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NOTES

THE WORSENING PROBLEM OF TRIAL PUBLICITY: IS "NEW" MODEL RULE 3.6 SOLUTION OR SURRENDER?

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INTRODUCTION

> Fair criminal prosecution and exercise of the guaranty of a free press are not incompatible with the constitutional right of a defendant to a fair trial by an impartial jury. Only the will to recognize and to subscribe responsibly to that fact has been lacking.[1]

Regrettably, in the thirty years since Judge Francis of the New Jersey Supreme Court wrote that passage, nothing has changed. The values of the fair administration of justice to both parties to a dispute and the right of free speech will always compete in some form. The goal must therefore be to discover and to exercise the will to make use of those rights responsibly.

Within the doctrinally irreconcilable debate between the poles of fair trial and free expression, however, there are certain areas in which those values must be harmonized, one of which concerns attorneys representing parties to litigation.[2] It has long been recognized that states, and specifically the judicial systems of the states, have authority to determine the standard of professional conduct for those admitted to the practice of law.[3] Most jurisdictions have enacted disciplinary rules matching or patterned after rules promulgated by the American Bar Association (ABA).[4] One ABA rule in particular, Model Rule of Professional Conduct 3.6,

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1. State v. Van Duyne, 204 A.2d 841, 852-53 (N.J. 1964).

2. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

3. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1066 (1991).

4. At the time of the *Gentile* decision, thirty-two states had adopted trial publicity rules substantially similar to the "substantial likelihood of material prejudice" standard of the Model Rules of Professional Conduct, originally promulgated by the ABA in 1983. They are: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Gentile*, 501 U.S. at 1068 & n.1. Eleven states retained Disciplinary Rule 7-107 (DR 7-107) or its "reasonable likelihood of

governs the extrajudicial statements made by attorneys involved in ongoing litigation.[5] Though the rule is present in one form or another in practically every

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prejudice" standard from the Model Code of Professional Responsibility. They are: Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, North Carolina, Ohio, Tennessee, and Vermont. *Id.* & n.2. Five states—Illinois, Maine, North Dakota, Oregon, and Virginia—and the District of Columbia used standards approximating "clear and present danger." *Id.* at 1068-69 & n.3. Montana adopted Model Rule 3.6 following the decision in *In re* Keller, 693 P.2d 1211 (Mont. 1984), in which the Montana Supreme Court declared DR 7-107 unconstitutional on its face.

5. Rule 3.6, in its original form, stated:

Trial Publicity

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

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

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

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

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

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

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

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

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

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

(2) the information contained in a public record;

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

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

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

jurisdiction,[6] as with all issues pitting free speech against fair trial, it has engendered considerable constitutional debate.

The leading case concerning Rule 3.6 is *Gentile v. State Bar of Nevada*.[7] *Gentile* upheld the rule's limits on extrajudicial commentary, but struck down the interpretation of it given by the Nevada Supreme Court. Numerous commentators have argued that the Court was incorrect in its determination that the rule itself was sound.[8] Following the *Gentile* decision, the ABA amended Rule 3.6 in 1994 in an attempt to alleviate commentators' criticisms and adjust the rule for practical use.[9]

This Note will argue that the changes to Rule 3.6 do not resolve the problems and questions bound up in the issue of what attorneys should say about a proceeding outside the courtroom. Even though the rule addresses only one component of a highly-publicized trial, it is important to the fair administration of the judicial system to hold the extrajudicial commentary of lawyers to a high standard. Part I of this Note will highlight the development of Rule 3.6 and its 1994 amendments. Part II will analyze how state courts have defined terms within the rule and suggest how future cases may be decided. Finally, Part III will examine the weaknesses of the rule and recommend ways for courts to strengthen and utilize the rule.

I. REVISED RULE 3.6 AND ITS BACKGROUND

The first wholesale efforts to create rules in the public interest limiting the out

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

(7) in a criminal case:

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

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

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

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

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983).

6. *See supra* note 4.

7. 501 U.S. 1030 (1991).

8. *See, e.g.*, Esther Berkowitz-Caballero, Note, *In the Aftermath of* Gentile: *Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 524 (1993) (noting the Court espouses a rule "ultimately more restrictive of speech than necessary"); *see generally* Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The* Gentile State Bar of Nevada *Decision*, 43 CASE W. RES. L. REV. 1347 (1993); L. Cooper Campbell, Note, Gentile v. State Bar *and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pretrial Publicity*, 6 GEO. J. LEGAL ETHICS 583 (1993).

9. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.6:102, at 666.4 (2d ed. 1996).

of court speech of representing attorneys occurred following the assassination of President John F. Kennedy.[10] The Report of the President's Commission on the Assassination of President John F. Kennedy (Warren Report) "concluded that '[b]ecause of the nature of the crime, the widespread attention which it necessarily received, and the intense public feelings which it aroused, it would have been a most difficult task to select an unprejudiced jury [for Lee Harvey Oswald].'"[11] Though this statement refers to the prosecutor's advantage gained through publicity, the Commission also noted the potential for bias against the prosecution.[12] The Supreme Court pushed the effort along considerably with its decision in *Sheppard v. Maxwell.*[13] In a strongly worded opinion reflecting disgust over the handling of Dr. Samuel Sheppard's trial,[14] the Court declared: "[C]ourts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. 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."[15]

By 1969, the ABA had developed the Model Code of Professional Responsibility ("Code").[16] Found therein is Disciplinary Rule 7-107 (DR 7-107) with its prohibition of statements "reasonably likely to interfere with a fair trial."[17] Practically every state implemented DR 7-107 by 1980[18] despite federal appellate decisions such as *Chicago Council of Lawyers v. Bauer.*[19] In *Bauer*, the court stated the standard of DR 7-107 was "overbroad and therefore does not meet constitutional standards."[20] Further, the court specifically declared that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."[21] *Bauer* stands as the leading case holding the "reasonably likely" standard unconstitutional.

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10. *See* Berkowitz-Caballero, *supra* note 8, at 503-04. *See generally* Oscar Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453 (1940) (concerning publicity during the trial of Bruno Hauptmann in the Lindbergh kidnapping case).

11. Berkowitz-Caballero, *supra* note 8, at 503-04 (quoting Chief Justice Earl Warren, Chairman, REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 227, 238 (1964)).

12. Berkowitz-Caballero, *supra* note 8, at 504 & n.57.

13. 384 U.S. 333 (1966).

14. Fourteen pages of Justice Clark's majority opinion are devoted solely to a minutely detailed description of the investigation, pretrial proceedings, and trial of Dr. Sheppard, as well as the prejudicial publicity surrounding them. *Id.* at 336-50.

15. *Id.* at 363.

16. Berkowitz-Caballero, *supra* note 8, at 509.

17. 1 HAZARD & HODES, *supra* note 9, § 3.6:102, at 665.

18. Berkowitz-Caballero, *supra* note 8, at 509 & n.88. *See generally* REGULATION OF LAWYERS: STATUTES AND STANDARDS 349 (Stephen Gillers & Roy D. Simon, Jr. eds., 1994).

19. 522 F.2d 242 (7th Cir. 1975).

20. *Id.* at 249.

21. *Id.* (quoting *In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971)).

