* at 248 (citing Sheppard v. Maxwell, 384 U.S. 333 (1966)).
83. *Id.* (citing *Sheppard*, 384 U.S. at 363).

a constitutional right must possess "clearness, precision, and narrowness."[84]

Applying the constitutional test to DR 7-107 and the local court rules, the court held that the no-comment rules were overbroad. The court adopted a "narrower and more restrictive" standard of proscribing statements that "pose a 'serious and imminent threat' of interference with the fair administration of justice . . . ."[85]

The *Chicago Council* court commented that the public placed special credibility on comments made by attorneys, and thus lawyers' remarks become an important source of prejudicial publicity. In view of the special deference given attorneys' statements to the media, the court reasoned that "prohibiting only the speech of a very small group whose members are officers of the court with a special interest in protecting the integrity of our system of justice"[86] is a relatively unobtrusive means of controlling trial publicity.

C. *The Clear and Present Danger Test*

The clear and present danger test historically has been applied to prior restraints and to use the court's contempt power to punish extrajudicial remarks concerning pending litigation or grand jury investigations.[87] The clear and present danger test was used to restrict attorney speech in *Markfield v. Association of the Bar*.[88] In *Markfield* the attorney participated in a radio panel discussion about prison rebellions while he was participating as an attorney in a prison riots trial. He was charged with violating DR 7-107(D). The *Markfield* court acknowledged that the purpose of DR 7-107(D) was to "achieve a fair balance between the attorney's right of free speech as opposed to society's interest in protecting the integrity of the judicial process and thereby guaranteeing a fair and impartial trial."[89] The court determined that only when extrajudicial attorney speech presents a clear and present danger to the administration of justice is there a likelihood of interfer-

84. *Id.* at 249.

85. *Id.*; *see also In re* Oliver, 452 F.2d 111 (7th Cir. 1971); *In re* Lasswell, 296 Or. 121, 673 P.2d 855 (1983) (applying "serious and imminent threat" standard).

86. 522 F.2d at 250.

87. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Wood v. Georgia, 370 U.S. 375 (1962); Bridges v. California, 314 U.S. 252 (1941); Near v. Minnesota, 283 U.S. 697 (1931) (prior restraint); *see also* Schenck v. United States, 249 U.S. 47 (1919) (first articulation of clear and present danger test to limit free speech rights).

88. 49 A.D.2d 516, 370 N.Y.S.2d 82 (1975); *see also In re* Keller, 213 Mont. 196, 693 P.2d 1211 (1984) (discussing all three tests in relation to DR 7-107(B) and (H) but declining to adopt any one test; also holding DR 7-107(B) and (H) unconstitutional).

89. *Markfield*, 49 A.D.2d at 517, 370 N.Y.S.2d at 85.

ence with an impartial trial.[90]

The court in *In re Hinds*[91] considered but rejected the clear and present danger test. In *Hinds* the attorney under investigation, Hinds, was an active civil rights lawyer and director of the National Conference of Black Lawyers. Hinds represented a reputedly militant black woman during pretrial proceedings who had been accused of killing a New Jersey state trooper. These early controversies involved the accused's incarceration. Hinds did not represent the defendant at her criminal trial.[92]

Hinds called a press conference to criticize the judge during the time a jury was being impaneled for the criminal proceeding.[93] Hinds declared that he spoke for the defense team, whose members evidently were subject to a gag order. After television and newspaper coverage divulged Hinds's remarks, the county ethics committee began an investigation to determine whether Hinds's comments violated DR 7-107(D) and DR 1-102(A)(5).[94]

Hinds asserted that DR 7-107(D) was unconstitutionally vague and overbroad under the First Amendment. Hinds argued that limiting speech is permissible only when out-of-court statements present a clear and present danger to trial, and that his remarks did not warrant sanction under this standard.[95]

The court rejected Hinds's allegations. It applied the two-step test articulated in *Procunier v. Martinez*:[96] first, the restriction must further important governmental interests unrelated to suppression of speech, and second, the circumscription must be as narrowly tailored as possible.[97] The court then balanced the gravity and probability of harm caused by allowing the expression against the extent free speech would be inhibited by suppression.[98]