Other courts took a dim view of the rule's breadth as well.[22] As a result, when the ABA promulgated the Model Rules of Professional Conduct in 1983 ("Rules"), it issued a new trial publicity rule,[23] Model Rule 3.6. Originally, this rule had three parts.[24] Paragraph (a) adopted a standard prohibiting statements that the attorney "knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[25] Paragraph (b) listed six categories of statements that were considered likely to violate paragraph (a).[26] Finally, paragraph (c) incorporated a safe-harbor provision permitting attorneys to make certain statements "without elaboration."[27]

Within four years, the Rules were adopted by twenty jurisdictions, and by 1990 the number had swelled to thirty-four states and the District of Columbia.[28] Eleven states, however, have retained either DR 7-107 or the standard within it.[29] It was with no small interest on the part of the nation's attorneys and disciplinary commissions that the Supreme Court considered a constitutional challenge to the "substantial likelihood of material prejudice" standard of Rule 3.6.[30]

One basis for the ABA's decision to change the rule[31] was the Court's decision in *Gentile v. State Bar of Nevada*.[32] In *Gentile*, the Court heard an appeal from a disciplinary sanction, pursuant to a rule[33] very similar to Rule 3.6,[34] upheld by the Nevada Supreme Court.[35] Attorney Gentile represented a Las Vegas man accused of theft.[36] Shortly after his client's indictment, and amid considerable

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22. *See* 1 HAZARD & HODES, *supra* note 9, § 3.6:102, at 665 ("Practically every court that considered constitutional challenges to DR 7-107 said that the rule was overbroad."); *see also* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (though the "reasonably likely" standard passes constitutional muster, other parts of the rule are overbroad).

23. Berkowitz-Caballero, *supra* note 8, at 512 & n.103.

24. *See supra* note 5.

25. *Id.*

26. *Id.*

27. *Id.*

28. 2 HAZARD & HODES, *supra* note 9, § AP4:101, at 1255.

29. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1068 & n.2 (1991). Those states are Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, North Carolina, Ohio, Tennessee, and Vermont. North Carolina adopted a "reasonable likelihood" of prejudice test within its rule. *See supra* note 4.

30. *Gentile*, 501 U.S. at 1030.

31. *See* 1 HAZARD & HODES, *supra* note 9. While amendments to the rule were envisioned prior to 1991 due to differences between sections of the ABA, the *Gentile* decision brought matters to a head. *Id.* § 3.6:100 (forthcoming 1995).

32. 501 U.S. 1030 (1991).

33. NEV. SUP. CT. R. 177 (1995).

34. At the time of Gentile's statements, the applicable rule copied the original Rule 3.6 verbatim. *See* NEV. SUP. CT. R. 177 (1991), *quoted in Gentile*, 501 U.S. at 1060-62. *See supra* note 5 for the text of the original Rule 3.6.

35. *Gentile*, 501 U.S. at 1033.

36. *Id.* at 1039-40.

publicity adverse to his client,[37] Gentile carefully planned a press conference during which he read a prepared statement and answered questions.[38] Part of Gentile's preparation included an evening's research into Nevada's disciplinary rules.[39] The Court noted that Gentile apparently believed he had complied with the rules[40] and that his motivation was to prevent circulating press reports from prejudicing a jury against his client.[41]

By a five-to-four margin, with Justice O'Connor casting the swing vote, the Court pronounced the standard embodied in Rule 3.6 constitutional,[42] but declared the rule void for vagueness.[43] In holding that the standard embodied in Rule 3.6 was constitutional, the Court relied heavily on the relationship between attorneys and the judicial system.[44] The opinion distinguished *Nebraska Press Ass'n v. Stuart*,[45] a case concerning commentary about ongoing judicial proceedings, by explaining the difference "between participants in the litigation and strangers to it."[46] As counsel for a defendant, Gentile certainly qualified as a participant and was held to a stricter standard than that which would have been applied to the press and other third parties.

The portion of the opinion that declared the rule void for vagueness, was based on the good faith efforts of Gentile to fit his statements within the rule's "safe-harbor" provision.[47] Justice Kennedy's portion of the majority opinion relied on the notion that the rule "creates a trap for the wary as well as the unwary"[48] and

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37. *Id.* at 1040-41.

38. *Id.* at 1033.

39. *Id.* at 1044.

40. *Id.* at 1049.

41. *Id.* at 1042.

42. *Id.* at 1063.

43. *Id.* at 1048.

44. Chief Justice Rehnquist, in his part of the majority opinion, wrote: "In the United States, the courts have historically . . . exercised the authority to discipline . . . lawyers whose conduct departed from prescribed standards. 'Membership in the bar is a privilege burdened with conditions,' to use the oft-repeated statement of Cardozo . . . ." *Id.* at 1066 (quoting *In re* Rouss, 116 N.E. 782, 783 (1917)). In her concurrence, Justice O'Connor stated the proposition more directly: "Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech." *Id.* at 1081-82.

45. 427 U.S. 539 (1976).

46. *Gentile*, 501 U.S. at 1072-73. Chief Justice Rehnquist quoted Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), in which the Court recognized that litigants' "First Amendment rights . . . may be subordinated to other interests" in the courtroom setting. *Gentile*, 501 U.S. at 1073.

47. "As interpreted by the Nevada Supreme Court, the Rule is void for vagueness . . . for its safe harbor provision . . . misled [Gentile] into thinking that he could give his press conference without fear of discipline." *Gentile*, 501 U.S. at 1048.

48. *Id.* at 1051.

could precipitate disciplinary actions against those who attempt to comply.[49] Even though the rule's standard passed constitutional muster, the safe-harbor provision invalidated the rule because it was not safe enough.

On August 10, 1994, the ABA House of Delegates amended Model Rule 3.6.[50] The new Rule contains several substantive changes as well as one noteworthy refusal to change.[51]

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49. *Id.* at 1049. Justice Kennedy wrote at some length of the research and careful preparation by Gentile and his associates designed to discover the parameters of the rule and the permissible statements he could make to the press. *Id.* at 1044.

50. The amended Rule 3.6 provides:

> (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.
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> (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) information contained in a public record;
>
> (3) that an investigation of a matter is in progress;
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> (4) the scheduling or result of any step in litigation;
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> (5) a request for assistance in obtaining evidence and information necessary thereto;
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> (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
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> (7) in a criminal case, in addition to subparagraphs (1) through (6):
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> (i) the identity, residence, occupation and family status of the accused;
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> (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
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> (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.
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> (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).

51. One change that will not be addressed within this Note is the addition to Rule 3.6 of paragraph (d). While this new paragraph may have remarkable internal effects on the policies and practices of existing firms and agencies, those effects are beyond the scope of this Note. *See supra* note 50 for the text of amended Rule 3.6.

The most important change in Rule 3.6 concerns the paragraph defining presumptively improper statements. The amendments remove the paragraph from the text of the Rule and include the language in the Rule's official comment, creating a void in the Rule's effective language.[52] Thus, the primary black-letter guideline, not to mention the teeth, of the Rule has become simply a suggested method of enforcement. Other commentators have noted that few boundaries have been set pertaining to permissible extrajudicial statements by attorneys,[53] and the Rule is ineffective as a result.[54] Elimination of the guidelines delineating presumptively improper statements only makes the Rule less effective.

The second major change to Rule 3.6 is within its safe-harbor provision.[55] While retaining the categories of protected statements from the old Rule, the new Rule has eliminated language tending to make the provision difficult to apply.[56] The old Rule limited the attorneys to Rule 3.6(c) statements "without elaboration,"[57] and permitted an attorneys to speak only of the "general nature" of their clients' claims or defenses.[58] Those two phrases in particular were a basis for the holding in *Gentile* that Nevada's application of the rule was impermissibly vague.[59] Writing for the majority, Justice Kennedy maintained:

> The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. 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.[60]

The amended Rule contains neither phrase, and it thus eliminates one of the

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52. Comment 5 to the amended Rule 3.6 states in pertinent part: "There are . . . certain subjects which are more likely than not to have 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." The comment quotes verbatim subsections (b)(1) through (b)(6) of the original Rule. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 5 (1994). *See supra* note 5 for the text of the original Rule 3.6. Whether the language "more likely than not" would create any presumption, particularly when only within a comment, remains a debatable issue.

53. *See, e.g.*, Berkowitz-Caballero, *supra* note 8, at 500 ("Model Rule 3.6 . . . must better delineate what speech should be subject to restriction in trial and pretrial contexts."). Indeed, Justice Kennedy's analysis of Model Rule 3.6, embodied in Nevada Supreme Court Rule 177, as void for vagueness was predicated on the lack of "any clarifying interpretation by the state court." *Gentile*, 501 U.S. at 1048.

54. *See generally* Berkowitz-Caballero, *supra* note 8, at 524-37.

55. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1983); *supra* note 5.

56. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(b) (1994); *supra* note 50.

57. *See supra* note 5.

58. *Id.*

59. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048-49 (1991).

60. *Id.*

principal objections to the propriety of the Rule by removing the language potentially susceptible to discriminatory enforcement.[61] Nonetheless, the amended Rule retains the substance of the very provision which evoked disapproval from the *Gentile* Court, and loses a primary guide to its interpretation and use.

The final and most debatable change in the Rule is the addition of a right of reply.[62] The ability to reply has been hailed as a "necessary and important aspect of the [Rule], as it responds directly to a principal concern raised in *Gentile* by providing lawyers with a means of countering recent publicity which is prejudicial to their client's interests."[63] The right apparently extends to representing attorneys if the publicity to which they are replying was not generated by the attorney or the client, and only to the extent that is necessary to remedy damage to the client's interests.[64]

With this new provision, the ABA has evidently thrown out the baby with the bath water.[65] Though such a right may operate to combat the revelations—both proper and improper—of police and prosecutorial agencies,[66] it is much more likely to exacerbate the problems of protecting the integrity and economy of the adjudicatory system, interests that the *Gentile* Court aimed to safeguard.[67] Moreover, the right of reply offers those lawyers who prefer to litigate in the court of public opinion, rather than within legitimate adjudicatory bodies, an aegis protecting them from professional sanction.[68] Given the number of participants and media parties commenting on a high profile case, it is not difficult to imagine that any statement made by either side would be able to be fit within the right of reply. Consider, for example, the case of *People v. Simpson*. In the two-day

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61. *Id.* at 1051.

62. The right of reply paragraph provides:

> 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.*

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

63. Berkowitz-Caballero, *supra* note 8, at 539-40.

64. 1 HAZARD & HODES, *supra* note 9, § 3.6:401, at 676.

65. "If the new version of Rule 3.6(c) is widely adopted in the states and given even a moderately generous interpretation, it will end meaningful attempts to curb the pretrial speech of lawyers participating in high profile cases, especially criminal cases." *Id.*

66. *Id.*

67. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991).

> The . . . test embodied in Rule 177 [Model Rule 3.6] . . . is designed to protect the integrity and fairness of a State's judicial system . . . . The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs [arising from extensive voir dire, venue change, or other methods of ensuring a fair trial] on the judicial system and on the litigants.

Id.

68. *See supra* note 65 and accompanying text.

period after the discovery of the murder of Nicole Brown Simpson and Ronald Goldman, at least 65 newspaper articles containing information about the incident had been published.[69] Depending on the content of a given story, both the defense and the prosecution could have legitimately argued that such stories constituted the "substantial undue prejudicial effect"[70] necessary to activate the right of reply. As a result, any comment calculated to counteract that effect would be permissible "[n]otwithstanding paragraph (a)."[71] Adoption of this provision by a state could result in erosion of that state's ability to supervise its attorneys and adjudicatory systems.

II. State Interpretations of Rule 3.6 Norms

The *Gentile* decision was not intended to affect trial publicity rules outside of Nevada.[72] Each state's rule, therefore, must be judged according to the interpretative guidelines expressed by the state's courts or legislature.

A. "Clear and Present Danger" Standard

Several different standards and constructions have been used by the states. The first standard, and that which is defended by most commentators,[73] is the "clear and present danger" or "serious and imminent threat" standard[74] established in *Markfield v. Association of the Bar of New York.*[75] In *Markfield*, the court considered the appeal of an attorney involved in a criminal case, who was found guilty of professional misconduct (pursuant to DR 7-107)[76] based on his

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69. Search of WESTLAW, Papers Database (Oct. 18, 1994).

70. Model Rules of Professional Conduct Rule 3.6(c) (1994).

71. *Id.*

72. Justice Kennedy, who wrote the portion of the *Gentile* opinion holding Nevada Supreme Court Rule 177 (Model Rule 3.6) void for vagueness, noted, "The matter before us does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a 'substantial likelihood of materially prejudicing an adjudicative proceeding,' but is limited to Nevada's interpretation of that standard." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1034 (1991). However, Justice Rehnquist disputed that position: "We disagree with Justice Kennedy's statement .... Petitioner challenged [the rule] as being unconstitutional on its face in addition to as applied .... The validity of the rules in the many states applying the 'substantial likelihood of material prejudice' test has, therefore, been called into question in this case." *Id.* at 1069 n.4. Because Justice Kennedy's statement appeared as a part of the majority opinion, it may be inferred that his position on this point is the Court's position.

73. *See, e.g.*, Berkowitz-Caballero, *supra* note 8, at 542-43; *see generally* Day, *supra* note 8; Campbell, *supra* note 8.

74. The two tests are considered together because they are used to stand for the same concept. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (whether speech will be protected "is a question of proximity and degree" (Holmes, J.)).

75. 370 N.Y.S.2d 82 (N.Y. App. Div. 1975) (per curiam), *appeal dismissed*, 337 N.E.2d 612 (N.Y. 1975).

76. The differences between the amended Rule 3.6 and DR 7-107 are fourfold. First, Rule

statements made during a panel discussion broadcast over a New York radio station.[77]

Though admitting that a less restrictive standard "would pass constitutional muster,"[78] the court chose to limit application of the rule "to those situations where it is found that the extra-judicial [sic] statements were such as to present a '"clear and present danger" to the administration of justice.'"[79] In dictum, however, the court equates "likelihood of interference" with "clear and present danger" and implies the necessity of a showing of actual prejudice.[80] Thus, the opinion provides other courts with little guidance as to the proper standard and misinterprets the language of the rule.[81]

Other states have addressed the "clear and present danger" test. Oregon, in *In re Porter*,[82] rejected the standard by distinguishing Supreme Court cases such as *Craig v. Harney*[83] and *Pennekamp v. Florida*[84] on the basis that those cases dealt with laymen rather than attorneys.[85] The *Porter* court upheld the application of DR 7-107 with its "reasonably likely" standard.[86] Nevertheless, nine years later the Oregon Supreme Court, in *In re Lasswell*,[87] muddied the waters by "holding that the . . . statements must intend or be knowingly in-different to highly probable serious prejudice to an imminent procedure . . . ."[88] Although by using the terms

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3.6 uses "substantial likelihood" of material prejudice rather than the stricter "reasonable likelihood" standard of DR 7-107. Second, Rule 3.6 clearly limits those subject to the rule to attorneys or their associates who "are, or have been involved in a proceeding." Third, the presumptively improper statements section, substantially the same between DR 7-107 and the original Rule 3.6, has been removed from the text to the comment in the amended Rule. Finally, amended Rule 3.6 grants a right of reply to prejudicial adverse publicity. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1994).