The court found that the state has a substantial interest in securing a fair trial not only for the benefit of an accused, but also for the benefit of the public at large. The court observed that the state also

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90. *Id.*

91. 90 N.J. 604, 449 A.2d 483 (1982). *See also In re* Rachmiel, 90 N.J. 646, 449 A.2d 505 (1982) (companion case to *In re Hinds*); *In re* Zimmerman, 764 S.W.2d 757 (Tenn.), *cert. denied*, 490 U.S. 1107 (1989).

92. *In re* Hinds, 90 N.J. at 610, 449 A.2d at 486.

93. *Id.*

94. *Id.* at 611, 449 A.2d at 486-87. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A), DR 7-107 (1980).

95. *Hinds*, 90 N.J. at 613, 449 A.2d at 488.

96. 416 U.S. 396 (1974).

97. *Id.* at 413.

98. *Hinds*, 90 N.J. at 614, 449 A.2d at 488 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)).

has a substantial interest in assuring a competent, ethical bar.[99] Moreover, the court noted that attorneys are officers of the court and as such "occupy a special status and perform an essential function in the administration of justice."[100] Thus, a lawyer cannot utilize "a public forum to obstruct justice and interfere with a fair trial [and then] invoke the protection of the first amendment" to avoid discipline.[101]

Determining whether DR 7-107(D) is narrowly tailored to effect the state's interests is a difficult issue. The court conceded that usually First Amendment rights can be restricted only if the speech "creates 'a clear and present danger' of threatening some substantial governmental interest unrelated to the suppression of expression."[102] However, the court in *In re Hinds* found that attorney judicial speech in criminal proceedings was different.[103] The court rejected the clear and present danger test as being no more precise than the reasonable likelihood standard.[104] The court acknowledged that a clear and present danger measure may be more strict, but found that the reasonable likelihood test nevertheless met the constitutional requisite of narrow tailoring. Significantly, the court found that extrajudicial speech potentially insinuates extraneous matters into criminal cases. The court observed that "if left unchecked, [outside influences] could divert the search for truth and wreck the intricate machinery of the criminal justice system."[105]

In response to concerns evidenced by the courts and attorneys, the ABA's Standing Committee on Association Standards for Criminal Justice assigned the job of re-evaluating the attorney no-comment rules to a task force on fair trial and free press. The task force recommended replacing the reasonable likelihood standard with one requiring clear and present danger of harm to a protected interest. The task force recommended adopting of a four-step analysis approved in *Landmark Communications, Inc. v. Virginia*.[106] The analysis subsequently was adopted by the ABA and provides the following test: (1) Does the restriction advance a legitimate governmental interest? (2) Does the public comment pose an extremely serious threat to the governmental interest sought to be protected? (3) Does that threat appear likely to occur imminently? (4) Is the restriction on public comment

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99. *Id.* at 616, 449 A.2d at 489.

100. *Id.* at 615, 449 A.2d at 489.

101. *Id.* at 616, 449 A.2d at 490 (citing *In re* Sawyer, 360 U.S. 622, 649 (1959) (Stewart, J., concurring)).

102. *Id.* at 618-19, 449 A.2d at 490-91 (citations omitted).

103. *Id.* at 619, 449 A.2d at 491.

104. *Id.* at 622, 449 A.2d at 493.

105. *Id.* at 622, 449 A.2d at 494.

106. 435 U.S. 829, 845 (1978).

necessary to secure the protection or advancement of the jeopardized governmental interest in jeopardy?[107]

D. The Substantial Likelihood Test

In states that have adopted the Model Rules, attorney speech is protected unless it presents a "substantial likelihood of materially prejudicing an adjudicative proceeding."[108]

The United States Supreme Court recently concluded that the "substantial likelihood of material prejudice" standard satisfies the First Amendment in *Gentile v. State Bar*.[109] In *Gentile* the Disciplinary Board of the Nevada Bar recommended a private reprimand of Gentile based on comments he made at a press conference in reference to a pending criminal matter.