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

78. *Id.* at 85.

79. *Id.* (quoting Craig v. Harney, 331 U.S. 367, 372 (1947)).

80. "Indeed, only where the words used present a clear and present danger, can it be said that there is a likelihood of interference with a fair trial." *Id.*

81. In considering Model Rule 3.6, which, like DR 7-107, revolves around the finding of "likelihood," the *Gentile* Court agreed with the Nevada Supreme Court's conclusion that "'absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice.'" Gentile v. State Bar of Nevada, 501 U.S. 1030, 1069 (1991). Chief Justice Rehnquist's majority opinion focused on the language "likely" and "likelihood." *Id.* at 1075.

82. 521 P.2d 345 (Or. 1974) (en banc), *cert. denied*, 419 U.S. 1056 (1974).

83. 331 U.S. 367 (1947).

84. 328 U.S. 331 (1946).

85. The court stated: "We hold that these opinions are not applicable to the present situation. When one is admitted to the bar he embraces certain ethical considerations and restrictions not required or expected of laymen . . . ." *In re Porter*, 521 P.2d at 349.

86. *Id.*

87. 673 P.2d 855 (Or. 1983).

88. *Id.* at 858 n.3. *Lasswell* may be distinguishable on the basis that the court considered the degree of culpability of the attorney making the statements, not necessarily the degree of

"serious" and "imminent" the court injected uncertainty as to the test to be applied, Oregon may be considered a state that subscribes to the "clear and present danger" test.

B. "Substantial Likelihood" Standard

Several states use the "substantial likelihood" test affirmed in *Gentile*. The Wisconsin Supreme Court used a "reasonable likelihood" test in upholding sanctions against an attorney in *In re Eisenberg*.[89] The court held that the standard "strikes an appropriate balance between a lawyer's right of free speech and an accused's right to a fair trial . . . [and] promotes the public's interest in the fair administration of justice."[90] The court also recognized that the rule had been changed to incorporate the "substantial likelihood" standard and validated it, rejecting the amicus argument of the Wisconsin State Public Defender urging adoption of the stricter "clear and present danger" test.[91]

Similarly, the New Jersey Supreme Court pronounced a test resembling "substantial likelihood" in *State v. Van Duyne*.[92] Though the defendant did not allege error in his conviction for murder based on prejudicial remarks made by prosecutors to the press, the court took the opportunity to set new guidelines for explication of the rule governing releases of information to the media.[93] The court interpreted the rule in force[94]

> to ban statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or inculpatory admissions by the accused . . . . Such statements *have the capacity to interfere with a fair trial* and cannot be countenanced. . . . The ban on statements . . . applies as well to defense counsel.[95]

It may be argued that the *Van Duyne* test more closely approximates a "clear and present danger" standard.[96] However, the weight placed on the accused's right to a fair trial and the prevalence of "trial by newspaper" demonstrates a keen interest in limiting commentary which presents a substantial likelihood of material prejudice.[97] The New Jersey court's desire to establish "a broader and more

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likelihood of prejudice.

89. 423 N.W.2d 867 (Wis. 1988). The rule in question in *Eisenberg* was an earlier trial publicity rule, Wisconsin Supreme Court Rule 20.41, which contained "substantially the same kind of information" as Model Rule 3.6. *Id.* at 873-74 & n.3.

90. *Id.* at 874.

91. *Id.* at 874 n.4.

92. 204 A.2d 841 (N.J. 1964), *cert. denied*, 380 U.S. 987 (1965).

93. *Id.* at 852.

94. The New Jersey Supreme Court considered specifically Canons 5 and 20 of the ABA CANONS OF PROFESSIONAL "ETHICS" (1908). *Van Duyne*, 204 A.2d at 852.

95. *Van Duyne*, 204 A.2d at 852 (emphasis added).

96. *See supra* note 74 and accompanying text.

97. *Van Duyne*, 204 A.2d at 850.

stringent rule"[98] suggests that a wider scope of statements would be prohibited.[99]

C. "Reasonable Likelihood" Standard

Several states have retained the "reasonable likelihood" standard of DR 7-107 in their trial publicity rules.[100] The Tennessee Supreme Court, in *Zimmermann v. Board of Professional Responsibility*,[101] used a traditional two-prong analysis to consider "whether a substantial governmental interest is furthered by the restriction" and "'that the restriction be no greater than is necessary . . . to protect the governmental interest involved.'"[102] The court characterized the governmental interest as "the fairness and integrity of the administration of justice," especially criminal justice.[103] Additionally, because the restrictions applied to a limited class, which has "a unique role and responsibility . . . and, therefore . . . an extraordinary power to undermine or destroy the efficacy of the criminal justice system," and limits only speech "'reasonably likely to interfere with or affect a fair trial," they met the test of the latter prong as well.[104]

The court in *Zimmermann*, however, further opined that the differences between "clear and present danger" and "reasonable likelihood" are "more semantical [sic] than real."[105] The guidelines are to be found in the use of the term "reasonable," which the court considered to make the rule explicit.[106] Here, as in *Markfield*, the court muddied the water to some extent.[107] Nevertheless, if the inference is made that the *Zimmermann* court intended to use the jurisprudentially accepted concept of reasonable (the "reasonable attorney"), the rule is clear

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98. *Id.* at 852. The court's rule is "broader and more stringent" compared to a rule adopted by one New York district attorney simply "prohibiting release of confessions to newspapers prior to trial." *Id.*

99. In Sheppard v. Maxwell, 384 U.S. 333 (1966), a leading case regarding trial publicity (*see* Berkowitz-Caballero, *supra* note 8, at 506-08), the Court ties the *Van Duyne* holding together with "prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests . . . or like statements *concerning the merits of the case*." *Sheppard*, 384 U.S. at 361 (emphasis added). It may be inferred that, at the least, the Court considered *Van Duyne* to stand for the proposition that extrajudicial statements concerning the merits were presumptively prejudicial, and that a showing of "substantial likelihood" was all that was needed.

100. These include: Delaware (*see* Hughes v. State, 437 A.2d 559 (Del. 1981)); Ohio (*see* State v. Ross, 304 N.E.2d 396 (Ohio Ct. App. 1973), *appeal dismissed*, 415 U.S. 904 (1974)); Oklahoma (*see* Holdge v. State, 586 P.2d 744 (Okla. Crim. App. 1978)); South Carolina (*see In re* Delgado, 306 S.E.2d 591 (S.C. 1983), *cert. denied*, 464 U.S. 1057 (1984)); and Washington (*see* State v. Bonner, 587 P.2d 580 (Wash. Ct. App. 1978)). *See also supra* note 4.

101. 764 S.W.2d 757 (Tenn. 1989), *cert. denied*, 490 U.S. 1107 (1989).

102. *Id.* at 761 (quoting *In re* Rachmiel, 449 A.2d 505, 510 (N.J. 1982)).

103. *Id.*

104. *Id.*

105. *Id.* at 763.

106. *Id.*

107. *See supra* notes 75-81 and accompanying text.

enough to be enforced.

Pennsylvania, in *Widoff v. Disciplinary Board of the Supreme Court of Pennsylvania*,[108] also explicitly accepted the "reasonably likely" standard of DR 7-107 in the context of an administrative proceeding. In *Widoff*, an attorney sought a declaratory judgment holding the "reasonably likely" standard unconstitutional on the basis of vagueness and overbreadth.[109] The attorney's arguments, which called for the "clear and present danger" test suggested in *Hirschkop v. Snead*[110] and *Chicago Council of Lawyers v. Bauer*[111] were rejected by the court.[112] Using the traditional state interest and necessary means analysis,[113] the court held "that the 'reasonable likelihood' language defines the degree of constitutional protection necessary to ensure the fairness of any tribunal."[114] Given the greater stakes involved in a criminal (as opposed to administrative) proceeding and the concomitant greater need for fairness,[115] clearly the *Widoff* holding would extend to criminal trials.

D. Other Factors

Other factors considered within Rule 3.6, including the class of attorneys affected, the timing of extrajudicial statements, what constitutes an extrajudicial statement, and the type of showing required to establish likelihood of prejudice, have also been examined by various courts. The class affected by amended Rule 3.6 may be thought obvious: "[a] lawyer who is participating or has participated in the investigation or litigation . . . of a matter"[116] and a "lawyer associated in a firm or government agency with [such] lawyer . . . ."[117] Nonetheless, a New York court expanded the class in *People v. Buttafuoco*.[118] The court examined the New York trial publicity rule which circumscribes "the conduct of a lawyer 'participating in or associated with a criminal . . . matter.'"[119] In a notorious case in which the defendant's wife was not the victim of the defendant's alleged

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108. 420 A.2d 41 (Pa. Commw. Ct. 1980), *aff'd sub nom.* Cohen v. Disciplinary Board of the Supreme Court of Pennsylvania, 430 A.2d 1151 (Pa. 1981), *cert. denied*, 455 U.S. 914 (1982).

109. *Id.* at 42.

110. *See supra* note 22 and accompanying text.

111. *See supra* notes 19-21 and accompanying text.

112. *Widoff*, 420 A.2d at 47.

113. *See* Zimmerman v. Board of Professional Responsibility, 764 S.W.2d 757, 761 (Tenn. 1989); *supra* notes 101-106 and accompanying text.

114. *Widoff*, 420 A.2d at 45.

115. "Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 6 (1994).

116. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994); *supra* note 50.

117. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994); *supra* note 50.

118. 599 N.Y.S.2d 419 (Nassau County Ct. 1993).

119. *Id.* at 422.

conduct, but was nevertheless intimately concerned with that conduct,[120] the judge concluded that, given the facts of the case, including the wife's attorney's intent to use the media improperly,[121] the attorney was "associated with" the case for the purposes of the rule.[122] The judge reasoned, "[h]ad the drafters intended to limit [the rule's] provisions solely to attorneys prosecuting and defending actions, the Rule would so provide."[123] By adopting that line of thought with respect to the amended Rule 3.6, it is possible for courts and disciplinary boards to define the class of affected attorneys beyond those actually representing parties in the proceeding.

The timing of extrajudicial statements was of special concern to the minority in the *Gentile* decision. Justice Kennedy commented on the petitioner's decision that the timing of his remarks would be such as to avoid any finding of prejudice.[124] He noted further that, in the case and the trial venue at issue, the exposure of the public to the statement six months prior to trial "would not result in prejudice."[125]

The Supreme Judicial Court of Massachusetts has also imparted guidelines in dictum as to the timing of attorney remarks. In *Elder v. Commonwealth*,[126] the defendant in a bench trial claimed that public statements regarding the trial judge made by the prosecutor while the decision in the case was pending were prejudicial to his fair trial rights.[127] In denying the defendant's request for relief, the court nonetheless took the opportunity to note that the prosecutor's "choice, as to the time to speak, impeded the interests of the court and the defendant, as well as the . . . public interest . . . ."[128] Though concrete guidelines are not the answer,[129] these two cases give practitioners a good idea of the acceptable timing of extrajudicial statements.

As with the class of attorneys affected by the amended Rule 3.6, what constitutes an extrajudicial statement would appear to be sufficiently defined by common sense. Direct oral statements, such as press conferences or interviews,

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120. The defendant was charged, *inter alia*, with endangering the welfare of a child and six counts of rape. *Id.* at 420-21. The victim of the defendant's conduct allegedly injured the defendant's wife. *See generally* Susan Forrest, *A Teen 'Obsessed', Girl, 17, Confesses to Shooting Lover's Wife, Cops Say*, N.Y. NEWSDAY, May 23, 1992, at 3.

121. *Buttafuoco*, 599 N.Y.S.2d at 422.

122. *Id.*

123. *Id.*

124. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1044 (1991).

125. *Id.*

126. 431 N.E.2d 571 (Mass. 1982).

127. *Id.* at 573.

128. *Id.* at 576.

129. Both courts, in *Gentile* and in *Elder*, embraced a case-by-case analysis in trial publicity cases. "[T]he [r]ule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing *that proceeding*." *Gentile*, 501 U.S. at 1076 (emphasis added). *See also Elder*, 431 N.E.2d at 576 (noting the uniqueness of the circumstances of extrajudicial commentary).

certainly fit within the rule.[130] Questions have arisen, however, regarding the release of printed matter. In *Bludworth v. Palm Beach Newspapers, Inc.*,[131] a district attorney appealed an order requiring him to release certain information previously furnished to counsel for the defense.[132] The appellant asserted that such a release, mandated by prior case law, constituted an extrajudicial statement and would conflict with the Florida trial publicity rule.[133] The court did not recognize the conflict "when the state attorney releases documents procured or created during a criminal investigation and eschews any elaboration on them."[134] Though apparently in dictum, because it was not crucial to the outcome of the case, the court concluded with the forceful statement that "[w]e do not see how releasing an investigatory document constitutes making an 'extrajudicial statement.'"[135]

The Arizona Supreme Court, in *Cox Arizona Publications, Inc. v. Collins*,[136] relied on the reasoning of *Bludworth* in a case in which the prosecutor cited Rule 3.6 in refusing to release public records.[137] While noting that public records generally are exempt from the Rule,[138] the court issued a warning that no "public official is free to release investigative reports or other public records with impunity. . . . 'We have always recognized that an "unlimited right of inspection might lead to substantial and irreparable public or private harm . . . ."'"[139] Thus, there is precedent either for a blanket consideration of documents as beyond the scope of Rule 3.6, or for a case-by-case analysis.[140]

Finally, there remains the question of how to consider the amended Rule's prejudice factor. While carefully stating the Rule's import in terms of likelihood of prejudice at the time of the statement,[141] Justice Kennedy's view of the proper

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130. *See, e.g., Gentile*, 501 U.S. at 1030; *Elder*, 431 N.E.2d at 571 (press conferences); Markfield v. Association of the Bar of New York, 370 N.Y.S.2d 82 (N.Y. App. Div. 1975) (per curiam) (interviews).

131. 476 So. 2d 775 (Fla. Dist. Ct. App. 1985).

132. *Id.* at 776.

133. *Id.* at 780. Florida's trial publicity rule at the time of the *Bludworth* decision was DR 7-107. *Id.*

134. *Id.*

135. *Id.*

136. 852 P.2d 1194 (Ariz. 1993).

137. *Id.* at 1198.