Gentile's client was accused of taking money and drugs from a safety deposit box rented by undercover police officers. Gentile called a press conference the day after his client was indicted in order to respond to adverse publicity. During the press conference, Gentile declared that he had evidence to prove his client's innocence, and he characterized his client as a scapegoat of the police. He called potential witnesses convicted drug dealers and money launderers, and he named a certain police officer as a likely perpetrator who abused drugs.[110] Gentile made these remarks after reviewing Nevada Supreme Court Rule 177.[111]

The Nevada Supreme Court affirmed the private reprimand. The court found that a "reasonable attorney, especially after having researched the issue, should have known that his conduct was im-

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107. ABA STANDARDS FOR CRIMINAL JUSTICE 8-1.1 (2d ed. 1980 & Supp. 1986) (Fair Trial and Free Press) Commentary. *See also* Note, *Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107;* Hirschkop v. Snead, 41 OHIO ST. L.J. 771, 778 (1980) (citing ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 1 (2d Tent. Draft 1978)).

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

109. 111 S. Ct. 2720 (1991). The Supreme Court granted certiorari on January 7, 1991, on the following questions: (1) whether First Amendment speech and press clauses limit the power of the state to punish a lawyer for speech when there is no evidence that his statements could or did interfere with the impartial administration of justice; (2) whether speech regarding the behavior of public officials in an area of public concern may be forbidden, and if so, under what circumstances; and (3) whether a state supreme court rule using a substantial likelihood of material prejudice standard is impermissibly vague and overbroad under the First Amendment and Due Process Clause. *See* 59 U.S.L.W. 3451 (U.S. July 17, 1990) (No. 89-1836).

110. *Id.* at 2739.

111. *Id.* NEVADA SUPREME COURT RULE 177 is based on the MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983). *Id.* at 2745.

proper, particularly with respect to the comments regarding the police detective and other potential witnesses."[112] The court held that Gentile's comments probably would prejudice the proceedings based on the timing of the statements and because the case was highly publicized. The court also found that the remarks were substantially likely to materially prejudice the proceedings. Although the court acknowledged that there was no actual prejudice in this case,[113] it recognized actual prejudice is not required to establish a substantial likelihood of prejudice.[114]

On appeal, Gentile asserted that attorney speech should be limited only when there is a clear and present danger of actual prejudice or imminent threat to a judicial proceeding. Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Souter rejected this argument. The Court acknowledged that this country's criminal justice system is grounded on the notion that impartial jurors should decide criminal trials based on evidence presented in court, not in the newspapers. The Court also observed that the criminal justice system is but a part of a government of the people, however, and that the people at large require information, particularly through the media, in order to make changes to the system. According to the Court, the media disseminates necessary information to the public, and for this reason a clear and present danger standard will be applied to media speech. The majority found that lawyers representing clients in pending cases could be subjected to a less demanding test than the media when engaging in trial publicity.[115] The Court observed that attorneys are "key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct."[116] The Court also found that attorneys often have special access to information so that the public may perceive attorneys' statements in the media to be authoritative.[117]

Once the Court determined that attorney extrajudicial speech may be regulated by a less stringent standard than clear and present danger, it applied a balancing test to determine whether the "substantial likelihood test" of Nevada's Rule 177 was constitutional. The Court

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112. *Gentile v. State Bar*, 106 Nev. 60, 61, 787 P.2d 386, 387 (1990), *rev'd*, 111 S. Ct. 2720 (1991).

113. *Id.* It is unclear whether this is because Gentile's client was acquitted at trial six months after his indictment, or because some other evidence existed that showed no prejudice.