138. *Id.* at 1199.

139. *Id.* (quoting Mitchell v. Superior Court, 690 P.2d 51, 53 (Ariz. 1984)).

140. It should be noted that both the *Bludworth* and the *Collins* opinions had the additional backing of statutory or case law requiring the release of certain records. Though the decisions were made based on the view that the documents were not within the scope of Rule 3.6, an alternative ground may be proposed, namely that the rules of professional conduct were pre-empted by other law. There is no specific language in either case to suggest that interpretation, however, and it will not be addressed here.

141. In stating his opposition to the *Gentile* holding (that the standard of the original Rule 3.6 was acceptable), Justice Kennedy argued: "The record does not support the conclusion that petitioner knew or reasonably should have known his remarks *created a substantial likelihood* of

outcome in *Gentile* relied to a large extent on the lack of prejudice-in-fact to the proceeding. Gentile, he wrote, "spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice" to the interests of either his client or the State of Nevada.[142] Given a recent decision regarding trial publicity,[143] in which the Court held that the "barrage of publicity" to which the community had been subjected "did not rise even to a level requiring questioning of individual jurors about the content of publicity,"[144] Justice Kennedy went so far as to say that the Nevada court's finding of likelihood of prejudice was "most unconvincing."[145] He also noted the lack of any prejudice-in-fact.[146]

Other courts have also confronted this issue. The Oregon Supreme Court made its view explicit: "The [extrajudicial statements] rule deals with purposes and prospective effects, not with completed harm."[147] The Oregon court took the position that disciplinary inquiries were to be concerned with the circumstances at the time of the making of the statement, and the actual impairment of a proceeding was not an issue.[148]

The picture is a bit smoggier in New York. The *Markfield* court stated its belief that DR 7-107 should be applied to situations "where it is found that the extra-judicial [sic] statements *were* such" as to endanger justice.[149] The court's reasoning in removing sanctions against Markfield, however, included statements indicating consideration of both the potential and the actual effect of the statements.[150] There is precedent, in New York at least, for the judgment of a court on a disciplinary issue to be tempered by the actual outcome of the underlying case.

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material prejudice . . . . Neither the disciplinary board nor the reviewing court explain any sense in which petitioner's statements had a substantial likelihood of *causing* material prejudice." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1037-38 (1991) (emphasis added). These statements, alluding to creation and cause, clearly evidence a look forward to actual prejudice at the trial.

142. *Id.* at 1033.

143. *See* Mu'Min v. Virginia, 500 U.S. 415 (1991).

144. *Gentile*, 501 U.S. at 1039.

145. *Id.*

146. *Id.* at 1044.

147. *In re* Lasswell, 673 P.2d 855, 858 (Or. 1983).

148. *Id.*

149. Markfield v. Association of the Bar of New York, 370 N.Y.S.2d 82, 85 (N.Y. App. Div. 1975) (emphasis added).

150. *Id.* The appellate court noted that the trial judge knew attorney Markfield would be commenting on radio, and did not speak to him about it, suggesting an analysis centering on the potential for prejudice. Unfortunately, the court ended its reasoning with the statement that the trial judge "did not think the [comments] had any bearing on the conduct of the trial or have an affect [sic] upon the deliberations or thoughts of the jurors or was reasonably likely to do so." *Id.* The latter suggests a prejudice-in-fact analysis, and thus New York's analytical position is uncertain.

III. The Case for Retaining Tougher Trial Publicity Rules

A stricter view of trial publicity rules affecting the extrajudicial speech of representing attorneys should be adopted for several reasons. First, as officers of the court, attorneys speaking outside the courtroom must be held to a higher standard because they share the responsibility to the public for orderly, fair, and economical administration of justice.[151] Second, as an advocate, the duty of the attorney is to guide the client through the stages of litigation, protecting the interests of the client within the boundaries of the proceeding.[152]

Justice Rehnquist, in his part of the *Gentile* majority opinion, quoted Justice Cardozo: "'Membership in the bar is a privilege burdened with conditions.'"[153] Justice O'Connor agreed: "Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech."[154] Attorneys enjoy the power to go before society's adjudicative bodies to defend interests and assert accountability. It is incumbent upon them to realize the responsibilities that such power requires.

As an officer of the court, the attorney is no less responsible than a judge or other arbiter for assuring the fair administration of justice. In fact, the Tennessee Supreme Court considered the lawyer's "vital role in the preservation of society" as a reason for upholding sanctions against an attorney.[155] While the judge is, of course, the final word on the law in a jury trial, the adversary system calls upon attorneys to present the most compelling evidence and arguments so as to facilitate arrival at the truth.[156] To curb that adversarial nature and prevent unfair advantage, rules must be established; after all, the goal of the legal system is for justice to be done, not for the overpowering to flatten the competition. The ends do not justify the means, and therefore rules of procedure, evidence, and professional responsibility have been promulgated and enforced.

In the language of constitutional scholars, fair administration of justice is without question a legitimate and substantial state interest.[157] The Model Rules of

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151. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074-75 (1991).

152. "Part 3 [of the Model Rules of Professional Conduct] draws heavily upon Canon 7 of the Code of Professional Responsibility, copying verbatim many of its specific commands, but also capturing its essential teaching that lawyers must represent clients 'zealously,' but '*within* the bounds of law.'" 1 HAZARD & HODES, *supra* note 9, § 3.102, at 537.

153. *Gentile*, 501 U.S. at 1066. Justice Cardozo made the statement in *In re* Rouss, 116 N.E. 782, 783 (N.Y. 1917), and it was also quoted in Theard v. United States, 354 U.S. 278, 281 (1957).

154. *Gentile*, 501 U.S. at 1081-82 (O'Connor, J., concurring). *See also In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring).

155. Zimmermann v. Board of Professional Responsibility, 764 S.W.2d 757, 762 (Tenn. 1989).

156. *See* Murray L. Schwartz, *The Zeal of the Civil Advocate, in* THE GOOD LAWYER 150, 153-54 (David Luban ed., 1983).

157. *See Gentile*, 501 U.S. at 1075 ("the integrity and fairness of a State's judicial system" is a legitimate and protectible interest).

Professional Responsibility, like the Code and the Canons before them, foster that interest by requiring the development of professional ability and obedience to ethical norms. However, critics of Rule 3.6 and its predecessors have argued that Rule 3.6 is not the "least restrictive means" of protecting the fair administration of justice. First, they claim that the Rule, as it stands with the "substantial likelihood" criterion embedded in it, is too restrictive of First Amendment rights on its face.[158] In addition, critics argue that given the nature of the technology available and the lack of constitutional restrictions on third parties to the litigation, Rule 3.6 does not serve the purpose of protecting adjudicative proceedings.[159]

The *Gentile* Court and the state courts that have passed on the issue make it clear that the "substantial likelihood" standard is constitutionally permissible.[160] Indeed, as has previously been shown, several states have permitted a more restrictive test regarding attorney speech to stand.[161] Further, several courts have distinguished prior restraints[162] from rules of professional conduct.[163] The Tennessee Supreme Court, for example, made the distinction based on the purpose of the rules; they were "to discipline and not to punish."[164] The standard that has been used with respect to gag orders and prior restraints was stated in these words by the Court in *Nebraska Press Ass'n v. Stuart*:[165]

> [In order to suppress press commentary on evidentiary matters, the state would have to show that] further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.[166]

The Court in *Gentile* held such a standard to be inapplicable to disciplinary rules by distinguishing press restraints from attorney restraints, particularly in view of the historical regulation of the practice—and practitioners—of law by courts.[167]

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158. *See generally* Day, *supra* note 8; Campbell, *supra* note 8.

159. *See* Berkowitz-Caballero, *supra* note 8, at 524-28.

160. *Gentile*, 501 U.S. at 1075.

161. *See supra* notes 100-115 and accompanying text.

162. Broadly defined, a prior restraint is a prohibition by public officials of the "use of a forum in advance of actual expression." Sixteenth of Sept. Planning Comm., Inc. v. City of Denver, 474 F. Supp. 1333, 1338 (D. Colo. 1979) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)).

163. *See, e.g.*, National Broadcasting Co. v. Cooperman, 501 N.Y.S.2d 405, 409 (N.Y. App. Div. 1986) (prior restraints are imposed by a trial court); Zimmermann v. Board of Professional Responsibility, 764 S.W.2d 757, 761 (Tenn. 1989); *In re* Eisenberg, 423 N.W.2d 867, 871-74 (Wis. 1988).

164. *Zimmermann*, 764 S.W.2d at 761.

165. 427 U.S. 539 (1976).

166. *Id.* at 569.

167. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1065-66 (1991). *See also* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.").

As a result, the Rule does not overly restrict the rights of free speech.

Further, the *Gentile* Court also noted that First Amendment rights are not eradicated by the Rule; rather, the Rule "merely postpones the attorneys' comments until after the trial."[168] Questions of prejudice are properly raised within the trial court (using procedures for venue change, closing of proceedings, or court orders to follow rules of professional responsibility[169]) and on appeal (e.g., claiming evidentiary error or breach of the Sixth Amendment right to a fair trial), but not in a public media forum. At his press conference, attorney Gentile spoke of his suspicions of police corruption and the role evidence of such behavior would play in the defense of his client.[170] Justice Kennedy seized on that fact, considering the issue to be "the constitutionality of a ban on political speech critical of the government and its officials."[171] Such a concern properly occupies a main position in Justice Kennedy's reasoning, as it plainly cuts to the very essence of the guarantees of the First Amendment. Nevertheless, appropriate relief from alleged governmental abuses of power will remain available, through either the political or the judicial process, following the trial in which the attorney is participating.

Many commentators have argued that attorneys involved in criminal cases enjoy the usual rights of any other citizen, and as a result cannot be compelled to leave their First Amendment rights at the courtroom door.[172] In order to leave no doubt about the fairness of the trial to both the accused and to the people, however, the original Rule 3.6[173] must be followed. Commentary concerning the trial or the rights of the litigants must be made in court so as to be subjected to the proper rules of procedure and evidence and to be preserved for possible appeal. Outside commentary must be delayed until after the trial is concluded. Although studies and the Supreme Court may indicate that it is difficult to in fact prejudice a trial,[174] the casting of any doubt whatsoever on the fairness of the process must be avoided. In this situation, the right to a fair trial, for both society and the defendant, must receive greater weight than a temporary burden on an attorney's

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168. *Gentile*, 501 U.S. at 1076.

169. *See, e.g.*, United States v. Cutler, 815 F. Supp. 599 (E.D.N.Y. 1993) (hearing on motion to dismiss contempt charges stemming from court order to follow disciplinary rules); United States v. Cutler, 840 F. Supp. 959 (E.D.N.Y. 1994) (conviction of those charges), *aff'd,* 58 F.3d 825 (2nd Cir. 1995).

170. *Gentile*, 501 U.S. at 1059 (appendix to opinion of Kennedy, J.).

171. *Id.* at 1034.

172. *See* Lester Porter, Jr., *Leaving Your Speech Rights at the Bar*—Gentile v. State Bar, 67 WASH. L. REV. 733 (1992); *see also Gentile*, 501 U.S. at 1072-73.

173. *See supra* note 5.

174. *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415 (1991) (trial of convicted murderer, who committed another murder while out of prison on a work detail, was not prejudiced by local news media publicity even though eight of the twelve jurors admitted reading or hearing something of the case but averred that they had formed no opinion as to guilt). *See also* Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests about the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1 (1989).

free speech rights.[175]

Commentators have also argued that Rule 3.6 and its kin conflict with other rules of professional conduct, particularly the admonition to attorneys to zealously represent the interests of the client.[176] The argument is that, in a high-publicity case, the client's interests may include protection of his reputation within the community.[177] That point of view, however, ascribes to the law profession a task outside its ambit. Trial lawyers, in general, are not trained in media relations; their expertise is to be found in considering tactics and strategy within the courtroom, in presenting and objecting to evidence, and in eloquent argument before jury and judge. Lawyers are certainly in the business of representation, and as such may be called upon in many situations to make statements on behalf of their clients. Nevertheless, avoiding risk of prejudicing a trial or hampering the administration of justice must be the primary concern of all parties to criminal litigation.[178]

Finally, critics of Rule 3.6 and the *Gentile* opinion have asserted that proscription on extrajudicial comments by attorneys has very little effect on the volume and quality of publicity surrounding a trial. There is considerable weight in that argument, as evidenced by the California trial of *People v. Simpson*.[179] Even if the defense team and the Los Angeles County District Attorney's Office were held to the present standard of Rule 3.6, the numerous witnesses, law enforcement officers, family members, and others with some knowledge of the case could not be prohibited from speaking to local or national media without a showing of clear and present danger to the fairness of the trial.[180] Considering also

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175. "But [freedom of discussion] must not be allowed to divert the trial from the 'very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.'" Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966) (quoting Cox v. Louisiana, 379 U.S. 559, 583 (1965) (Black, J., dissenting)).

176. *See, e.g.*, 1 HAZARD & HODES, *supra* note 9, § 3.102, at 537; Berkowitz-Caballero, *supra* note 8, at 532-34.

177. *See* Berkowitz-Caballero, *supra* note 8, at 532-35. Recall, too, former Labor Secretary Raymond Donovan's quote after his acquittal on criminal charges: "Which office do I go to get my reputation back?" George Lardner, Jr., *Bronx Jury Acquits Donovan; Ex-Labor Secretary, Codefendants Cleared of Larceny Charges*, WASH. POST, May 26, 1987, at A1.

178. "'As officers of the court . . . attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.'" Gentile v. State Bar of Nevada, 501 U.S. 1033, 1074 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (Brennan, J., concurring)). Further, Chief Justice Rehnquist pronounced the state's interest "in preventing officers of the court . . . from imposing such costs [of extensive voir dire or change of venue] on the judicial system and on the litigants." *Id.* at 1075.

179. People v. Simpson, No. BA097211 (Los Angeles County Super. Ct. filed Sept. 27, 1994).

180. This is the standard enumerated in *Nebraska Press Ass'n*, 427 U.S. at 569. *See supra* note 166 and accompanying text.

the number of media outlets reporting on the Simpson trial,[181] it may seem like a futile gesture to prohibit attorneys from throwing bread crumbs of information to well-fed media pigeons.

The goal of Rule 3.6 is to prevent comments that are apt to influence a trial's result or prejudice potential jurors.[182] The likelihood of prejudice from attorney statements comes primarily from the fact that an attorney representing a party, and presumably intimately familiar with the facts and the theory of the case, is doing the speaking.[183] In their role as advocates, attorneys have "extraordinary power to undermine or destroy the efficacy of the criminal justice system."[184] Whereas the number of sources of information may be quite large, it may be very difficult to find a more authoritative source than a lawyer involved in the case.[185] Thus, while it is admitted that the volume of attorney statements in a high-publicity trial may be small relative to the total commentary, it is maintained that such statements are more likely to be prejudicial because of their source.