114. *Id.*

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

116. *Id.*

117. *Id.* at 2745 (citing *In re* Hinds, 90 N.J. 604, 627, 449 A.2d 483, 496 (1982) and *In re* Rachmiel, 90 N.J. 646, 656, 449 A.2d 505, 511 (1982)).

found that for the above reasons the state had a legitimate interest in regulating attorney speech, and that Rule 177 was narrowly tailored to limit attorney "comments that are likely to influence the actual outcome of the trial, and . . . comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found."[118] The Court conceded that trial prejudice may be cured through change of venue, voir dire, or other device, but that the state has a substantial interest in avoiding the costs, presumably in time, money, and resources, inherent in implementing these curatives.[119]

Justice Kennedy, joined by Justices Marshall, Stevens, Blackmun, and O'Connor in a separate concurrence, reversed Gentile's conviction on the basis that Rule 177's "safe harbor" provision was void for vagueness.[120] The Court found that the language of the safe harbor provision

> contemplates that a lawyer describing the 'general nature of the . . . defense' 'without elaboration' need fear no discipline, even if he comments on '[t]he character, credibility, reputation or criminal record of a . . . witness,' and even if he 'knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding.' . . . In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.[121]

The Court was persuaded by the fact that Gentile made a conscious effort to comply with Rule 177, and yet still was disciplined for his statements to the press. The Court determined that Gentile had been misled by the vague language of the safe harbor provision, and thus had not received fair notice that his conduct would be subject to discipline. More importantly, the Court cautioned that a vague regulation could encourage discriminatory enforcement by the state, particularly when attorneys' statements are critical of the state.[122]

Chief Justice Rehnquist and Justices White, Scalia, and Souter dissented from the Court's reversal. The dissent asserted that Gentile was well aware that his statements to the media were prohibited under Rule 177. The dissent noted that Gentile called the press conference

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118. *Id.*; Justice Kennedy wrote that the Court was limited to reviewing Nevada's interpretation of Rule 177. *Id.* at 2724. The majority disagreed, noting that many states apply the "substantial likelihood of material prejudice" test. *Id.* at 2742 n.4.

119. *Id.* at 2745.

120. *Id.* at 2731.

121. *Id.*

122. *Id.* at 2732.

specifically to prejudice his client's trial by influencing potential jurors, and that he would not have gone to the trouble had there not been a substantial likelihood of success.[123] Although the majority found it important that Gentile's comments were made six months in advance of trial so that their impact on the jury was minimal, the dissent argued that the necessity of showing actual prejudice would allow attorneys who made prejudicial comments to escape discipline if, for unrelated reasons, the trial is not affected. By the same token, another attorney making equally reprehensible statements might be disciplined when the pending trial is prejudiced. According to the dissent, "[t]he United States Constitution does not mandate such a fortuitous difference."[124]

Justices Kennedy, Marshall, Stevens, and Blackmun perceived Gentile's statements as political criticism entitled to the highest First Amendment protection.[125] Consequently, they would have struck down Nevada's interpretation of Rule 177 as insufficiently deferential to the attorney's First Amendment rights, preferring instead a "clear and present danger" standard.[126]

With the retirement of Justice Marshall and probable appointment of a conservative replacement, the Court's majority position that attorney speech may be restricted appears to be inextricably woven into the law. However, the Court has upheld a more stringent "substantial likelihood of material prejudice" test. This standard arguably will allow attorneys greater First Amendment freedom than the "reasonably likely" criterion articulated in DR 7-107.

E. Third Party Challenges

Parties other than attorneys also have endeavored to challenge no-comment rules. In *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi v. Martin*[127] the plaintiffs, media members and one newspaper subscriber, challenged an order prohibiting trial participants in a criminal case from making prejudicial statements to, granting interviews with, or being in the proximity of the press. The plaintiffs asserted that the order destroyed the press's right to gather news from important sources.[128]

The *Martin* court held that the press has no constitutional right to

123. *Id.* at 2746.
124. *Id.* at 2748.
125. *Id.* at 2724.
126. *Id.* at 2725.
127. 431 F. Supp. 1182, *aff'd in part*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).
128. *Id.* at 1184-85.

gather information.[129] The court observed that the restraining order included only participants in the criminal trial and thus the plaintiffs had no standing to complain. At most, the plaintiffs suffered a generalized grievance shared in equal measure by the public at large and unworthy of adjudication.[130] Moreover, the plaintiffs failed to show that had the order not been issued, the trial participants would have disclosed information desired by plaintiffs.[131] Thus, their alleged injury was merely speculative.