In order to make existing and future trial publicity rules more palatable to courts and attorneys, certain procedural and substantive changes in the application of the rules must be made. Initially, if the publicity surrounding a trial is an issue to the court or to counsel, a determination must be made early in the proceeding as to whether the danger of prejudice exists, regardless of the test used. If it is found that a substantial likelihood of material prejudice does exist, litigants' attorneys will then have abundant warning to consider carefully their out-of-court statements. To assist in that early determination, state courts of last resort, legislatures, and bar disciplinary boards within jurisdictions using Rule 3.6 must clarify their interpretations of its provisions.

What constitutes "substantial likelihood of material prejudice" must also be determined as early as possible in a given criminal proceeding. The trial court may wish to consider the issue *sua sponte* as its first order of business, or it may prefer to wait until other questions are examined at an arraignment or pretrial hearing. As shown by the *Simpson* case, it would be preferable to make the determination prior to jury selection.[186]

Three factors should be considered with respect to the definition in a given case of "substantial likelihood of material prejudice." First, the volume and

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181. In addition to the three major national television networks (ABC, CBS, and NBC), several cable television networks (such as CNN and ESPN) and radio networks (such as National Public Radio), numerous production companies for syndicated television programs such as *Entertainment Tonight, Inside Edition*, and national talk shows have taken part in reporting on the trial.

182. *Gentile*, 501 U.S. at 1075.

183. *Id.* at 1074.

184. *Id.* (quoting *In re* Rachmiel, 449 A.2d 505, 511 (N.J. 1982)).

185. *Id.*

186. In the Simpson proceedings, the trial judge's first assessment of the impact of trial publicity came as the parties and the jury pool were preparing for voir dire. By that time, unsubstantiated stories and evidence which was unlikely to be admissible had found their way into print; additionally, voir dire was slowed remarkably by arguments over publicity issues.

nature of the publicity surrounding the trial at the time of the determination must be the foremost consideration. Large numbers of news organizations, continuous coverage of the proceedings and the participants, the existence of unsubstantiated stories within the media, and the publishing of substantial works of literature or film whose subject is the matter under adjudication all suggest a high likelihood that the authoritative commentary of a litigant's attorney will influence potential or seated jurors.[187]

Second, the nature of the crime and the venue must be weighed. Large cities, with their correspondingly larger media outlets, may present more opportunity for publicity than smaller towns. Rural areas, on the other hand, may yet be blessed with a scarcity of crime and a notable one may engender sizable notice from the regional media. The nature of the act is at issue as well. A drug-related shooting in a major urban area may not produce tremendous coverage, unless the victim or the alleged perpetrator is a well-recognized person. Petty theft committed in a small town will not receive the same notice as an extraordinary murder or robbery spree.

Finally, the public image of the parties and their representatives must be added to the equation. It is hardly speculation to suggest that the case against Bruno Hauptmann would have amassed less public attention had the victim not been the child of celebrated aviator Charles Lindbergh. Similarly, the *Simpson* case is one in which the publicity is due to the celebrity of the defendant. In a city like Los Angeles, where over 1,000 murders were committed in 1992,[188] it is sadly not the victims which receive attention, but the famous person accused of the act.

Though Rule 3.6 removes its presumptively improper statement language to the official comment,[189] where the "likelihood" determination[190] has been made, the presumptions should be enforced. Justice Kennedy's holding striking down Nevada's application of the 1983 Rule was grounded entirely on the safe-harbor provision of the Rule.[191] His opinion was also emphatic regarding its scope: "The

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187. It may well be argued that such considerations speak more to the issue of whether a statement could reasonably be expected "to be disseminated by means of public communication," rather than whether there exists "substantial likelihood of material prejudice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1994); *see supra* note 50. It has been held, however, that the public communication requirement applies to the means by which the lawyer makes the statement, not the publicity surrounding the trial. In State v. Bonner, 587 P.2d 580 (Wash. Ct. App. 1978), the court found a comment believed by the attorney to be off the record could not reasonably be expected to be publicly communicated. *Id.* at 585.

188. *See generally* Scott Harris, *Getting Away with Murder, 42% of the Time*, L.A. TIMES, Apr. 28, 1994, at B3 (Los Angeles Police Department investigates over 1,000 homicides each year); Vicki Torres, *Dead-End Cases Pile Up*, L.A. TIMES, Feb. 10, 1994, at J10 (in 1992, 1,094 murders were investigated by the Los Angeles Police Department and an additional 565 by the Los Angeles County Sheriff's Department).

189. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 5 (1994), *supra* notes 50-52 and accompanying text.

190. *See supra* notes 182-187 and accompanying text.

191. Gentile v. State Bar of Nevada, 501 U.S. 1033, 1048 (1991).

matter before us does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding . . . ."[192] The question of the propriety of presumptively improper statements appears, therefore, to be open. To prevent the traps to which Justice Kennedy alluded,[193] states should retain within their disciplinary rules the presumption of impropriety.[194]

CONCLUSION

It is certainly true that the facts of history tend to recur; the only changes are the names of the parties involved. Accordingly, the high-profile cases involving Dr. Samuel Sheppard[195] and Billie Sol Estes [196] can be found in the present; the names have become Simpson, Menendez, Tyson, and Buttafuoco. It cannot be denied that doubt is cast upon notable trials each year by the comprehensive and pervasive brand of publicity that follows such proceedings.

This Note does not challenge the critical place of the freedoms enjoyed by citizens and media alike to speak with a bare minimum of encumbrances about issues which reach the most noble and the most prurient aspects of human character, however those terms may be defined. Nevertheless, when the capacity of a court of law to render an unbiased decision is called into question—even in the smallest way, in law, in fact, or in common sense—steps must be taken to address the problem.

The potential for harm to a trial from publicity may never be removed, but out-of-court speech of attorneys representing the litigants which affects the trial is a good place to start. The *Gentile* court held that Nevada's attempt was unconstitutional only in practice, not in theory; unfortunately, the ABA may have tossed its trial publicity rule out of the frying pan of criticism and into the fire of uselessness. It is therefore recommended that the states retain statutory language, rules of court, and case law which place the onus on attorneys to conscientiously gauge the content and intended reach of their statements regarding ongoing litigation. As Justice Frankfurter wrote:

> Not a Term passes without this Court being importuned to review . . . substantial claims [which] are made that a jury trial has been distorted because of inflammatory newspaper accounts--too often, as in this case, with the prosecutor's collaboration . . . making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. . . . This Court has not

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192. *Id.* at 1034.

193. *Id.* at 1051.

194. These statements refer generally to: (1) reputation or witness identity information; (2) possibility of a guilty plea or existence of a confession; (3) opinion as to guilt or innocence; (4) apparently inadmissible evidence; and (5) the fact that a person has been charged with a crime. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983), *supra* note 5.

195. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

196. *See* Estes v. Texas, 381 U.S. 532 (1965).

> yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system--freedom of the press, properly conceived.[197]

In the same way, the protection afforded to freedom of speech, particularly with respect to the traditionally court-supervised profession of lawyer, cannot be permitted to dominate the fair administration of justice.

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197. Irvin v. Dowd, 366 U.S. 717, 730 (1961) (concurring opinion).