The court remarked that even if the plaintiffs had standing to challenge the restraining order, the clear and present danger test which underlies prior restraints to the press or public's right to speak or publish is inapplicable to the conduct of trial participants. The *Martin* court indicated that a trial judge may take appropriate steps to protect criminal defendants when a reasonable likelihood that publicity will compromise trial proceedings exists.[132]

In *National Broadcasting Co. v. Cooperman*[133] NBC and an attorney involved in a criminal action challenged a gag order which denied counsel in the case from discussing any aspect of the proceedings with the media. Unlike the court in *Martin*, the *Cooperman* court determined that the media petitioner had a constitutionally guaranteed right to gather news and that the attorney petitioner was directly affected by the order, so that both petitioners had standing. The court differentiated between prior restraints on the media to publish and prior restraints on attorneys to make extrajudicial statements. The court found the latter category to be acceptable because attorneys have an obligation to safeguard the right to a fair trial. The *Cooperman* court adopted a standard of "a 'reasonable likelihood' of a serious and imminent threat to the administration of justice."[134] The court concluded that prior restraints of attorney extrajudicial statements implicated a less strict test than tests applied to prior restraints on publication. Here, the court found the directive to be overbroad and not the least restrictive alternative to preserve fair trial.[135]

F. Application to Defense Counsel

Some commentators suggest that limitations on extrajudicial comments should not be applied to defense counsel because the rules were

129. *Id.* at 1187 (citing Branzberg v. Hayes, 408 U.S. 665 (1972)).
130. *Id.* (citing Warth v. Seldin, 422 U.S. 490 (1975)).
131. *Id.* at 1187-88.
132. *Id.* at 1188 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)).
133. 116 A.D.2d 287, 501 N.Y.S.2d 405 (1986).
134. *Id.* at 292, 501 N.Y.S.2d at 408.
135. *Id.* at 294, 501 N.Y.S.2d at 409.

developed to protect Sixth Amendment rights of the accused.[136] Arguably, the state's interest in protecting an accused's Sixth Amendment rights is not as compelling when his attorney's extrajudicial statements are favorable to him. Courts have noted that defense attorney comment is often a necessary ballast to balance scales typically weighted heavily against criminal defendants.[137] Further, the Sixth Amendment guarantees a fair trial to the criminal defendant, and not to the state. Thus, publicity and extrajudicial statements that favor a criminal defendant do not conflict with this constitutional right. The Supreme Court's holding in *Sheppard v. Maxwell*,[138] that a trial judge has the inherent power to control statements made by any and all participants in order to protect the judicial process and guarantee a fair trial, however, seems to contradict this view. Although "[a] judicial process untainted by prejudice against the prosecution is . . . a worthy goal, . . . that is not the point so far as the Constitution is concerned."[139] If that is true, there is no constitutional basis to justify application of no-comment rules to defense counsel. Defendants possess a peculiar need for free speech when they are accused of a crime. Under no-comment rules:

> Circumstances will virtually never occur in which the right to freedom of speech could be of more importance to an individual than in the course of criminal proceedings. The prosecutor is privileged to publish to the world—including the defendant's family, friends, neighbors, and business associates—what in almost any other context would constitute libel per se. The indictment may contain detailed charges of the most heinous conduct, and the delay before ultimate vindication may be many months, if not years. In the meantime, entirely apart from the proceedings in court, the good name earned during a lifetime can be demolished. There can be no more pressing occasion, therefore, for immediate, effective public rebuttal.[140]

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136. *See, e.g.*, J. HALL, PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER 522 (1987); Freedman & Starwood, *Prior Restraints*, *supra* note 42.

137. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (1975). See also *In re* Hinds, 90 N.J. 604, 623 n.4, 449 A.2d 483, 493 n.4 (1982) ("defendant and his counsel need access to the public to combat the stigma of an indictment") for a listing of commentaries regarding this argument. The court in United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969), took a different view and observed:

> [T]he public has an overriding interest that justice be done in a controversy between the government and individuals and has the right to demand and expect "fair trials designed to end in just judgments." . . . This objective may be thwarted unless an order against extrajudicial statements applies to all parties to a controversy.

Id. at 666 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949) (citations omitted)).

138. 384 U.S. 333 (1966).

139. Freedman & Starwood, *Prior Restraints*, *supra* note 42, at 612.

140. *Id.* at 613.

A footnote in *Gentile v. State Bar*[141] reveals that at least four members of the United States Supreme Court have disapproved of this theory. Joined by Justices White, Scalia, and Souter, Chief Justice Rehnquist opined that "[t]he remedy for prosecutorial abuses that violate the rule lies not in self-help in the form of similarly prejudicial comments by defense counsel, but in disciplining the prosecutor."[142] Conversely, Justices Kennedy, Stevens, Marshall and Blackmun agreed that defense attorneys may seek to counter publicity prejudicial to their clients.[143] It appears that this question has yet to be resolved.

It is apparent from both its language and interpretation that DR 7-107(A) applied to prosecuting counsel only.[144] No such exception for defense counsel is included in Rule 3.6.

VI. APPLICATION OF NO-COMMENT RULES IN SOUTH CAROLINA

Any attorney in South Carolina can study Rule 3.6 and know precisely which types of extrajudicial statements are subject to its prohibition. The rule characterizes these statements as those that will ordinarily have a substantial likelihood of material prejudice. An attorney seeking to comply with Rule 3.6 must consider a statement and the circumstances extraordinary in order to speak. This judgment call is subject to disciplinary action. The law surrounding the scope and application of Rule 3.6 is still developing, however, and the manner in which a South Carolina attorney's decision to speak will be called into question under Rule 3.6 remains to be seen. Plainly, the *Gentile* case impacts South Carolina lawyers.

The only South Carolina case that addresses attorney speech is *In re Delgado*,[145] decided under prior rule DR 7-107(G). Counsel represented an inmate in his post-conviction relief trial. He wished to arrange an interview between his client and the press, but permission was refused by the prosecuting solicitor. Thereafter, counsel escorted a reporter from *The State* newspaper to a prison to interview his client. Although counsel asserted the reason for the reporter's visit was legal, the court held that he knew, or should have known, the interview was not proper.[146] The court stated that it was the attorney's duty to present his client's cause in court, not to change his client's public image.

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141. 111 S. Ct. 2720 (1991).

142. *Id.* at 2748 n.6.

143. *Id.* at 2735-36.

144. *See In re* Axelrod, 150 Vt. 136, 137-38, 549 A.2d 653, 654-55 (1988) (DR 7-107(A) applies only to those investigating a criminal matter; defense attorneys are brought in after charges are made).

145. 279 S.C. 293, 306 S.E.2d 591 (1983), *cert. denied*, 464 U.S. 1057 (1984).

146. *Id.* at 297-99, 306 S.E.2d at 594-95.

Therefore, the court found that counsel had violated DR 7-107(G).[147] This case appears to follow the reasoning of those members of the United States Supreme Court who agree that attorney statements to the media properly may be restricted if the speech seeks to try a pending case in the court of public opinion, rather than before a jury.

VII. Conclusion

The determination by the Court in *Gentile* that the "substantial likelihood of material prejudice" standard is sufficiently narrow to be constitutionally valid could be decisive in an appeal of a disciplinary action in states that use Rule 3.6. Obviously, each attorney's goal is to make the correct ethical choice in order to avoid discipline. The *Gentile* case demonstrates that attorneys should take affirmative steps to ensure that statements to the press fall within the strictures of the applicable disciplinary rule. At the very least, speech appearing to fall outside applicable standards will be reprimanded on a case-by-case basis. Although the "substantial likelihood" test seems to allow lawyers greater freedom to exercise their First Amendment rights, those practicing in the criminal area will be well advised not to stray from the express parameters of Rule 3.6.

147. *Id.* at 300, 306 S.E.2d at 595-96.